[***Cresswell Investments Ltd. v. Pavone, [2011] B.C.J. No. 1523***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22V9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: June 28-29, 2011.

Judgment: August 9, 2011.

Docket: S107183

Registry: Vancouver

**[2011] B.C.J. No. 1523** | 2011 BCSC 1069 | 7 C.L.R. (4th) 285 | 206 A.C.W.S. (3d) 428 | 2011 CarswellBC 2223

Between Cresswell Investments Inc., Plaintiff, and Giuseppe Anthony Pavone and Pina Valentina Pavone, Defendants

(56 paras.)

**Case Summary**

**Contracts — Misrepresentation — Negligent misrepresentation — Fraudulent misrepresentation — Silence — Claim by Cresswell for damages relating to monies spent on bringing a mezzanine into compliance dismissed — The plaintiff had purchase a commercial strata unit from the defendants — At plaintiff's request, purchase price had included a steel mezzanine structure that had been erected inside the unit — Plaintiff subsequently learned that the mezzanine had been installed without the necessary building permits — Plaintiff claimed fraudulent and negligent misrepresentation on the part of the defendants — The unauthorized status of the mezzanine was readily discoverable on reasonable inquiry and was therefore a patent defect.**

**Real property law — Sale of land — Misrepresentation — Fraudulent misrepresentation — Negligent misrepresentation — Quality defects — Latent — Patent — Remedies — Damages — Claim by Cresswell for damages relating to monies spent on bringing a mezzanine into compliance dismissed — The plaintiff had purchase a commercial strata unit from the defendants — At plaintiff's request, purchase price had included a steel mezzanine structure that had been erected inside the unit — Plaintiff subsequently learned that the mezzanine had been installed without the necessary building permits — Plaintiff claimed fraudulent and negligent misrepresentation on the part of the defendants — The unauthorized status of the mezzanine was readily discoverable on reasonable inquiry and was therefore a patent defect.**

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| Claim by Cresswell for damages relating to monies spent on bringing a mezzanine into compliance. On May 28, 2007, the plaintiff agreed to buy a commercial strata unit from the defendants. Following a brief exchange of counter-offers relating to the purchase price, the agreement of purchase and sale was finalized with a price of $390,000. At the plaintiff's request, the purchase price included a steel mezzanine structure that had been erected inside the unit, creating additional floor space. Following the sale, the plaintiff subsequently learned that the mezzanine had been installed without the necessary building permits and did not comply with the B.C. Building Code. The mezzanine lacked proper fire separation, emergency exits, lighting and signage. In order to bring the mezzanine structure into compliance with the building code and obtain the necessary permit, the plaintiff spent $32,286. The plaintiff says the status of the mezzanine was a latent defect that the defendant vendors had a duty to disclose and says the defendants fraudulently or, alternatively, negligently misrepresented the mezzanine's status. The plaintiff claimed damages equal to the amount it had to spend to bring the mezzanine into compliance and obtain the necessary approvals. The defendants said they made no representations about the mezzanine and the plaintiff knew, or ought to have known, that it had been erected without a permit because they had disclosed that fact in an earlier sale of an identical adjacent unit with an identical mezzanine. Although that earlier sale was to a different purchaser, the real estate agent who represented that purchaser also represented the plaintiff in the transaction at issue.  HELD: Claim dismissed.  There was no evidence in this case of a conscious intention to deceive. When asked for authorization to obtain plans from the City file and for the name and contact information of the mezzanine supplier, the defendants immediately complied. Although that occurred after the contract of purchase and sale had been signed, the defendants' response was not consistent with the conduct of a party attempting to conceal information or to deceive. As a result, the plaintiff failed to prove fraudulent misrepresentation. Furthermore, in both the transactions of the real estate agent, the mezzanines had been included only at the specific request of the purchasers. No disclosure statement was requested as part of this transaction, although one had been requested and provided in the earlier transaction. Accordingly, silence in these circumstances did not amount to negligent misrepresentation or recklessness. Finally, the plaintiff could have discovered the true status of the mezzanine through the reasonable, indeed minimal, inquiries that a reasonable purchaser in its position would be expected to make. It was therefore a patent defect, for which the vendor was not automatically liable. |

**Statutes, Regulations and Rules Cited:**

B.C. Building Code,

**Counsel**

Counsel for Plaintiff: A. Morrison.

Counsel for Defendants: D.K. Takahashi.

**Reasons for Judgment**

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

**INTRODUCTION**

**1**  On May 28, 2007, the plaintiff Cresswell Investments Inc. agreed to buy a commercial strata unit from the defendants Mr. and Mrs. Pavone. At the plaintiff's request, the purchase price included a steel mezzanine structure that had been erected inside the unit, creating additional floor space. The plaintiff subsequently learned that the mezzanine had been installed without the necessary building permits and did not comply with the *B.C. Building Code*.

**2**  The plaintiff says the status of the mezzanine was a latent defect that the defendant vendors had a duty to disclose and says the defendants fraudulently or, alternatively, negligently misrepresented the mezzanine's status. The plaintiff claims damages equal to the amount it had to spend to bring the mezzanine into compliance and obtain the necessary approvals.

**3**  The defendants say they made no representations about the mezzanine and the plaintiff knew or ought to have known that it had been erected without a permit because they had disclosed that fact in an earlier sale of an identical adjacent unit with an identical mezzanine. Although that earlier sale was to a different purchaser, the real estate agent who represented that purchaser also represented the plaintiff in the transaction at issue.

**FACTS**

**4**  The property at issue is located in a strata-title industrial park in Richmond. The defendants owned five strata units in which they carried on a furniture making business. The steel mezzanine structures had been installed in two of the units -designated as units 2135 and 2140 - in 2004. Prior to that installation, each unit had approximately 2,200 square feet on the ground floor and 860 square feet on a partial upper floor. The mezzanines effectively added 1,153 square feet to each of the upper floors, but were removable. They were made from steel components bolted together and were anchored to the floor, but were not connected to the walls.

**5**  The mezzanines had been supplied and installed by a company then called CDS Warehouse Equipment ("CDS"). In providing a quotation to a company owned by the defendants, CDS stated that the installation was "subject to the requirements of the local municipality/city and BC Building Code" and that it was the buyer's "responsibility to apply for any required permits." However, it gave the buyer the option of expressly authorizing CDS to proceed without the required permits. Mr. Pavone signed that authorization and opted to proceed without the required permits.

**6**  Mr. Pavone testified that his understanding at the time of the CDS quotation was that a building permit "may or may not" be required. That understanding is not necessarily inconsistent with the language used in the quotation, but Dave Saw, who was the CDS sales representative at the time, testified that there was no doubt a building permit would be required.

**7**  Dale Mitzel, a City of Richmond (the "City") building inspector inspected the property in November 2006, in response to an application for a new or revised business licence. Mr. Mitzel determined that the mezzanine had been built without the required permit and concluded that it did not meet building code in a number of respects. The mezzanine lacked proper fire separation, emergency exits, lighting and signage. Mr. Mitzel was also concerned that the City had not been supplied with engineering drawings certifying structural integrity, although both Mr. Saw and Mr. Pavone testified such drawings had been produced at the time of installation.

**8**  Mr. Mitzel told Mr. Pavone that the mezzanine structure required a building permit and that it would have to be either upgraded to meet the *B.C. Building Code* or removed. Mr. Pavone replied that he was planning to remove the mezzanine as part of an anticipated move to new premises. Mr. Mitzel testified that he agreed not to take immediate action on the understanding that the move would take place within six months.

**9**  Normally, when a business licence application is rejected, the applicant receives a formal letter from the City advising of the rejection. There is no evidence that Mr. Pavone received such a letter and he denies being told that the licence application was rejected. In his inspection report, an internal City document, Mr. Mitzel wrote that he would "hold" the business licence application until the move, then cancel it when the new application was processed. However, he also circled the printed word "rejected" in reference to the business licence application.

**10**  In February 2007, the defendants listed all five of their units for sale. The two units containing mezzanines were each advertised at 3,060 square feet - a size that did not include the mezzanines. Each was listed at a price of $410,000.00, as was a third unit of the same size in which no mezzanine had been installed.

**11**  On May 1, 2007, the defendants agreed to sell unit 2140 to a Mr. Fraser for $395,000.00. The standard form contract included a paragraph identifying fixtures and other items that were to be included in the purchase price. In addition to the pre-printed list that referred to such items as plumbing, electrical fixtures, awnings, etc., the purchasers requested the inclusion of the mezzanine. The contract identifies Peter Dolecki as the agent for the buyer.

**12**  An addendum to the contract included a statement, handwritten by Mr. Pavone, that: "The buyer agrees that the mezzanine use may or may not require city permits. It is the sole responsibility of the buyer to obtain any required permits."

**13**  The defendants also provided a document labelled "Property Disclosure Statement, Strata Title Properties". This two-page document was, like the contract of purchase and sale, a standard form created by the Real Estate Board of Greater Vancouver. The form included a pre-printed question asking if the vendor was aware of any additions or alterations made without a required permit. In response, the box labelled "yes" was marked and the word "mezzanine" was handwritten next to the question.

**14**  Four weeks later, on May 28, 2007, the plaintiff made an offer to purchase the adjacent unit, number 2135. That offer also added the mezzanine to the pre-printed list of included items. Randy Zimmerman, the principal of the plaintiff company, said Mr. Dolecki, the same agent involved with the buyer of unit 2140, had introduced him to the property and shown it to him. Mr. Zimmerman testified that he was looking for a property from which the plaintiff could obtain rental income and that he considered the mezzanine, with its additional floor space, to be an attractive feature. He said Mr. Dolecki told him that the he was sure the vendor would agree to include the mezzanine in the sale because a similar mezzanine had been included in the sale of the adjacent unit.

**15**  Following a brief exchange of counter-offers relating to the purchase price, the agreement of purchase and sale was finalized with a price of $390,000.00 and no subject clauses. The offers and counter-offers were exchanged between Mr. Dolecki and Robert Watt, the listing realtor. Mr. Zimmerman never met the defendants.

**16**  Unlike the earlier contract between the defendants and Mr. Fraser for the sale of unit 2140, the contract for the sale of unit 2135 did not include an addendum stating the mezzanine may or may not require City permits. There was also no disclosure statement form similar to what had been provided in the earlier transaction. Mr. Watt testified that no disclosure statement was provided for unit 2135 because the purchaser did not ask for one.

**17**  Both Mr. Pavone and Mr. Watt testified that they believed Mr. Dolecki was aware, through his involvement in the earlier transaction, that the mezzanine was unauthorized. Mr. Zimmerman testified he was not told the mezzanine had been built without a permit, that it did not comply with building code or that Mr. Mitzel had refused to approve a business licence because of it. He said that if he had been told any of those facts, he would not have purchased the property. He said Mr. Dolecki told him the mezzanine could be used for storage. Mr. Dolecki is not a party to this action and was not called as a witness by either party.

**18**  Two weeks after the contract of purchase and sale was signed, but before the agreed upon completion date, Mr. Dolecki sought the defendants' authorization to obtain plans from the City file as well as the name of the mezzanine supplier and the supplier's contact information. There was no evidence about the reason for this request and, although the requested authorization and information were provided within two days, there was no evidence about what use, if any, was made of them at the time.

**19**  Mr. Zimmerman testified that he only became aware of a problem with the mezzanine in the spring of 2010, when a new tenant in the property was denied a business licence. (An earlier tenant had apparently operated without applying for a business licence.) In order to bring the mezzanine structure into compliance with the building code and obtain the necessary permit, the plaintiff spent $32,286.01 and now claims that amount as damages.

**DISCUSSION**

**20**  Real estate transactions are generally subject to the doctrine of *caveat emptor* ("let the buyer beware"), which denies the purchaser a remedy for defects and deficiencies discovered in the property. However, as summarized by Ballance J. in *Cardwell v. Perthen*, [*2006 BCSC 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23PX-00000-00&context=) [*Cardwell*], aff'd [*2007 BCCA 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21G0-00000-00&context=), there are exceptions:

[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. Partly for historical reasons and in part because the buyer is in the best position to determine the quality of the home he wishes to purchase, the law has put the onus on the purchaser to determine the state and quality of the property being sold.

[121] Although on its face *caveat emptor* appears to offer a vendor a complete defence to any claims made by a purchaser regarding defects in the property (absent specific contractual terms), the doctrine has been attenuated by a number of exceptions. Circumstances where *caveat emptor* will not operate to deny a plaintiff recovery were summarized by Bennett J. 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=), [*19 R.P.R. (3d) 218*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2JM-00000-00&context=) at para. 53 (S.C.) [*McCluskie*]:

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.

[Emphasis added.]

**21**  In *McCluskie v. Reynolds* [*(1998), 65 B.C.L.R. (3d) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2JM-00000-00&context=) (S.C.) [*McCluskie*], Bennett J. (as she then was) discussed the nature of any representations made, at paras. 47 and 48:

If a representation is entirely innocent, however, there can be no recovery.

Between innocent misrepresentation, however, and active concealment, there lie the possibilities of negligent misrepresentation, or reckless disregard for the truth.

**22**  The concept of a latent, as opposed to a patent, defect is discussed in Victor Di Castri, *Law of Vendor and Purchaser*, loose-leaf (last updated 2011-Rel. 4), 3d ed. (Toronto: Carswell, 1988) [*Law of Vendor and Purchaser*] at 7-32:

A patent defect which can be thrust upon a purchaser must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. ...

A latent defect, obviously, is one which is not discoverable by mere observation.

In the case of a patent defect, as distinguished from a latent defect as to quality or condition, and where the means of knowledge are equally open to both parties and no concealment is made or attempted, a prudent purchaser will inspect and exercise ordinary care: *caveat emptor*.

[Internal footnotes omitted.]

**23**  Whether a defect is patent or latent, a vendor who makes a fraudulent or negligent misrepresentation as to the quality of the property will be held liable for that misrepresentation. The analysis therefore begins with the question of whether there was any such misrepresentation in this case.

**24**  There is no evidence of any express representations made by the defendants on which the plaintiff relied. What the plaintiff is alleging is misrepresentation by intentional concealment or silence, or alternatively, a negligent failure to advise of the status of the mezzanine by the defendants.

1. **Fraudulent Misrepresentation**

**25**  It is well settled that silence and the intentional concealment of the truth can amount to a fraudulent misrepresentation: *Alevizos v. Nirula*, [*2003 MBCA 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JF1Y-B29F-00000-00&context=) at para. 24. However, the plaintiff must establish a conscious intention to deceive - a "guilty mind": *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*] at para. 52.

**26**  There is no evidence in this case of a conscious intention to deceive. When Mr. Dolecki asked for authorization to obtain plans from the City file and for the name and contact information of the mezzanine supplier, the defendants immediately complied. Although that occurred after the contract of purchase and sale had been signed, the defendants' response is not consistent with the conduct of a party attempting to conceal information or to deceive.

**27**  The defendants had also made disclosure of the mezzanine's status in the earlier sale of the adjacent unit and knew that they were dealing with the plaintiff through the same realtor, Mr. Dolecki. The plaintiff argues that disclosure was not complete - Mr. Pavone did not disclose that he had been specifically told the mezzanine did not meet the building code or that the City had already refused to issue a business licence because of the mezzanine. The plaintiff also points out, correctly, that in order for an agent's knowledge to affect the principal, that knowledge must be acquired by the agent in connection with the present principal's business: G.H.L. Fridman, *The Law of Agency*, 6d. ed. (Toronto: Butterworths, 1990) at 319.

**28**  But the fact that Mr. Dolecki's knowledge cannot be imputed to the plaintiff under principles of agency is entirely distinct from the question of what the opposite party in a transaction may honestly believe. Mr. Pavone knew that Mr. Dolecki acted for the plaintiff and knew that Mr. Dolecki had, in the course of the earlier transaction, learned at least that the mezzanine had been built without permit. I find that a reasonable vendor in Mr. Pavone's position could reasonably expect the same information to be communicated to the new principle. At the very least, the disclosure Mr. Pavone made in the previous transaction and his knowledge that Mr. Dolecki was aware of that disclosure serves to negate any inference that he was actively attempting to conceal information or to deceive the plaintiff. I therefore find that the plaintiff has failed to prove fraudulent misrepresentation.

1. **Negligent Misrepresentation**

**29**  The law surrounding negligent misrepresentation was summarized by Iacobucci J. 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:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;
2. the representation in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making said misrepresentation;
4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. the reliance must have been detrimental to the representee in the sense that damages resulted.

**30**  In *McCluskie*, Bennett J. said there is authority for the proposition that in certain circumstances, the absence of a statement can be a negligent misrepresentation: at para. 67. The determination of whether it is, in fact, negligent requires consideration of the same standard that is used in every ***negligence*** action - that of the hypothetical "reasonable person": at para. 70.

**31**  The question then is whether a reasonable vendor in the position of Mr. Pavone would perceive the transaction as one warranting additional disclosure. On that point, I return to the fact that Mr. Pavone was aware of the plaintiff's agent's knowledge of the status of an identical mezzanine structure contained within an identical adjacent property sold by the defendants only four weeks earlier. The defendants had not, in offering either property for sale, represented that the mezzanine was included in the advertised floor space.

**32**  In both transactions, the mezzanines had been included only at the specific request of the purchasers. No disclosure statement was requested as part of this transaction, although one had been requested and provided in the earlier transaction. A reasonable vendor could assume that the purchaser's agent did not consider a further disclosure statement to be necessary because it would likely contain the same information.

**33**  I find that a reasonable vendor in those circumstances could reasonably expect that the agent would communicate his knowledge to his client. While it may have been prudent for Mr. Pavone to repeat the disclosure previously made, even in the absence of a specific request, that is a standard of perfection rather than a standard of reasonable care. I do not find that Mr. Pavone's silence in these circumstance amounted to negligent misrepresentation or recklessness.

1. **Latent Defect**

**34**  The absence of fraudulent intent or of ***negligence*** does not necessarily protect a vendor who fails to disclose a latent defect in the property. The analysis must therefore begin with a determination of whether the undisclosed defect is in fact a latent one.

**35**  The distinction between patent and latent defects was canvassed by Ballance J. in *Cardwell*, which concerned the liability of a vendor of a residential property for defects discovered by the purchaser after the completion of the purchase. In *Cardwell* it was stated:

[122] The distinction between patent and latent defects is central to a vendor's obligation of disclosure under the doctrine [of *caveat emptor*]. 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=).

**36**  In *Ashcroft*, Burnyeat J. said at para. 45:

Where a vendor knows of the latent defect but fails to disclose that latent defect to a prospective purchaser, the vendor may be held liable for fraudulent misrepresentation: *Rowley v. Isley* [*[1951] 3 D.L.R. 766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X4D3-00000-00&context=) (B.C.S.C.). On the other hand, there is no duty on the part of a vendor to disclose patent defects to the purchaser: patent defects being those which are discoverable by conducting a reasonable inspection of the premises and making reasonable inquiries into its qualities. In the case of patent defects, the rule of caveat emptor strictly applies. It is also the case that a purchaser will be held to a fairly high standard of inspection: see for instance *Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.* *(1996), 141 D.L.R. (4th) 394* (Ont. C.A.).

**37**  Again, the *Law of Vendor and Purchaser* states at 7-45:

It is reasonably clear that a vendor is not obliged to disclose all known facts affecting the value of the land which may be material to the purchaser's judgment. The purchaser must form his own judgment: *caveat emptor*.

**38**  The vendor's disclosure obligation does not even extend to all latent defects. Liability arises only if the latent defect is such as to render the property dangerous or unfit for its intended purpose. For purposes of this action, I accept that non-compliance with building code requirements relating to fire safety made the property dangerous. I have some reservations about whether it rendered the property unfit for its intended commercial use. The presence of the mezzanine did not prevent or interfere with the use of the property in any direct physical sense, although it was a barrier to the acquisition of a municipal business licence. Again, for purposes of this judgment, I am prepared to assume that if the status of the mezzanine was a latent defect, it was a latent defect of the kind that must be disclosed.

**39**  Mr. Pavone was aware that the mezzanine was in violation of building code, such that it previously formed the basis of a denial of a business licence. Mr. Zimmerman was attracted to the mezzanine because it increased the amount of rentable floor space.

**40**  The fact that the mezzanine did not comply with building code was clearly not visible to the eye or discoverable on casual inspection by the purchaser. However, as noted by Ballance J. in *Cardwell*, there is a fairly high onus on the purchaser to inspect and discover patent defects. This means that defects otherwise undetectable on casual inspection may nonetheless be treated as patent if they would have been readily discoverable upon a reasonable inspection by a qualified person: at para. 122.

**41**  Ballance J.'s description of the onus placed on prospective purchasers was affirmed on appeal: [*2007 BCCA 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21G0-00000-00&context=) [*Cardwell CA*]. The Court of Appeal said at para. 48:

The cases make it clear that the onus is on the purchaser to conduct a reasonable inspection and make reasonable inquiries. A purchaser may not be qualified to understand the implications of what he or she observes on personal inspection; a purchaser who has no knowledge of house construction may not recognize that he or she has observed evidence of defects or deficiencies. In that case, the purchaser's obligation is to make reasonable inquiries of someone who is capable of providing the necessary information and answers. A purchaser who does not see defects that are obvious, visible, and readily observable, or does not understand the implications of what he or she sees, cannot impose the responsibility - and liability - on the vendor to bring those things to his or her attention.

**42**  In *Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.* *(1996), 141 D.L.R. (4th) 394* (O.N.C.A.), the Court found that the plaintiff purchaser could have determined prior to purchase that the land was contaminated, and the contamination was therefore treated as a patent defect. At para. 19 the Court held:

A reasonable inspection of the property, reasonable inquiries of the respondents, reasonable inquiries of the local and provincial authorities would have put the appellants on notice of the existence of the contaminant. Indeed, had the appellants pursued the taking of soil samples with reasonable diligence after the respondents had permitted them to take those samples, they would have learned of the existence of the contaminant before closing. Instead, the appellants chose not to disclose their intended use of the property and to take no steps to satisfy themselves that the property could be used for that purpose.

That passage was affirmed by the Court of Appeal in *Cardwell CA* at para. 45.

**43**  *Ekkebus v. Lauinger* [*(1994), 22 C.C.L.T. (2d) 148*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCT1-FCCX-6491-00000-00&context=) (Ont. Gen. Div.) concerned a hot tub which failed to comply with the appropriate bylaws by not having a surrounding fence with a locked gate. The Court found that the defect clearly was of a patent character, as "[t]he defect in the property could have been detected by the plaintiffs by checking with municipal authorities": at para. 20.

**44**  However, there are other cases where the lack of necessary permits and/or non-compliance with the building code has been found to be a latent defect. For example, *Jakubke v. Sussex Group* [*(1993), 31 R.P.R. (2d) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3B2-00000-00&context=) (B.C.S.C.), relied upon by the plaintiff, involved rooms that had been added to a house four or five years before the purchase at issue. That addition had been built without permit and did not comply with building code in force at the time the work was done, although it may have been lawful if built at an earlier date and subject to different requirements. Errico J. held the lack of building permit and non-compliance to be a latent defect and held the vendor liable for "conscious non-disclosure."

**45**  *Rawson v. Hammer* [*(1982), 23 R.P.R. 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92X1-FFFC-B2D6-00000-00&context=) (A.B.Q.B.) involved a house that was purchased while still under construction. The vendor/builder had not obtained a number of required permits and certificates. The resulting defects ultimately caused the house to be condemned. The Court found these to be latent defects not readily observable.

**46**  The characterization of a defect as patent or latent is clearly a question of fact in each case, requiring consideration of such issues as the nature of the defect, its importance to the purchaser and the extent of the inspection and inquiry that would be both reasonable in the circumstances and necessary to reveal the defect.

**47**  Where reasonable and vigilant inquiries or timely inspections reveal no discoverable defect, the defect may be latent and the vendor who was aware of it may be liable for a failure to disclose. On the other hand, if reasonable inquiries or inspections reveal a defect, the imposition of liability is not necessary. And if defects are not discovered or known by either party, the imposition of liability is not appropriate.

**48**  Put another way, the duty of vendors to disclose certain facts and to avoid misrepresentation is balanced by the duty of purchasers to protect their own interests and to know what they are buying. The standard of care required by the latter duty can be no more or less than conduct to be expected of a reasonable purchaser in the circumstances.

**49**  In determining the appropriate standard of care, it may also be relevant that the purchaser is a sophisticated and experienced commercial buyer who plans to put the property to a specific business use. The level of investigation and inquiry expected of such a buyer may be higher than that of, say, a buyer of a single residential property, but I do not need to decide that point.

**50**  In this case, Mr. Zimmerman was attracted to the mezzanine and the potential for additional rental income it offered. He knew that it had not been offered for sale as part of the property and knew or should have known that it was not included in the advertised square footage. He also must have realized it was neither part of the original structure nor a permanent addition - that is why he had to specifically ask for it to be included in the transaction. There is no evidence of any questions put to the defendants or their agent regarding the quality, safety, utility, etc., of the mezzanine structure.

**51**  At some point before completion, the plaintiff or its agent apparently considered the desirability of seeking further information. Mr. Dolecki asked for and received the defendants' authorization to review City files as well as the contact information for the supplier of the mezzanine. Had the plaintiff pursued the matter after receiving the requested authorization and information, it would likely have discovered the status of the mezzanine. Although Mr. Dolecki's request was not made until after the contract for purchase and sale was signed with no subjects, a reasonable and prudent purchaser would, in my view, have made that request at the time the agreement was signed and would have made the agreement subject to the result of those inquiries. There is no evidence of any circumstances, such as pressure from the existence of a competing offer, that would have prevented that approach.

**52**  But the plaintiff did not necessarily have to go even that far. A simple request for a standard form disclosure statement, such as the one that had been provided in the sale of the neighbouring unit, would have been sufficient to reveal that the mezzanine had been built without a permit, which would alert a reasonable purchaser to the need for further inquiries before proceeding with the transaction.

**53**  I therefore find that the plaintiff could have discovered the true status of the mezzanine through the reasonable, indeed minimal, inquiries that a reasonable purchaser in its position would be expected to make. It was therefore a patent defect, for which the vendor is not automatically liable and to which *caveat emptor* applies.

**CONCLUSION**

**54**  The facts of this case reveal no fraudulent misrepresentation by intentional concealment or silence, nor do they reveal any negligent misrepresentation by the defendants.

**55**  The unauthorized status of the mezzanine was readily discoverable on reasonable inquiry and is therefore a patent defect to which the doctrine of *caveat emptor* applies.

**56**  The plaintiff's claim is therefore dismissed. The defendants are entitled to costs at Scale B, unless counsel need to speak to matters of which I am unaware.

N.H. SMITH J.

**End of Document**

[***Curran v. MacDougall, [2006] B.C.J. No. 1391***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1R2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack, British Columbia

Fisher J.

Heard: April 24 - 28, 2006 (New Westminster).

Judgment: June 19, 2006.

Chilliwack Registry No. S15945

**[2006] B.C.J. No. 1391** | 2006 BCSC 933 | 151 A.C.W.S. (3d) 443

Between Dale Wesley Curran, plaintiff, and Roderick David MacDougall and Her Majesty the Queen in Right of the Province of British Columbia, defendants

(160 paras.)

**Case Summary**

**Damages — Aggravated damages — Action for damages for sexual abuse suffered by the plaintiff while he was an inmate at a provincial correctional facility — He was abused twice by a prison guard — General and aggravated damages awarded in the amount of $50,000, reduced by $10,000 for pre-existing conditions suffered by the plaintiff — The prison guard abused his authority and the plaintiff was, at the time, a young, vulnerable inmate — The plaintiff was significantly affected by the assaults at the time, and continued to have some symptoms — Aggravated damages were appropriate in these circumstances.**

**Damages — Exemplary or punitive damages — Damages — Aggravated damages — Action for damages for sexual abuse suffered by the plaintiff while he was an inmate at a provincial correctional facility — He was abused twice by a prison guard — General and aggravated damages awarded in the amount of $50,000, reduced by $10,000 for pre-existing conditions suffered by the plaintiff — The prison guard abused his authority and the plaintiff was, at the time, a young, vulnerable inmate — The plaintiff was significantly affected by the assaults at the time, and continued to have some symptoms — Punitive damages in the amount of $10,000 were also awarded.**

**Damages — For torts — Affecting the person — Sexual assault — Action for damages for sexual abuse suffered by the plaintiff while he was an inmate at a provincial correctional facility — He was abused twice by a prison guard — General and aggravated damages awarded in the amount of $50,000, reduced by $10,000 for pre-existing conditions suffered by the plaintiff — The prison guard abused his authority and the plaintiff was, at the time, a young, vulnerable inmate — The plaintiff was significantly affected by the assaults at the time, and continued to have some symptoms — Aggravated damages were appropriate in these circumstances — Punitive damages in the amount of $10,000 were also awarded.**

**Damages — Psychological injuries — Post-traumatic stress disorder — Action for damages for sexual abuse suffered by the plaintiff while he was an inmate at a provincial correctional facility — He was abused twice by a prison guard — Plaintiff's expert testified that that while the sexual assaults were not the exclusive source of Curran's symptoms for post-traumatic stress disorder, they were the primary source — Crown's expert disagreed opined that this disorder was not primarily attributable to the sexual assaults — General and aggravated damages awarded in the amount of $50,000, reduced by $10,000 for pre-existing conditions suffered by the plaintiff — The sexual assaults materially contributed to Curran's PTSD — However, some reduction in damages was appropriate given his other serious traumas.**

**Government law — Crown — Actions by and against Crown — Crown liability for acts of employees — Action for damages for sexual abuse suffered by the plaintiff while he was an inmate at a provincial correctional facility — He was abused twice by a prison guard — General and aggravated damages awarded in the amount of $50,000, reduced by $10,000 for pre-existing conditions suffered by the plaintiff, along with $4,000 for cost of future care — The Crown was vicariously liable for the assaults — The Crown was entitled, as against the prison guard, to be indemnified against the plaintiff's claim, a judgment in the amount of $44,000, and a judgment for the amount of costs to be paid to Curran and for its own costs of defending Curran's claims.**

**Tort law — Torts by the Crown — Liability of officials and employees — Liability for acts of servants — Action for damages for sexual abuse suffered by the plaintiff while he was an inmate at a provincial correctional facility — He was abused twice by a prison guard — General and aggravated damages awarded in the amount of $50,000, reduced by $10,000 for pre-existing conditions suffered by the plaintiff, along with $4,000 for cost of future care — The Crown was vicariously liable for the assaults — The Crown was entitled, as against the prison guard, to be indemnified against the plaintiff's claim, a judgment in the amount of $44,000, and a judgment for the amount of costs to be paid to Curran and for its own costs of defending Curran's claims.**

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| Action for damages for sexual abuse allegedly suffered by Curran while he was an inmate at a provincial correctional facility -- Curran alleged that he was abused twice by MacDougall, a corrections officer, in 1979 and 1980 -- In November 2000, MacDougall was convicted of nine counts of indecent assault or sexual assault of five individuals between 1980 and 1991 -- The assaults took place at the correctional facility, when MacDougall was a special services officer and the complainants were inmates -- Curran was not one of the criminal complainants -- He obtained a default judgment against MacDougall in July, 2005, with damages to be assessed -- The Crown issued third party proceedings against MacDougall, wherein it sought judgment for any amount that was found due to Curran -- At trial, the Crown admitted that, if the alleged sexual assaults against Curran took place, it was vicariously liable -- The Crown challenged Curran's credibility -- He had spent most of his life in jail, and he had also been diagnosed as having an anti-social personality disorder -- Expert evidence confirmed that individuals with this disorder are known to be deceitful -- During his examination for discovery in November, 2005, Curran denied having been sexually abused when he was younger -- This was not true -- Curran explained that he was asked this question in the afternoon and he was tired -- He did not want to discuss this earlier event and he wanted to leave the room -- As to damages, both Curran and the Crown presented medical experts -- Curran's expert testified that Curran suffered from post-traumatic stress disorder (PTSD) -- He explained that while the sexual assaults were not the exclusive source of Curran's symptoms for PTSD, they were the primary source -- The Crown's expert did not disagree with Curran's expert's diagnosis of PTSD, but he did disagree with his conclusion that this disorder was primarily attributable to the sexual assaults -- The Crown expert's view was that Curran's expert had identified three other serious traumas that likely contributed to the diagnosis, but did not fully assess these in order to rule them out -- HELD: MacDougall was found liable to Curran for the sexual assaults committed by him in 1979 and 1980 -- The Crown was vicariously liable for the assaults -- Despite some inconsistencies with Curran's testimony, he had established on the balance of probabilities that the sexual assaults occurred -- The assaults committed by MacDougall were on the lesser end of the spectrum -- However, they were still serious assaults because MacDougall was a person in authority and Curran was a young inmate who was vulnerable -- The assaults were combined with threats against Curran, which he believed were true -- MacDougall's sexual assaults materially contributed to Curran's PTSD -- However, some reduction in damages was appropriate given his other serious traumas -- Under the circumstances, Curran was entitled to general and aggravated damages in the amount of $40,000, future care costs of $4,000 and punitive damages against MacDougall of $10,000 -- The Crown was granted, as against MacDougall, a declaration that it was entitled to be indemnified against Curran's claim, a judgment in the amount of $44,000, and a judgment for the amount of costs to be paid to Curran and for its own costs of defending Curran's claims. |

**Counsel**

Counsel for the Plaintiff: D. Brent Adair, Q.C.

Counsel for the Defendant Crown: K. Johnston

No one appearing for the Defendant Roderick MacDougall

[Editor's Note: A Corrigendum was released by the Court June 21, 2006. The correction has been made to the text and the Corrigendum is appended to this document.]

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| **FISHER J.** |

**1**   This civil trial for historic sexual abuse involved allegations by a former inmate of the Lower Mainland Regional Correctional Centre, known as Oakalla, against Roderick MacDougall, a Corrections Officer formerly employed by the Crown. The plaintiff, Dale Curran, was an inmate at Oakalla at various times between 1978 and 1988. He alleges that Mr. MacDougall sexually assaulted him on two occasions, in 1979 and 1980.

**2**  In November 2000, Mr. MacDougall was convicted of nine counts of indecent assault or sexual assault of five individuals between 1980 and 1991. The assaults took place at Oakalla, when Mr. MacDougall was a special services officer and the complainants were inmates. The plaintiff was not one of the criminal complainants. Mr. MacDougall was ultimately sentenced to four years imprisonment and has served this sentence.

**3**  Mr. MacDougall took no part in these proceedings. The plaintiff obtained a default judgment against him on July 26, 2005, with damages to be assessed. The Crown issued third party proceedings against Mr. MacDougall, seeking judgment for any amount that may be found due to the plaintiff. At trial, the Crown entered a default judgment against Mr. MacDougall.

**4**  The Crown admits that if the sexual assaults took place, it is vicariously liable. Liability and damages are in issue.

**Background**

**5**  The plaintiff has had a very difficult life. He is 44 years old and has AIDS. He is addicted to heroin and cocaine and is presently being treated with methadone. He has an extensive criminal record, which mainly involves property and drug offences and charges of escaping custody. He has spent most of his life in jail.

**6**  From a young age, the plaintiff had difficulties at home and in school. He was in and out of juvenile detention. When he was about 12 years old, he was admitted to the Maples. On his discharge, his parents refused to take him home and put him into care. Over the following years, the plaintiff lived in many different foster and group homes. When he was about 14 years old, he was sexually abused by a care worker. He drank alcohol, smoked marijuana, and committed numerous crimes, mainly theft.

**7**  The plaintiff has not seen his parents for many years. He has an older brother who has also been in and out of jail, was addicted to drugs and who also has AIDS. He rarely sees his brother. He also has a younger sister who he was close to as a child, but he has seen her rarely throughout the years; the last time he saw her was in 1997.

**8**  The plaintiff has had several relationships with women, some quite long term. In 1979, he had a child who, unfortunately, died in infancy. In 1984, he began a 13-year relationship and was close to a stepson. However, he has not seen his stepson for about five years. He is not currently involved in an intimate relationship.

**9**  The plaintiff went to Oakalla for the first time in September 1978, when he was 17 years old. In November 1978, he was transferred to New Haven Correctional Centre. He escaped from there in December 1978 and was captured in March 1979. He returned to Oakalla on April 27, 1979, on remand for some charges and to serve a 12-month definite/9-month indefinite sentence for break and enter and theft. It was during this period that he first met Mr. MacDougall and when he says Mr. MacDougall sexually assaulted him for the first time.

**10**  In May 1979, the plaintiff was transferred from Oakalla to Ford Mountain Correctional Centre. He escaped from there in October 1979 and was captured in February 1980. He was sent back to Oakalla, where he stayed until September 1980, when he escaped again. It was during this period that he says Mr. MacDougall sexually assaulted him for the second time.

**Issues**

**11**  This is one of many actions against Mr. MacDougall and the Crown. The events in this action took place over 26 years ago. This in itself presents challenges for both the plaintiff and the defendants.

**12**  The first issue is whether the assaults took place as alleged by the plaintiff. The plaintiff's credibility is the key factor here. The second issue relates to damages. If the assaults took place, what amount of damages should be awarded to the plaintiff for general and aggravated damages, for past and future loss of income and for the cost of future care?

**The standard of proof**

**13**  The plaintiff must prove on a balance of probabilities that he was sexually assaulted by Mr. MacDougall. Such allegations are subject to a heightened evidentiary standard, often referred to as the "clear and cogent" standard: ***B.G. v. British Columbia,*** [*[2003] B.C.J. No. 3002*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-616C-00000-00&context=), [*2003 BCSC 1890*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-616C-00000-00&context=), at paras. 118-119; ***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.), varied on other grounds [*(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=); ***Boyd v. HMTQ,*** [*[2001] B.C.J. No. 963*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63FJ-00000-00&context=), [*2001 BCSC 667*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63FJ-00000-00&context=), at paras. 40-41 and the cases cited therein. There must be a high probability commensurate with the seriousness of the allegations: ***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=) (C.A.), [*2001 BCCA 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R5-00000-00&context=) at para. 25.

**14**  The plaintiff advances serious allegations against Mr. MacDougall, who has chosen not to defend himself in these proceedings. The only evidence about the sexual assaults comes from the plaintiff. While I may accept the plaintiff's evidence on its own, in these circumstances, such uncorroborated or unconfirmed allegations should be considered with great caution: ***Blackwater v. Plint*** [*(2001), 93 B.C.L.R. (3d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=) (S.C.), [*2001 BCSC 997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=); varied [*(2003), 21 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60W1-00000-00&context=) (C.A.), [*2003 BCCA 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60W1-00000-00&context=); aff'd [*[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=), [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), at para. 16.

**Evidence issues**

**15**  In ***Blackwater***, *supra*, Chief Justice Brenner aptly described the special challenges the court faces in historic abuse claims:

[337] ... With the passage of time objectively verifiable evidence of the assaults is generally long gone.

[338] What remains for the Court to consider are the subjective reports of the plaintiffs concerning both the physical injuries, which are no longer objectively verifiable, and, more importantly, the psychological injuries which, by their very nature, were never objectively verifiable. The experts who assess a plaintiff are in the same position as the court: their opinions must necessarily be based on subjective information either directly from the plaintiff or from collateral sources who have recorded subjective information from the plaintiff. In such circumstances the reliability of such subjective evidence, and consequently the plaintiffs' credibility, become central issues.

**16**  It is not necessary for the court to conclude that the plaintiff has consciously lied before his evidence is not accepted; it may simply be unreliable. The passage of time hampers the plaintiff's ability to prove his claim, and also affects a defendant's ability to locate and present evidence. Accordingly, the court must be very careful when considering the plaintiff's uncorroborated evidence.

**The plaintiff**

**17**  The Crown challenges the plaintiff's credibility. I have addressed this more specifically below, in analyzing the evidence relating to each of the sexual assaults. It is true that a plaintiff such as Mr. Curran has an uphill struggle. Not only has he spent most of his life in jail, he has also been diagnosed as having an anti-social personality disorder. Expert evidence confirmed that individuals with this disorder are known to be deceitful. I have considered these factors carefully. I have also observed the plaintiff during the trial. While at times he was angry and frustrated, he acknowledged this and was able to control his behaviour.

**18**  During his examination for discovery in November 2005, the plaintiff denied having been sexually abused when he was younger. This was not true. The plaintiff explained that he was asked this question in the afternoon and he was tired. He did not want to discuss this earlier event and he wanted to leave the room. This was an unacceptable way to handle the situation. Although I accept his explanation, it does demonstrate that the plaintiff may not tell the truth in some situations.

**19**  This earlier sexual abuse took place when the plaintiff was living in a group home at Powell Lake, B.C.. The family services records indicate that he was there between June and September, 1977. The plaintiff had become quite close to his care worker, who he described as his "partner in crime". He said that the two of them would break and enter cabins and sporting goods stores, stealing alcohol and guns. He testified that the assault took place when he was staying at a motel with his worker. The plaintiff had been drinking and smoking marijuana. He fell asleep. When he woke up, his shorts were around his ankles and the worker had his hands in his crotch area. He pulled his pants up and went to sleep on the floor. When he woke up again, the worker's hands were in his pants again. The plaintiff was upset and went outside to sleep in the car.

**20**  This description of the actual assault was substantially consistent throughout the plaintiff's testimony and in previous statements. His evidence about what happened after that assault was curious. He said that he got into a fight with his worker and he was going to tell the police about the break and enters and the sexual assault. The worker asked him not to do that. He gave the plaintiff four Powell Lake Farm cheques to pay him for some guns and stolen property. The cheques were blank and the plaintiff later filled them in and cashed them. He could not explain why he was given four cheques.

**21**  In a description of this assault dated July 8, 2004, the plaintiff wrote that the worker paid him for his silence, in not reporting the sexual assault to the police. Although the specific statement was not put to him in cross-examination, the plaintiff was asked if he received the cheques for the purpose of keeping him quiet. He denied this, and reiterated that the cheques were payment for stolen property.

**22**  The plaintiff was questioned about the circumstances in which he left Powell Lake and about a report that he had stolen his care worker's station wagon. He denied that the worker had a station wagon. He said that the worker had a Datsun 510 that he "was allowed to drive" and that he had a driver's licence. He described an occasion when he drove the Datsun from Powell Lake to Vancouver to sell some guns and other stolen property, with the worker's permission.

**23**  The Crown submitted that the plaintiff's evidence about these events is not credible and that more likely explanations are found in the plaintiff's Family Services records. However, these records were admitted into evidence for the purpose of showing that such records were made. They contain a lot of second and third-hand information, much of it speculative. The plaintiff did not accept any of the explanations suggested by the Crown.

**24**  I find the plaintiff's evidence about the specific circumstances of this early sexual assault credible. However, I have some difficulty with his evidence about the events surrounding it. He said he had a drivers licence at the time, but he did not turn 16 until August of 1977, and his explanation about the worker giving him four blank cheques on the Powell Lake Farm account is quite implausible.

**25**  Despite this, the plaintiff was sincere and consistent in his testimony about the assaults by Mr. MacDougall. The allegations against Mr. MacDougall are not corroborated or confirmed by any other evidence. I have been cautious as the law directs. I have accepted the plaintiff's evidence where it is not contradicted by other, reliable evidence. My specific findings are set out below.

**26**  I note that the plaintiff's sister, Kelly Pepper, testified about their family life and her observations of the plaintiff. She described her parents as being very difficult and the plaintiff as a "Dennis the Menace" when he was a young boy. Once the plaintiff went into custody, Ms. Pepper did not see him for many years. She saw him in 1980. She noticed that he was changed, withdrawn, that "the light had gone out of his eyes." She suspected that something had happened to him, but never asked. She said she knew the look, as she was a rape victim.

**27**  Ms. Pepper's testimony was moving and sincere. However, she had no personal knowledge about any of the matters at issue in this action.

**Adverse inference**

**28**  Mr. Adair submitted that the court should draw an adverse inference against the Crown for failing to call Mr. MacDougall to give evidence. Although he acknowledged that there would be credibility issues, Mr. MacDougall could have given evidence about his job role and duties, at least in 1979. The other former correctional officers called by the Crown could not give detailed evidence about what Mr. MacDougall was doing in 1979 as a corrections officer.

**29**  Mr. Johnston advised the court that Mr. MacDougall, despite his criminal convictions, continues to maintain his innocence, and his credibility would be questionable. He submitted that Mr. MacDougall's testimony would be of little probative value in these circumstances and that no adverse inference should be drawn.

**30**  Both counsel referred to the case of ***Boyd v. HMTQ****, supra*, where Madam Justice Stromberg-Stein considered this issue in the context of allegations of ***negligence*** and vicarious liability for sexual assaults that dated over 26 years. There, both parties asked the court to draw adverse inferences for their failure to call certain witnesses. At para. 45 she said:

The failure to call evidence may, depending on the circumstances, amount to "an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it": Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (2nd ed. 1999) at para. 6.321; ***Murray v. Saskatoon***, [*[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=) at 505-506 (Sask. C.A.).

**31**  The general rule goes back a very long way. It was succinctly described by Lord Mansfield In ***Blatch v. Archer*** (1774), 1 Cowp. 63, 98 E.R. 969, at p. 65:

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

**32**  The party against whom the adverse inference is sought may give a satisfactory explanation for the failure to call the witness: ***R. v. Jolivet***, [*[2000] 1 S.C.R. 751*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M455-00000-00&context=), [*2000 SCC 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M455-00000-00&context=). Such explanation must satisfy the trial judge that the circumstances would in "ordinary logic and experience, furnish a plausible reason for non-production": ***R. v. Rooke*** [*(1988), 40 C.C.C. (3d) 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22HG-00000-00&context=) (B.C.C.A.) at p. 513, quoting ***Wigmore on Evidence***. There is a stronger basis for drawing an adverse inference if the party has special access to the potential witness: ***R. v. Jolivet***, *supra.*

**33**  In ***Boyd***, Madam Justice Stromberg-Stein pointed out, at para. 46:

Reconstructing events from 26 years ago has posed challenges to both sides in this case. A case like this does not improve with age, as evidenced by missing and incomplete records, missing or dead witnesses, and faded memories, to name just a few of the challenges. It is Mr. Boyd who ultimately bears the burden of proof and runs the risk from a failure to call a material witness.

**34**  She concluded that no adverse inferences should be drawn against either party, particularly where the witness would be equally available to either party, if available at all.

**35**  Similar considerations apply here. While it may have been helpful to the Court to hear evidence from Mr. MacDougall, the Crown no longer has special access to him, and its explanation for not calling him is plausible. In my view, this is not a proper case to draw an adverse inference against the Crown.

**Vicarious liability**

**36**  As noted above, the Crown admits that it is vicariously liable if it is proven that Mr. MacDougall sexually assaulted the plaintiff. This accords with the law as set out by the Supreme Court of Canada 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=), [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), at para. 20.

**The assaults**

1. **The first assault - April - May 1979**

***The plaintiff's evidence***

**37**  The plaintiff testified that he met Mr. MacDougall in April 1979 shortly after his second admission to Oakalla. He said that Mr. MacDougall was introduced as his case worker. Mr. MacDougall talked to the plaintiff about his sentence and asked how he was adjusting. The plaintiff asked if it would be possible for him to serve his time at a camp, such as Ford Mountain. Mr. MacDougall laughed at this because the plaintiff had just come back from escape. He then said that the only way the plaintiff would get support for such a transfer was if they had sex. The plaintiff thought this was a joke. He called Mr. MacDougall a "fag" and said that was never going to happen. When he returned to his tier, he told several inmates about this. One of these inmates was a friend of his named Cordell Low. Mr. Low is now deceased.

**38**  Several days later, Mr. MacDougall brought the plaintiff into his office. Mr. MacDougall was angry. He slammed the door and yelled at the plaintiff about telling other inmates that he was a "fag" and had propositioned him. The plaintiff was scared. He told Mr. MacDougall he thought it had been a joke. Mr. MacDougall said that it wasn't a joke, that he did not like the plaintiff spreading rumours, and that he should consider what he said to people. Mr. MacDougall said he could have the plaintiff hurt. He then asked him if he still wanted a transfer. The plaintiff said he did. Mr. MacDougall told him he could have his transfer if he had oral sex with him.

**39**  The plaintiff testified that he realized this was not a joke and that his "nightmare was standing in front of him." Mr. MacDougall told the plaintiff to sit down on the desk and open his pants. Mr. MacDougall pulled up a chair and performed oral sex on the plaintiff. The plaintiff had an erection but he did not ejaculate. He told Mr. MacDougall he did not want to do this. After a few minutes, Mr. MacDougall stopped and the plaintiff left the office. The entire meeting took about five minutes.

**40**  The plaintiff described the office where these events took place as having two desks, two chairs and two filing cabinets. It was located beside the staff lunch room at Westgate B.

**41**  Several days later, Mr. MacDougall told the plaintiff that he would be transferred in a few days. The plaintiff was transferred to the Chilliwack Sentence Management Unit on May 7, 1979, and then to Ford Mountain Correctional Centre on May 10, 1979. He did not tell anyone about this incident with Mr. MacDougall.

***Other evidence***

**42**  The Crown submits that the plaintiff's evidence about this assault is not credible, because it could not have happened in the manner described in April or May of 1979. At that time, Mr. MacDougall was a corrections officer. Corrections officers did not have their own offices and they did not routinely interview inmates. Mr. MacDougall did not have his own office until January 1980, when he was appointed Special Services Officer. In that role, he was responsible for temporary absences, escorting inmates, liaising with police, the courts, probation and the Ministry of Social Services, and establishing programs for alcohol and drug treatment, psychological counselling and education. According to John Alexander, a former corrections officer who worked at Westgate B during this time, Mr. MacDougall's office as Special Services Officer was in the front hall of Westgate B. The Crown says it is unlikely that Mr. MacDougall would have used someone else's office in 1979 for the purpose of interviewing inmates.

**43**  Another former inmate of Oakalla testified for the plaintiff. This individual, who has also commenced a lawsuit against Mr. MacDougall and the Crown, was remanded to Oakalla on May 22, 1979. He testified that he was sexually assaulted by Mr. MacDougall at the time of his admission, during a classification interview, in an office located off the centre hall of the institution. This is contradicted by the evidence of Hendrick Van Staalduinen, a former corrections officer who worked in the records office from 1977 to 1980. He testified that all new admissions to Oakalla went to the records office. Only sentenced prisoners had classification interviews; remanded prisoners normally did not. Mr. Van Staalduinen also said that there were offices off the centre hall, in administration, which were used by lawyers, immigration officers and others in similar circumstances. These offices were all glassed and an officer was stationed outside at all times. The Crown submits that there were no offices in the area described where such an assault could occur and that the evidence of this former inmate should be rejected.

**44**  The Crown's evidence raises questions of credibility and reliability regarding the evidence of this witness. He was called for the purpose of verifying that as of May 1979, Mr. MacDougall was doing classification work for some inmates on admission and he had access to an office in which to do that. The Crown did not object to this evidence being admitted for this purpose, and it called Mr. Van Staalduinen as a rebuttal witness. Because of the limited purpose of his testimony, this witness did not testify about the assault in any detail, other than to describe where it took place. In such circumstances, it is very difficult to assess the credibility of this witness and the reliability of his evidence. While I have concerns about his credibility, I do not consider his evidence - whether or not there was an office off the centre hall in which Mr. MacDougall could have assaulted inmates - to be pertinent to the plaintiff's case. The plaintiff described an office in Westgate B beside a staff lunchroom. I consider the evidence of this former inmate to have little, if any, weight, and I have not relied on it.

**45**  I accept that Mr. MacDougall did not have an office of his own in 1979. However, there is evidence that a corrections officer could have had access to an office at that time. It is not necessarily material that this would not be in the normal course, because the assaults were not in the normal course. The plaintiff understood that Mr. MacDougall was the case worker for inmates under definite/indefinite sentences. Neither Mr. Anderson nor Mr. Van Staalduinen had knowledge of what Mr. MacDougall's specific duties were in 1979. Mr. Anderson did not know who was dealing with definite/indefinite inmates.

**46**  The Crown also says that the plaintiff's conversation with Cordell Low several days before the assault could not have taken place, because Mr. Low was not at Oakalla in April and May of 1979. Mr. Low's client history record indicates that he was admitted into Oakalla for the first time on August 15, 1979.

**47**  Rose Wilson, Acting Manager for the Systems Management Unit with the Corrections Branch, gave evidence about how these kinds of records are prepared and how the codes are used.

**48**  Mr. Adair objected to the admissibility of Ms. Wilson's evidence on the basis that it was expert opinion evidence, since Ms. Wilson was being called to interpret records, and no statement was provided under Rule 40A of the ***Rules of Court***. I ruled that the evidence was admissible. In my view, Ms. Wilson did not give expert opinion evidence. She simply explained how client history records are kept and how to apply the codes that are recorded or were used at the time. In any event, regardless of Ms. Wilson's interpretation of Cordell Low's record, the document speaks for itself.

**49**  Ms. Wilson has been employed by the Crown as a systems analyst since 1983. She also worked on an auxiliary basis for six months in 1981. The client records in this case, while generated recently, record data going back to the early 1970's. Although the entries in issue are for a period of time before Ms. Wilson was employed by the Crown, Ms. Wilson had knowledge about the records that was applicable to information generated before 1983.

**50**  Ms. Wilson explained that client history records deal with movements within provincial adult and youth custody and community corrections. She explained how the codes and locations shown on the record describe either an institution or a community office.

**51**  In the early 1980s, records were sent from each institution or community office and the information was then keyed into the provincial case file. Each "client", identified by name and known aliases, was assigned a unique eight-digit Corrections Service number. Information could only be entered into the system with this number. In the 1990's, photographs were included, which added another measure of reliability. The process today is similar, but information is now transferred electronically through the Court Services Branch information system.

**52**  Regardless of the manner in which the information is recorded and transferred, it is clear that information in these records is generated by different individuals at different times. Ms. Wilson acknowledged that the accuracy of a record depends on the efficiency of the individual who records the information, and that on occasion, individuals used incorrect codes.

**53**  Cordell Low's client history report records the following:

1. August 18, 1978 - remanded at Vancouver Provincial Court on a Failure to Appear.
2. March 28, 1979 - a new admission to "Bail" on March 28, 1979; Ms. Wilson explained that the code "Bail", which was used at the time, meant the Vancouver Bail office.
3. July 4, 1979 - released from bail at court.
4. August 14, 1979 - a new admission to the Maple Ridge Sentence Management Unit.
5. August 15, 1979 - a provincial transfer from the Maple Ridge Sentence Management Unit and an admission to Oakalla.

**54**  There appears to be a gap in Cordell Low's record. On August 18, 1978, the report records that Mr. Low was remanded at Vancouver Provincial Court. However, there is no corresponding entry indicating an admission to any facility. Ms. Wilson was not able to explain this. She did confirm, however, that in 1978, the remand centre for the Vancouver court was Oakalla. She also testified that for the period between March 28 and July 4, 1979, the record indicates that Cordell Low was not in custody, but under a community order. This is the period in which the plaintiff says Mr. Low was at Oakalla.

**55**  The plaintiff challenged the accuracy of Cordell Low's client history report. He suggested that Mr. Low may have been remanded to Oakalla before August 1979 for a failure to perfect bail. Mr. Adair submitted that the record may not be accurate, because it does not record an admission to a facility after the remand ordered on August 18, 1978.

**56**  The plaintiff was certain that he talked to Cordell Low about Mr. MacDougall's proposition and he recalled being in Oakalla with Cordell Low before he was transferred to the Chilliwack Sentence Management Unit. In cross-examination, he agreed that it was possible he was confusing his interaction with Cordell Low with another time. However, he also said:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 34 |  | A |  | That could be possible, but I'm saying it's -- in |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 35 |  | the way the events happened, he would have had to |  |
| 36 |  | have been a figment of my imagination. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 37 |  | Q | Okay. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 38 |  | A |  | If I'm saying it happened and he wasn't there, then |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 39 |  | I must have lost my mind. |  |

**57**  The plaintiff was transferred from Oakalla to the Chilliwack Sentence Management Unit twice during the relevant time period; the first time was on October 13, 1978, before he was transferred to New Haven, and the second time was on May 7, 1979, before he was transferred to Ford Mountain. I find it unlikely that the plaintiff confused the time he spoke to Mr. Low about Mr. MacDougall.

**58**  The only evidence that conflicts with the plaintiff's evidence about Cordell Low is the client history record. I have some concerns about the accuracy of this record, and hence its reliability. It appears that some information may not have made its way into the record, either because someone did not send it for entry into the provincial case file, or it was not inputted. No other documentary evidence, such as a court record, was proffered by the Crown.

**59**  Despite some of my concerns about the plaintiff's general credibility, I believed his evidence about the first assault. His memory of these events was quite good, and his evidence about them was consistent. In my view, the documentary evidence about Cordell Low is not sufficiently reliable to prefer over the evidence of the plaintiff.

***Conclusion***

**60**  Despite the challenges in reconstructing events from so long ago, I find that the plaintiff has proven that this assault occurred on the requisite standard of proof.

1. **The second assault - August - September 1980**

***The plaintiff's evidence***

**61**  On February 15, 1980, the plaintiff was admitted to Oakalla after having escaped from Ford Mountain Correctional Centre in October 1979. He had attended the funeral of his baby in October, and decided not to return. He wanted to be with his girlfriend, the mother of the baby. During his time on escape, he and his girlfriend had some problems and another boyfriend came into the picture.

**62**  The plaintiff said that he was first taken to the west wing of Oakalla, and then to Westgate B, where Mr. MacDougall worked. In the late summer of 1980, the plaintiff wanted to visit his girlfriend at her grandmother's house. Mr. MacDougall arranged for a pass and escorted the plaintiff on the visit. The plaintiff was upstairs with his girlfriend and Mr. MacDougall was downstairs with the grandmother. At some point, the plaintiff's brother and friend of his, Norman Pepper, also arrived at the house.

**63**  At some point the plaintiff and his girlfriend went outside. The plaintiff was upset about his girlfriend's other boyfriend, and he saw this person drive up the street. He told his brother (and perhaps Mr. Pepper) that if the boyfriend approached the house, he was going to hurt him, and he hoped that his brother and Mr. Pepper would stop the man from coming on to the property. The plaintiff went into the kitchen and put a French knife in the back of his pants. Fortunately, the boyfriend was told to leave, which he did. Mr. MacDougall and the grandmother came out of the house and saw the knife in the plaintiff's pants. Mr. MacDougall said that the visit was over, and he and the plaintiff left the house.

**64**  On the way back to Oakalla, Mr. MacDougall pulled the car over in Central Park. He was angry about what had happened and was apparently concerned that he would not be able to take inmates out on passes. He asked the plaintiff if he had any drugs on him and told him to open his pants to check. The plaintiff did so. Mr. MacDougall then told him not to do up his pants and that he wanted to give him oral sex. The plaintiff said no, he did not want any part of this. Mr. MacDougall told him he did not have a choice, began fondling the plaintiff's penis and then proceeded to give him oral sex. The plaintiff had an erection, but he was angry and started crying and yelling and banging on the car, asking why Mr. MacDougall was doing this to him. The plaintiff did not ejaculate and Mr. MacDougall eventually stopped.

**65**  The plaintiff testified that once he was back in his tier at Oakalla, he felt humiliated, embarrassed, angry, scared and confused. He felt that Mr. MacDougall had guards and inmates on his side. On September 6, 1980, within about a week of this incident, the plaintiff escaped from Oakalla. He was captured and returned to Oakalla on September 17, 1980.

**66**  The plaintiff said he was in the west wing. After a few weeks, he was called down to the gate at the end of his tier. Mr. MacDougall was there to see him. He was angry about the plaintiff's escape. Mr. MacDougall had given the plaintiff ground privileges and a good job, and he was now in a position to have to explain how the plaintiff escaped while on that job. The plaintiff told Mr. MacDougall that he had not really done anything for him, that it was his job to do these things, that he was tired of Mr. MacDougall's threats, promises, intimidation and use of him as a sex toy. He said he was going to tell Mr. MacDougall's bosses what was going on. Mr. MacDougall said they would never take the word of a convict over his. He told the plaintiff he would have him hurt by inmates or guards.

**67**  When he was back in his cell, the plaintiff was distraught. He thought things could happen the way Mr. MacDougall had described. He slashed his wrists, forearms and his neck. When guards entered his cell, he wrestled with them. He was handcuffed and taken to health care for several days.

***Other evidence***

**68**  There is no dispute that Mr. MacDougall escorted the plaintiff on the visit to his girlfriend's grandmother's house in 1980. The Crown submits, however, that the plaintiff's evidence about the visit contradicts the evidence of a witness, and that this calls into question the plaintiff's credibility about the second assault.

**69**  Norman Pepper was a friend of the plaintiff's brother, Wayne Curran, who introduced Mr. Pepper to the plaintiff's girlfriend and her grandmother. Mr. Pepper at times stopped for a cup of coffee at the grandmother's house. He was visiting there on the day of the plaintiff's visit. This was the first time Mr. Pepper met the plaintiff. Some years later, Mr. Pepper married the plaintiff's sister. However, he did not see the plaintiff for a long time after the visit in 1980, perhaps 20 years.

**70**  Mr. Pepper remembered very little about the visit. He recalled being outside with the plaintiff, his girlfriend, her grandmother and a guard. He did not say anything about Wayne Curran being there. He thought he had arrived before the plaintiff, and was quite sure that he left before the plaintiff and the guard. He did not recall anyone else arriving or any altercation. The only thing noteworthy to him was that a guard was there.

**71**  The Crown submitted that Mr. Pepper's evidence should be preferred to that of the plaintiff, because Mr. Pepper would have remembered an altercation of the kind described by the plaintiff had it occurred. Mr. Adair pointed out that this event was significant to the plaintiff, but insignificant to Mr. Pepper, whose memory of it was vague. The knife was in the back of the plaintiff's pants and was not readily apparent to someone not intimately involved in the event.

**72**  This visit took place about 26 years ago. Mr. Pepper's memory of it was understandably vague. On the other hand, the plaintiff's memory was quite clear. The plaintiff said that he spoke to his brother and possibly to Mr. Pepper about the other boyfriend. The other boyfriend did not join the group. It is possible that Mr. Pepper would not have been aware of the situation, at least to the extent that he would remember it more clearly after so many years.

***Conclusion***

**73**  In my view, the plaintiff's evidence about this second assault is credible. It is consistent with the Crown's admission that Mr. MacDougall escorted the plaintiff on the visit that preceded the assault. The discrepancy between the plaintiff's evidence about the visit before the assault and Mr. Pepper's evidence is not surprising, considering the passage of time. I find that the plaintiff has proven that this assault took place on the requisite standard of proof.

**Events subsequent to the assaults**

**74**  The plaintiff was released from Oakalla on December 20, 1980. Unfortunately, he was returned only a few days later on new charges. He encountered Mr. MacDougall but there were no assaults. The plaintiff escaped again, in March 1981. He went to the United States, where he was arrested. He was returned to Oakalla in January 1982. When at court on further charges, he requested a federal sentence so he would not have to return to Oakalla. Records indicate he was sent to a penitentiary on March 17, 1982.

**75**  Most significantly, in July 1984 when the plaintiff was back at Oakalla, he saw Mr. MacDougall at the gate. The plaintiff told Mr. MacDougall that he was not the same guy who had left and that if Mr. MacDougall had any thoughts about continuing as before, he would hurt him. Mr. MacDougall apologized to the plaintiff and said it would not be the way it was. The plaintiff thought that this apology was genuine. After this, Mr. MacDougall took the plaintiff out on a pass and there were no further incidents.

**76**  The plaintiff escaped from Oakalla on November 19, 1984 and was captured and readmitted on November 30, 1984. Records indicate that he stayed in Oakalla until May 17, 1985. He did not see Mr. MacDougall again.

**Causation and damages**

**77**  Having found the sexual assaults proven, I must now consider first, the extent to which these acts caused the plaintiff injury (liability) and second, whether that injury has caused the plaintiff a loss (the extent of the liability). Injury refers to the initial physical or mental impairment of the plaintiff as a result of the sexual assaults and loss refers to the pecuniary or non-pecuniary consequences of that impairment. The issue of causation applies both to considerations of establishing liability and damages: ***Blackwater v. Plint*** [*(2001), 93 B.C.L.R. (3d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=) (S.C.), aff'd on these issues [*(2003), 21 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60W1-00000-00&context=) (C.A.), [*[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=).

**78**  Cases of historic sexual assault present significant challenges to a court in determining issues of causation. As Chief Justice Brenner noted in ***Blackwater***, *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.

**79**  This daunting task was acknowledged by the Supreme Court of Canada in ***Blackwater***, *supra*:

74 Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), at para. 32.

**80**  The Court further noted that it is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort:

78 ... 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: *Athey*.

**81**  I have applied the law of causation in the manner described by Chief Justice Brenner in ***Blackwater***, *supra*, at para. 370:

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.
4. **The plaintiff's injuries**

**82**  The plaintiff's problems are mainly psychological. He also suffers from AIDS and is drug-dependent.

**83**  Dr. Ronald LaTorre, a clinical and forensic psychologist, gave evidence for the plaintiff. Dr. LaTorre was qualified as an expert in the field of psychology, with experience dealing with sexual abuse, substance abuse and the interplay between substance abuse and criminality.

**84**  Dr. Atholl Malcom, also a clinical psychologist, gave evidence for the Crown. Dr. Malcolm was qualified as an expert in the field of psychology, to assess claims for psychological injuries involving Post-traumatic Stress Disorder (PTSD). Dr. Malcolm did not provide a psychological assessment of the plaintiff. He reviewed Dr. LaTorre's report and provided comments.

**85**  Much of the information on which Dr. LaTorre based his opinions was provided only by the plaintiff. Dr. LaTorre did not question whether or not the sexual assaults occurred. He based his opinion on the assumption that they had.

**86**  Dr. LaTorre opined that the plaintiff does not suffer from a major psychiatric disorder. He gave the following diagnostic impressions:

... Mr. Curran appeared to have an irritable edge and some mood lability; however at the present interviews he did not fit criteria for a Major Mood Disorder. Some of the neurovegitative indices of depression appear to be attributable to his medical condition and some of his mood lability appears attributable to his personality.

...

The following are offered as provisional diagnoses in this case:

|  |  |  |  |
| --- | --- | --- | --- |
|  | AXIS I | Alcohol Abuse (Historical Diagnosis) |  |

Cannabis Abuse (? Historical Diagnosis)

Cocaine Dependence, With Physiological Dependence

Opioid Dependence, With Physiological Dependence (Methadone Treatment)

Posttraumatic Stress Disorder, Chronic

Query Attention-Deficit/Hyperactivity Disorder, In Partial Remission

|  |  |  |  |
| --- | --- | --- | --- |
|  | AXIS II | Antisocial Personality Disorder |  |
|  | AXIS III | Auto-Immune Deficiency Syndrome |  |

Hepatitis C Seropositivity

**87**  In his report, Dr. LaTorre explained:

Chronic Posttraumatic Stress Disorder means that Mr. Curran experienced a traumatic event to which he responded in a particular fashion (with respect to the sexual assaults it was with fear and helplessness) and subsequent to which he developed a symptom pattern that included reexperience of the event, avoidance and numbing and hyperarousal. These have caused significant disturbance for Mr. Curran and the problems have persisted for greater than three months (i.e. they have been chronic).

The early history reported by Mr. Curran suggests he might have suffered from Conduct Disorder and, possibly, from Attention-Deficit/Hyperactivity Disorder. He presents with psychomotor agitation and claimed and demonstrated a limited attention span. For these reasons I am questioning if he does not have some continued evidence of Attention-Deficit/Hyperactivity Disorder.

Antisocial Personality Disorder means that Mr. Curran displayed evidence of some symptoms of Conduct Disorder prior to age 15 years, demonstrated a pervasive pattern of disregard for and violation of the rights of others.

**88**  Dr. LaTorre recognized that the plaintiff had a number of traumatic experiences before the sexual assaults, the most significant being, in his opinion, parental abandonment. He also expressed the view that the sexual assault associated with Powell Lake was "significantly disturbing to him," although he felt that the plaintiff was able to absolve himself of any responsibility for that abuse because he was drugged at the time. This issue was not canvassed in detail. In my opinion, however, given the circumstances of that abuse, it is likely that this earlier incident contributed to at least some of the plaintiff's psychological problems.

***Post-traumatic Stress Disorder***

**89**  Dr. LaTorre explained that a diagnosis of Post-traumatic Stress Disorder (PTSD) requires both a significant trauma (such as a threat to life, physical integrity, sexual assault) and a response of fear, helplessness or horror. He conducted a structured interview of the plaintiff in accordance with the Clinician-Administered PTSD Scale for DSM-IV (CAPS). The plaintiff reported to him that he had been subjected to a number of traumatic events in his life. He did not identify the sexual assaults as one of the three worst events; he identified these as (1) witnessing the sudden, violent deaths of friends in the penitentiary, (2) witnessing harm to another friend and (3) harm he might have caused others. The plaintiff declined to discuss the third trauma with Dr. LaTorre. Dr. LaTorre began questioning the plaintiff about the other two traumas and the sexual assaults, in accordance with CAPS. He did not conclude the analysis of the other two traumas because the plaintiff did not report the symptom patterns - re-experiencing the event - associated with PTSD. These symptom patterns were reported only with respect to the sexual assaults. Dr. LaTorre stated:

Specifically, Mr. Curran reported reexperiencing symptoms of intrusive recollections, psychological distress at exposure to cues and physiological reactivity on exposure to cues. He also reported avoidance and numbing symptoms including avoidance of thoughts or feelings, avoidance of activities, detachment or estrangement and restricted range of affect. He also reported hyperarousal symptoms of irritability or outbursts of anger and hyper-vigilance.

**90**  In Dr. LaTorre's opinion, the plaintiff's PTSD could be directly attributed to the sexual assaults by Mr. MacDougall. He explained that it is difficult to sort out the cause of all symptoms, and that while the sexual assaults were not the exclusive source of the plaintiff's symptoms for PTSD, they were the primary source.

**91**  Dr. Malcolm did not disagree with Dr. LaTorre's diagnosis of PTSD, but he did disagree with Dr. LaTorre's conclusion that this disorder was primarily attributable to the sexual assaults. Dr. Malcolm's view was that the plaintiff had identified three other serious traumas that likely contributed to the diagnosis, but Dr. LaTorre did not fully assess these in order to rule them out.

**92**  I share Dr. Malcom's concerns about Dr. LaTorre's opinion on this point. Dr. LaTorre did not fully assess the other traumas that the plaintiff identified, partly due to his initial assessment about their applicability and to the plaintiff's reluctance to discuss one of the traumas. Moreover, his assessment was based only on the plaintiff's subjective responses. Dr. Malcolm pointed out that it is easy to recognize the purpose of the questions in CAPS. Dr. LaTorre did not administer other written tests that are designed to provide some validity to subjective responses. He explained that he did not think that the plaintiff's reading abilities were sufficient to do these tests. I am not sure of the basis for this. There was no evidence that the plaintiff had serious reading difficulties. During the trial, I observed the plaintiff reading documents that were put to him and he responded appropriately to questions about those documents.

**93**  I note, however, that there is uncontradicted expert evidence that the plaintiff suffers from PTSD, which can be attributed at least in part, to the two sexual assaults. Accordingly, I have given some weight to Dr. LaTorre's opinion regarding this diagnosis, taking into account my concerns as outlined above.

**94**  I find that the sexual assaults alone and the plaintiff's other life circumstances alone could each have been a sufficient cause of his PTSD. It is unclear which was the cause in fact of this psychological injury. However, based on the expert evidence reviewed above, I have determined that Mr. MacDougall's sexual assaults materially contributed to the plaintiff's PTSD.

***Anxiety and depression***

**95**  Dr. LaTorre was also of the opinion that the sexual assaults "appear to have also contributed to, if not caused" the plaintiff's symptoms of anxiety and depression:

Depression is often considered a form of learned helplessness and it was a sense of helplessness that Mr. Curran experienced during the assaults by Mr. MacDougall.

**96**  According to Dr. LaTorre, helplessness was an important aspect of the plaintiff's problems. This related primarily to the symptoms of depression, but it also had a bearing on his diagnosis of PTSD. Regarding depression, he testified:

|  |  |  |  |
| --- | --- | --- | --- |
| 1 |  | ... I |  |
| 2 |  | think where Mr. MacDougall's assaults may have |  |

1. really undermined Mr. Curran was in what we call

|  |  |  |  |
| --- | --- | --- | --- |
| 4 |  | learned helplessness, and this is related to |  |
| 5 |  | depression. |  |
| 6 |  | People when they experience certain events can |  |
| 7 |  | see that these events are outside their control. |  |
| 8 |  | They develop when we call learned helplessness. |  |
| 9 |  | And it comes from studies from dogs. You put a dog |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 10 |  | in a box and you shock him and there's no escape |  |
| 11 |  | and he learns. You then put that dog in a box and |  |
| 12 |  | there is partition and you remove the partition so |  |
| 13 |  | the dog only has to go to the other side and he's |  |
| 14 |  | not shocked anymore. And you shock the dog and he |  |
| 15 |  | says there, he stays in the shock room and he just |  |
| 16 |  | lays down and whimpers. He's given up. Put |  |
| 17 |  | another dog in that box and shock him and he jumps |  |
| 18 |  | to the other side to get away from the shock. |  |
| 19 |  | I think what happened with Mr. Curran and is |  |
| 20 |  | frequent with depression and the post traumatic |  |
| 21 |  | stress disorder is people learn helplessness. They |  |
| 22 |  | take on the quality there's nothing I can do. And |  |
| 23 |  | I see this not only with inmates but with people in |  |
| 24 |  | society who are functioning but really feel that |  |
| 25 |  | they have no control over their lives, there's |  |
| 26 |  | nothing they can do to make their situation better. |  |
| 27 |  | And that's one of the things that really needs to |  |
| 28 |  | be dealt with in treatment, yes you do have |  |
| 29 |  | control, yes you can change, yes you can make |  |
| 30 |  | things better. And I think with Mr. Curran I think |  |
| 31 |  | he has kind of given up. |  |

**97**  I have some difficulty accepting Dr. LaTorre's conclusions regarding the plaintiff's reactions of helplessness. Dr. LaTorre was not aware of certain events that took place subsequent to the sexual assaults, which I view as significant.

**98**  The plaintiff was back at Oakalla several times - in December, 1980, March 1981, January 1982 and July 1984. He encountered Mr. MacDougall on occasion, but there were no further assaults. The most significant encounter was in July 1984, when the plaintiff stood up to Mr. MacDougall and Mr. MacDougall apologized. As described above, the plaintiff thought that this apology was genuine. After this, Mr. MacDougall took the plaintiff out on a pass and there were no further incidents. Records indicate that the plaintiff was in Oakalla at various times until August 1985 (and a few days in November 1988), after which he did not see Mr. MacDougall again.

**99**  The plaintiff gave this evidence in cross-examination:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 33 |  | Q |  | And at that time you had the conversation with him |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 34 |  | and you told him at that time not to try anything, |  |
| 35 |  | that things were not going to be the way they were |  |
| 36 |  | before, right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 37 |  | A | Yes, I did. |  |
| 38 |  | Q | You set him straight? |  |
| 39 |  | A | I did. |  |
| 40 |  | Q | You stood up to him? |  |
| 41 |  | A | I did. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 42 |  | Q |  | And that point MacDougall apologized to you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 43 |  | A | He did. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 44 |  | Q |  | And you were saying yesterday that you believe that |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 45 |  | he meant that, he was sorry? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 46 |  | A |  | He was sorry because he didn't believe that I would |  |
| 47 |  | take |  | it to the point that I did. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 1 |  | Q | Okay. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 2 |  | A |  | That's the way I interpreted it. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3 |  | Q | Okay. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 4 |  | A |  | Was he was sorry that I didn't handle it the way he |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 5 |  | maybe thought I should have or would have. He was |  |
| 6 |  | sorry that I went and did all this to myself. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 7 |  | Q | Okay. |  |
| 8 |  | A | Yeah. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 9 |  | Q |  | All right. And that made you feel better, to stand |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 10 |  | up to him? That gave you some of your power back, |  |
| 11 |  | didn't it? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 12 |  | A | It did. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 13 |  | Q |  | Okay. You weren't going to let him victimize you |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 14 |  | anymore? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 15 |  | A | Right. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 16 |  | Q |  | And he didn't bother you after that? |  |
| 17 |  | A |  | No. That's why I have these problems now is I |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 18 |  | should have probably been a little more aggressive |  |
| 19 |  | when I was 18 instead of cowering and letting him |  |
| 20 |  | have his way with me. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 21 |  | Q | Okay. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 22 |  | A |  | Because when I did stand up to him and learn how to |  |
| 23 |  | be a |  | little bit better with my hands and my feet, I |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 24 |  | found in prison you lay a bad beating on somebody |  |
| 25 |  | everybody else talks about it, it makes it a little |  |
| 26 |  | easier for you the next time. And for a lot of |  |
| 27 |  | years I had a lot of anger because I just didn't |  |
| 28 |  | take the control or the power. |  |

**100**  On the face of it, this is not the kind of behaviour that demonstrates that a person has given up. The plaintiff confronted his abuser, received what he considered to be a sincere apology and the abuser's behaviour changed. Although the plaintiff initially reacted to the assaults by withdrawing, he eventually addressed the situation on his own. Dr. LaTorre was asked about this in cross-examination:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. Well, I'll ask you to assume the following, |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 9 |  | if you would, and that is that in 1984 Mr. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 10 |  | MacDougall called Mr. Curran down to his office |  |
| 11 |  | again and that Mr. Curran told him in no uncertain |  |
| 12 |  | terms that he was not going to be victimized by Mr. |  |
| 13 |  | MacDougall again, and that he was not afraid of Mr. |  |
| 14 |  | MacDougall, and that Mr. MacDougall then apologized |  |
| 15 |  | to him and that Mr. Curran believed that apology to |  |
| 16 |  | be heart-felt. |  |
| 17 |  | Now, that would be of some significance, would |  |
| 18 |  | it not, in terms of the psychological and emotional |  |
| 19 |  | harm that Mr. Curran might suffer or would have |  |
| 20 |  | suffered as a result of the sexual assaults? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 21 |  | A |  | I'm not aware of literature My Lady that shows a |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 22 |  | perpetrator's apology to a victim significantly |  |
| 23 |  | impacts post trauma systems. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 24 |  | Q |  | Okay. So you're not aware of any literature. What |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 25 |  | about your experience as a psychologist? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 26 |  | A |  | My experience is that it's very important for |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 27 |  | victims to receive an apology but they are still |  |
| 28 |  | troubled by the behaviour that had occurred anyway. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 29 |  | Q | But it could well -- |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 30 |  | A |  | It might lessen as opposed to exacerbate when the |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 31 |  | perpetrator denies and continues to deny the |  |
| 32 |  | offence. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 33 |  | Q |  | Okay. And that would impact on your opinion about |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 34 |  | the learned helplessness presumably as well? | What |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 35 |  | I'm getting at here Dr. LaTorre is that and you |  |
| 36 |  | correct me if I'm wrong, the learned helplessness |  |
| 37 |  | is a function of being victimized is that a fair |  |
| 38 |  | way of putting it? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 39 |  | A | To some extent, yes. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 40 |  | Q |  | And the example that I've given to you about the |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 41 | 1984 |  | encounter indicates that Mr. Curran took some |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 42 |  | control and set boundaries between himself and Mr. |  |
| 43 |  | MacDougall? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 44 |  | A |  | That's what it sounds like. |  |
| 45 |  | Q |  | And that would then have impacted upon any |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 46 |  | suggestion that learned helplessness with respect |  |
| 47 |  | to the sexual assaults and with respect to |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 1 |  | MacDougall? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 2 |  | A |  | It may, but it's really not quite that simple |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 3 |  | because the feeling of learned helplessness that |  |
| 4 |  | derives from the actual initial event is not |  |
| 5 |  | necessarily completely resolved, one can sort of |  |
| 6 |  | set a boundary as it honoured there's that was six |  |
| 7 |  | years after the fact. And certain personality |  |
| 8 |  | characteristics develop certain cognitions |  |
| 9 |  | that might be resistant to simple change by the |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 10 |  | fact that you can tell someone, like I'm not going |  |
| 11 |  | to be victimized again don't do it and the person |  |
| 12 |  | apologizes. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 13 |  | Q |  | Whatever way that might occur on the facts as I |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 14 |  | suggested it could only have a positive effect, |  |
| 15 |  | correct? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 16 |  | A |  | No, I would say that it could have no effect. |  |
| 17 |  | Q |  | You think it might have no effect? |  |
| 18 |  | A |  | I'm saying that's possible. |  |
| 19 |  | Q |  | Okay. But I'm asking you what you think is likely |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 20 |  | given your experience as a psychologist, given what |  |
| 21 |  | you know of the facts of this case? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 22 |  | A |  | I would be hopeful that it would have a positive |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 23 |  | effect. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 24 |  | Q |  | And if you had known that at the time that would |  |
| 25 |  | have |  | factored into your opinion presumably? |  |
| 26 |  | A |  | It may have, yes. I can't say for certain that |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 27 |  | knowing that Mr. MacDougall apologized would have |  |
| 28 |  | made me -- would have made me follow through with |  |
| 29 |  | different conclusions than what I did. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 30 |  | Q |  | Well, on the issue of confronting one's abuser, is |  |
| 31 |  | that |  | not something that you ask a person when doing |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 32 |  | an assessment like this? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 33 |  | A |  | Ask them if they have confronted their abuser? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 34 |  | Q | Yes. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 35 |  | A |  | No it's not something that I generally ask. |  |
| 36 |  | Q |  | But you don't disagree that it's significant? |  |
| 37 |  | A |  | Yes. It can be significant. |  |
| 38 |  | Q |  | And you agree that it's not something that Mr. |  |

|  |  |  |  |
| --- | --- | --- | --- |
| 39 |  | Curran told you no the course of the assessment? |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 40 |  | A |  | No, he did not tell me that. |  |

(Emphasis added)

**101**  While he was somewhat equivocal about this, Dr. LaTorre agreed that this issue could be significant. Although the plaintiff did not volunteer this information to Dr. LaTorre, he wrote about it in his June 2005 summary, and this was one of the documents that Dr. LaTorre reviewed.

**102**  The plaintiff's current therapist, Ms. Judy Eberts, gave evidence about his course of treatment. It is surprising that Ms. Eberts was also unaware of Mr. MacDougall's apology, since the plaintiff's written summary is contained in her file. In any event, Ms. Eberts agreed that a heartfelt apology would probably be very helpful; depending on the victim, it could help to provide closure.

**103**  Because of the potential significance of this evidence, and the fact that Dr. LaTorre did not canvass this with the plaintiff, I consider his conclusions about the plaintiff's "learned helplessness" to have little weight. However, I accept that the plaintiff suffered some anxiety and depression following the sexual assaults, particularly given the evidence about his reaction to it and to Mr. MacDougall's threats.

**104**  I find that the plaintiff's life before the sexual assaults, as well as his other experiences in prison and out, could have been a sufficient cause of his anxiety and depression even if the sexual assaults had never occurred. For the reasons outlined above, I do not accept Dr. LaTorre's opinion that the sexual assaults contributed to or caused the plaintiff's symptoms of anxiety and depression to the extent he described. However, I do find that the sexual assaults alone could have been a sufficient cause of some of the plaintiff's anxiety and depression, and materially contributed to such injury.

***Substance dependence***

**105**  Within a few years after the assaults, when the plaintiff was in a federal penitentiary, he started to use heroin and cocaine. He continues to be addicted to those drugs. He has been treated with methadone from time to time.

**106**  Dr. LaTorre stated that the plaintiff's substance dependence could, to some extent, be attributed to the sexual abuse. He noted a temporal continuity, in that the plaintiff began to use heroin and cocaine a few years after the sexual assaults. However, his opinion was qualified. He also said that it would be difficult to argue that the plaintiff would or would not have resorted to intravenous drug use if the assaults had not occurred. At trial, Dr. LaTorre testified that the plaintiff's early drinking and drug-taking placed him at a greater risk of using heroin and cocaine at a later stage, and that given his history, the plaintiff's use of these hard drugs would be a natural progression. He thought, though, that the progression would not have been so sudden had the sexual assaults not occurred. I note that although Dr. LaTorre has experience dealing with substance abuse, he is not an addiction specialist.

**107**  I find that the plaintiff's substance dependence would have occurred without the injuries sustained in the sexual assaults. He was at high risk to progress to hard drugs, given his history. I do accept that the sexual assaults may have accelerated to some degree the plaintiff's dependence on hard drugs. However, the evidence is insufficient to prove, on a balance of probabilities, that the sexual assaults materially contributed to his dependence.

1. **The plaintiff's loss**

**108**  The plaintiff is entitled to be compensated for the loss caused by the sexual assaults, which includes his PTSD and some of his anxiety and depression. He is entitled to be restored, as much as possible, to his original position.

**109**  The main issue is the extent of the damages that should be awarded in order to put the plaintiff back into his original position. Major J., 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=) addressed the relevance of pre-existing conditions. The related principles of "thin skull" and "crumbling skull" differ in terms of assessment of damages. Major J. simplified this in ***Athey*** by moving away from this terminology, 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: 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,* [*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., 169 C.L.R. 638*; 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.

**110**  Unrelated intervening events are to be taken into account in the same way as pre-existing conditions. In ***T.W.N.A. v. Clarke***, [*(2003) 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=) (C.A.), [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=), Smith, J.A. held, at para. 36, citing ***Athey***:

If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately.

**111**  As described above, the plaintiff experienced a difficult life and a variety of psychological problems before the sexual assaults. His life experiences included physical abuse, abandonment by his parents, one incident of sexual abuse, substance abuse of alcohol and marijuana, and the death of a baby. He was involved in criminal activity from an early age. Dr. LaTorre diagnosed him with Antisocial Personality Disorder, a pre-existing condition stemming from symptoms of Conduct Disorder before the age of 15, and possibly Attention-Deficit/Hyperactivity Disorder. Subsequent to the assaults, the plaintiff's substance abuse escalated to hard drugs and he became dependent on heroin and cocaine. He continued to engage in criminal activity and there is evidence of increased seriousness over time. I have found that the plaintiff would have engaged in these subsequent behaviours even if the sexual assaults had not occurred.

**112**  Pre-existing conditions are more difficult to assess when dealing with psychological or emotional injuries. The evidence in this case is clear, however, that the plaintiff's pre-existing personality and behaviour disorders created a measurable risk that he would have suffered emotional and psychological problems in the future in any event. By the time of the assaults, these disorders had already manifested into serious anti-social and criminal behaviour. The plaintiff spent considerable time in juvenile and adult correctional facilities. These pre-existing traits are inherent in the plaintiff's original position.

**113**  Although the plaintiff's PTSD and some of his anxiety and depression are causally related to Mr. MacDougall's assaults, some reduction in damages is appropriate when considering his original position.

1. ***Non-pecuniary damages***

**114**  On behalf of the plaintiff, Mr. Adair submitted that an appropriate award for general and aggravated damages should be in the range of $60,000 to $80,000. For the Crown, Mr. Johnston submitted that appropriate range is $30,000 to $40,000, less a 25% reduction to account for the plaintiff's pre-existing and intervening disabilities.

**115**  The sexual assaults committed by Mr. MacDougall against the plaintiff were on the lesser end of the spectrum. Mr. MacDougall stopped at some point after the plaintiff reacted negatively, there was no ejaculation, no penetration and they did not continue over time. However, they were still serious assaults because Mr. MacDougall was a person in authority and the plaintiff was a young inmate who was vulnerable. The assaults were combined with threats against the plaintiff, which he believed were true. Mr. MacDougall breached his position of trust and authority.

**116**  The assaults were clearly distressing for the plaintiff. He felt humiliated, embarrassed and used. He was also angry, scared and confused. He wanted to retaliate but felt threatened.

**117**  About a week after the second assault, the plaintiff escaped from custody. When he returned just over ten days later, he had an argument with Mr. MacDougall at the gate at the end of the tier. Mr. MacDougall had arranged for the plaintiff to have a good job and he was angry about the plaintiff's escape. He threatened to have the plaintiff moved back to Westgate B. The plaintiff tried to stand up to him and threatened to tell his superiors about his actions, but Mr. MacDougall said that no one would take the plaintiff's word over his. The plaintiff testified that Mr. MacDougall also threatened to have him "beat up and hurt and raped."

**118**  The plaintiff believed that Mr. MacDougall had inmates looking out for him and guards on his side. When he went back to his cell, he slashed his wrists, forearms and neck with a razor. This was clearly a desperate act. He said that when the guards came into his cell he fought them. He was taken to health care for three or four days and then sent to south wing for observation. He denied doing this because he was depressed about other things in his life. I find that difficult to accept, given the plaintiff's life circumstances, but I do accept that Mr. MacDougall's actions materially contributed to this reaction.

**119**  The plaintiff was back in Oakalla several times after this, but it appears he had little to do with Mr. MacDougall. In 1984, some four years later, the two had a conversation. As I described above, the plaintiff stood up to Mr. MacDougall, who then apologized. The plaintiff agreed that he felt better standing up to Mr. MacDougall, that he learned something about how to stand up for himself in prison and that this gave him back some of his power.

**120**  The plaintiff also testified that as a result of the assaults, in an effort to protect himself, he withdrew. He would not talk to guards, case workers, parole officers. He became very institutionalized. He felt guilty that he did not handle the situation properly, and angry because "I should have just killed him then." He did a lot of drugs, including cocaine and heroin. However, he did not have doubts about his sexuality. He had some problems when he was with women because of visions coming back about Mr. MacDougall, but he was able to have normal sexual relationships with women.

**121**  This evidence of withdrawal is somewhat at odds with the plaintiff's evidence about learning to stand up for himself in prison. However, I accept that the plaintiff withdrew initially and in time learned how to survive in prison. He may have continued to withdraw on an emotional level. This is confirmed to some extent by the evidence of Ms. Ebert and Dr. LaTorre.

**122**  The plaintiff's symptoms of PTSD have waxed and waned over the years. They are present when the plaintiff is confronted with cues or has to discuss the assaults. It does not appear that these symptoms are front and centre in the plaintiff's life very often. Dr. LaTorre was not able to say how serious these symptoms were when compared with the plaintiff's other problems.

**123**  Mr. Adair submitted that the plaintiff's damages warrant a higher award, including aggravated damages, because of the context in which the assaults took place, emphasizing the prison setting where the plaintiff was under Mr. MacDougall's control. Mr. Johnston agreed that aggravated damages are part of general damages and can be awarded against the Crown under vicarious liability (citing ***T.W.N.A. v. Clarke***, *supra*), but submitted that such an award should not be made in this case.

**124**  I agree with Mr. Adair that the context is important. However, the plaintiff was under Mr. MacDougall's control only in the 1979-1980 time period. He had little to do with Mr. MacDougall when he was back in Oakalla between 1981 and 1985. What contact he did have with him during those years was not problematic.

**125**  Mr. Adair relied on several authorities, including ***Yo v. Carver*** [*(1996), 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.), ***S.(T.) v. P.(J.W.)*** [*[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=) (B.C.S.C.), ***H.L. v. Canada***, [*[2003] 5 W.W.R. 421*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-F528-G1NT-00000-00&context=) (Sask. C.A.), aff'd in part [*[2005] 1 S.C.R. 401*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B13W-00000-00&context=), [*2005 SCC 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B13W-00000-00&context=), ***E.(J.A.K.) v. British Columbia*** [*(2002), 1 B.C.L.R. (4th) 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0W0-00000-00&context=) (S.C.), [*2002 BCSC 418*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0W0-00000-00&context=), ***X. v. R.D.M.*** [*[2004] B.C.J. No. 2004*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2YX-00000-00&context=), [*2004 BCSC 1273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S31M-00000-00&context=), reversed in part ***Zastowny v. MacDougall*** [*[2006] B.C.J. No. 997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B23F-00000-00&context=), [*2006 BCCA 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B23F-00000-00&context=). Mr. Johnston referred to ***C.Y. v. Perreault***, [*[2006] B.C.J. No. 722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1P7-00000-00&context=), [*2006 BCSC 545*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1P7-00000-00&context=).

**126**  The sexual abuse in a number of these cases was more serious than the case at bar. In ***Yo v. Carver***, the plaintiff was sexually abused by her stepfather over a seven-year period, from ages 7 to 14, and physically and verbally abused for a further four years. The sexual abuse occurred one to three times a week in the plaintiff's bedroom. There were numerous sexual acts, including digital penetration. A jury award of $350,000 for general and aggravated damages was reduced on appeal to $250,000. The Court of Appeal confirmed that aggravated damages are not a separate head of damage, but are part of general damages. In ***S.(T.) v. P.(J.W.)***, a 60-year-old defendant sexually assaulted an 11-year-old plaintiff between 30 and 50 times over a period of about 1 1/2 years. The abuse included fondling, kissing and oral sex. The court found this claim to be in the upper middle range and awarded the plaintiff $130,000 in general damages, which included aggravated damages. ***E.(J.A.K.) v. British Columbia*** involved even more serious assaults, which included oral and anal intercourse of a teenaged plaintiff over a 16-month period while in foster care. The plaintiff was awarded $150,000 for general and aggravated damages. ***H.L. v. Canada*** involved sexual abuse by the Residence Administrator of an Indian residential school who ran a boxing program. The plaintiff was a boy in his early teens who, though not a resident of the school, attended the boxing program. The abuse consisted of one advance and two acts of masturbation. The trial judge awarded the plaintiff $80,000 for non-pecuniary damages. This amount was upheld on appeal, although the Court of Appeal noted that this was at the upper end of the range, "exceeding it perhaps", but was not inordinately high so as to justify interfering with the award. This issue was not the subject of a further appeal to the Supreme Court of Canada.

**127**  In ***E.(J.A.K.) v. British Columbia***, Loo J. reviewed a number of cases regarding the assessment of general damages, including ***Blackwater***, *supra* and ***T.W.N.A. v. Clarke***, *supra*, and concluded that the range for general and aggravated damages combined was between $50,000 and $250,000 depending on the circumstances and the differing degrees of harm attributed to the wrongful conduct.

**128**  Mr. Adair relied mostly heavily on ***X. v. R.D.M.***, a case involving Mr. MacDougall. There, the Crown admitted liability for two incidents of sexual assault, which were similar in nature, but somewhat more serious, to the assaults in this case. Cohen J. awarded the plaintiff $60,000 for general and aggravated damages. However, he did not consider the case to be a "crumbling skull" and made no reduction to the damages awarded. Further, he concluded that the sexual assaults caused or materially contributed to the plaintiff's myriad of psychological injuries, which included a serious antisocial personality disorder, low self-esteem and chronically poor self-concept, chronic sexual anxieties, self defeating behaviour, and exacerbated drug dependence. These ongoing symptoms were more serious than those suffered by the plaintiff in this case, and Cohen J.'s conclusions are quite different from the conclusions I have made.

**129**  In ***C.Y. v. Perreault***, $30,000 was awarded to a plaintiff who was sexually assaulted at knifepoint by a stranger, heavily intoxicated on liquor and drugs, who broke into her apartment brandishing a knife. The plaintiff suffered significant long term damage, including anger and depression, and her marriage broke down. In my view, this case appears to be below the normal range of damages awarded in other cases, particularly considering the serious nature of the assault.

**130**  Mr. MacDougall abused his authority and the plaintiff was, at the time, a young, vulnerable inmate. The plaintiff was significantly affected by Mr. MacDougall's assaults at the time, and continues to have some symptoms. Aggravated damages are appropriate in these circumstances. Considering the range of damages awarded in the authorities referred to above, it is my view that the plaintiff is entitled to an award of general and aggravated damages in the amount of $50,000, which should be reduced to $40,000 to take into account his original position.

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| ***(ii)*** | ***Loss of earning capacity*** |  |

**131**  The plaintiff claims damages for both past and future loss of income. Mr. Adair submitted that the court should adopt the same approach for both past and future income loss in this case, because the plaintiff did not have a realistic opportunity to develop a pre-abuse pattern of education or employment history to serve as a benchmark. He relied on ***Brooks 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=), [*2000 BCSC 735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61DP-00000-00&context=), where Levine J. (as she then was) noted:

298 ... in childhood sexual abuse cases there is rarely an educational or employment history unaffected by the injury to serve either as a baseline measure of natural aptitude or intelligence or of pretrial income, or as a predictor of future capacity to earn (see ***Cherry v. Borsman*** [*(1992), 70 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S120-00000-00&context=) at 317 (C.A.). Thus, when the court gazes into the proverbial crystal ball, the lost or impaired capacity that it discovers there is relevant to the quantification of both past and future loss.

299 Not surprisingly, therefore, the legal principles developed for the assessment of future loss of capacity are sometimes referred to by judges to assist in the assessment of damages for past pecuniary losses as well.

**132**  Mr. Johnston submitted that the approach to hypothetical events, articulated in ***Athey*** and applied to claims for future loss of earning capacity, is not applicable to past wage loss. He referred particularly to the requirement of proof of causation for past wage loss on a balance of probabilities.

**133**  I agree with Mr. Adair that the legal principles applicable to future income loss claims may assist in assessing damages for past income loss in these circumstances. However, it is important, in my view, to consider these claims separately on the issue of causation, due to the different standard of proof that applies to each. For past loss of income, the plaintiff must prove, on a balance of probabilities, a causal link between the sexual assaults and corresponding injury and what the plaintiff would have earned: ***Athey***, *supra*; ***Sales v. Clarke*** [*(1998), 57 B.C.L.R. (3d) 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0YK-00000-00&context=) (C.A.). For future loss of earning capacity, the standard of proof to be applied is simple probability. Possibilities and probabilities, chances, opportunities and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation: ***Rosvold v. Dunlop*** [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) (C.A.), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=); ***Athey,*** *supra*.

***Past loss of income***

**134**  The plaintiff claims damages for past loss of income in the range of $30,000. This amount takes into account pre-existing factors that negatively impacted the plaintiff's ability to earn income, the most significant being the plaintiff's years in prison. It also takes into account all amounts the plaintiff collected while on social assistance. The claim is based on income the plaintiff could have earned during the time he was not incarcerated, thus acknowledging the Supreme Court of Canada's decision in ***H.L. v. Canada***, *supra*, regarding judicial policy that generally precludes income loss claims during periods of incarceration.

**135**  The Crown disputes this claim. Mr. Johnston submitted that the plaintiff has not proven a causal link between the assaults and his ability to work.

**136**  The plaintiff had not established a work record prior to the sexual assaults, partly because of his age and partly because he had already spent a considerable amount of time in the juvenile and then adult correctional system. Following the assaults, the plaintiff was not able to maintain employment for any substantial period of time. In 1988, he worked for Lilydale Hatchery for about two months. He was then back in prison. When he was released in 1994, he did some salvage removal for a short time. He was in prison again until 1997. He then worked on construction for only a few days. He looked into the cooking field, but since he was diagnosed with HIV, this is no longer an option.

**137**  The plaintiff has an extensive criminal record. Before the assaults, he had been convicted primarily of property offences and escaping custody. There were some alcohol and drug related offences as well. After the assaults, the nature of his offences did not change until 1985, when he was convicted of robbery as well as other property offences and sentenced to five years. He had another robbery conviction in 1989. In 1990 he was convicted of assaulting a police officer and sentenced to four months. His record became more serious after this, but the pattern was the same: robberies (at times with the use of a firearm), failures to appear and trafficking in controlled substances. His drug dependence is reflected in his criminal activity, which became more serious as he committed more robberies to support his drug habit. He is still dependent on heroin and cocaine, but has been on a methadone program from time to time.

**138**  While I do not understand that the plaintiff is making any claim based on increased criminality as a result of the sexual assaults, Dr. LaTorre stated that the plaintiff became violent following the assaults. I agree that the plaintiff's criminal activity became more serious over time. However, the nature of his offences did not change remarkably. They were still property and drug offences, at times with violent overtones.

**139**  The plaintiff's record shows that during the past 26 years, he was living in the community for sporadic periods of time in between fairly long periods of incarceration. When he was not incarcerated, he rarely worked. Between 1990 and 2005 he collected $23,065.91 in social assistance.

**140**  Dr. LaTorre stated that the plaintiff may never have established a reliable work history following the sexual abuse. He attributed this to the significant periods of time the plaintiff was incarcerated and to his substance abuse. Although he was of the view that the assaults contributed in some way to the plaintiff's criminal history ("e.g., possibly more violence in his crimes that would have led to longer sentences") and substance abuse ("e.g., possibly exacerbating it and leading to substance dependence"), he was unable to conclude that the sexual abuse impacted the plaintiff's ability to train for and maintain employment in any substantial way.

**141**  I accept Dr. LaTorre's cautious assessment on this latter point. Even if the assaults contributed in some way to the plaintiff's criminal history and substance abuse, I find that they did not contribute materially. In my view, it is more likely than not that the plaintiff would never have established a reliable work record even if the sexual assaults had not occurred.

**142**  I agree with the Crown that the plaintiff has not established, on a balance of probabilities, a causal link between the sexual assaults and the plaintiff's past loss of income.

***Future loss of earning capacity***

**143**  The plaintiff claims a future loss of earning capacity in the amount of $50,000. The Crown disputes this claim as well, submitting that the plaintiff has not established that he is or will be unable to secure employment commensurate with his skills and abilities because of the sexual abuse.

**144**  Damages for loss of future earning capacity are intended to compensate a plaintiff whose earning capacity has been affected by a defendant's wrongdoing. The loss is of a capital asset. Some of the considerations to take into account were set out in ***Brown v. Golaiy***, [*[1985] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (B.C.S.C.):

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.

**145**  The court must assess the chance that such a loss will occur. As noted above, future or hypothetical events need not be proven on a balance of probabilities; they are simply given weight according to their relative likelihood: ***Athey***, *supra*.

**146**  The plaintiff has never been able to secure and maintain regular employment of any kind, primarily as a result of his criminal activity and extensive time in prison and his drug addiction. He lacks vocational skills. Given his criminal record, he is likely at a relatively high risk for recidivism. His current circumstances are, unfortunately, even more bleak than the past. He is in poor health, with active AIDS, and he remains dependent on heroin and cocaine. He has been able to refrain from using those drugs when he is incarcerated and on a methadone program.

**147**  Dr. LaTorre stated that the sexual assaults significantly contributed to a sense of learned helplessness that has and will continue to impact the plaintiff in future work-related efforts. For the reasons outlined above, I do not accept Dr. LaTorre's opinion regarding the plaintiff's "learned helplessness", at least to the extent he identified. In my view, the sexual assaults did contribute to some of the plaintiff's anxiety and depression, but not to the extent of impacting his future earning capacity.

**148**  Mr. Adair submitted that the appropriate approach is that applied in ***X. v. R.D.M.*** where Cohen J. awarded $50,000 for future income loss. I note, however, since this case was heard, the Court of Appeal has released its decision on the appeal (reported as ***Zaztowny v. MacDougall and British Columbia,*** *supra*). A majority of the court reduced the award for future loss of earning capacity by 30% in order to reflect the plaintiff's high risk of recidivism.

**149**  More importantly, Cohen J. made findings of fact that are significantly different from this case. He found that the plaintiff had established that his capacity to earn an income had been affected by the assaults. He accepted an expert opinion that the plaintiff's substance dependence and criminality (which was causally connected to the sexual assaults) directly interfered with his employment and vocational prospects. He also found that absent the assaults, after his release from Oakalla, the plaintiff would have overcome his use of cocaine, settled into an occupation and worked for a living.

**150**  I agree with the Crown that the plaintiff has not established, as a real and substantial possibility, that his capacity to earn income in the future has been impaired as a result of the sexual assaults.

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| ***(iii)*** | ***Future care*** |  |

**151**  The plaintiff sought counselling in 2002. His therapist, Judy Ebert, who works full time counselling male survivors of sexual abuse, testified about her work with the plaintiff. She said that it took some time to establish a trust relationship with him, but that he had begun to open up and talk about many of his problems, including those stemming from his childhood. It appears that the plaintiff is making some progress. She recommended that he continue counselling. Although she did not have a firm view about how long this should continue, she did say for at least six months or a year, perhaps longer.

**152**  Dr. LaTorre was of the view that the plaintiff is a multi-needs individual who could receive significant benefit from targeted therapy for a minimum of six months. He calculated the cost of continuing therapy for six months on a weekly basis, a further six months on a bi-weekly basis and a second year on a monthly basis, at $3570, assuming a rate of $70 per hour. I note, however, that the current cost of therapy with Ms. Ebert is $80 per hour.

**153**  The Crown submitted that an appropriate award for future care would be $3,500, in line with Dr. LaTorre's recommendation. While some of this continued therapy is intended to address a number of issues unrelated to the sexual assaults, I recognize that it is extremely difficult to separate causes of psychological issues. It is clear that the plaintiff has benefited from this therapy and I am satisfied he will continue to do so. I award $4,000 for future care.

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| ***(iv)*** | ***Punitive damages*** |  |

**154**  The plaintiff also seeks punitive damages against Mr. MacDougall only, in the amount of $10,000. This is the amount set by Joyce J. in a series of decisions involving Mr. MacDougall and other plaintiffs. His reasons are set out in ***O'Neill v. MacDougall***, [*[2006] B.C.J. No. 243*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1WM-00000-00&context=), [*2006 BCSC 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1WM-00000-00&context=).

**155**  I agree that such an award is appropriate in the circumstances, and the plaintiff is entitled to $10,000 as punitive damages against the defendant Roderick MacDougall.

**Third Party Proceedings**

**156**  Pursuant to the Crown's default judgment against Mr. MacDougall, it is entitled to the relief set out in its Third Party Notice.

**Conclusion**

**157**  Mr. MacDougall is liable to the plaintiff for the sexual assaults committed by him in 1979 and 1980. The Crown is vicariously liable for the same assaults.

**158**  The plaintiff is awarded general and aggravated damages in the amount of $40,000, future care costs of $4,000 and punitive damages against Roderick MacDougall only of $10,000.

**159**  The plaintiff is also entitled to costs on the usual scale. Because neither counsel addressed costs, the parties will have liberty to make submissions on costs if they consider this to be necessary.

**160**  The Crown is entitled, as against Mr. MacDougall, to (a) a declaration that it is entitled to be indemnified against the plaintiff's claim, (b) judgment in the amount of $44,000, and (c) judgment for the amount of costs to be paid to the plaintiff and for its own costs of defending the plaintiff's claims.

FISHER J.

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CORRIGENDUM

Released: June 21, 2006.

On page 5, paragraph 13, second last line of paragraph the citation number quoted should read:

"[13] ... ***B.(M.) v. British Columbia*** ..... [*2001 BCCA 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R5-00000-00&context=)....

**End of Document**

[***Feldstein v. 364 Northern Development Corp., 2016 CLLC para. 210-028***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-WKK1-JKPJ-G18S-00000-00&context=)

Canadian Labour Law Reporter

Supreme Court of British Columbia

Before: Power J

Decision: January 26, 2016.

Docket No. S145977

***Canadian Labour Law Reporter*  > *Cases* > *Archival* > *2010s* > *2016***

**2016 CLLC para. 210-028** | [*[2016] B.C.J. No. 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J17-BK31-F5T5-M24C-00000-00&context=) | [*2016 BCSC 108*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J17-BK31-F5T5-M24C-00000-00&context=)

Cary Feldstein v. 364 Northern Development Corporation

See commentary at [*CLLC para. 6326*](https://advance.lexis.com/api/document?collection=analytical-materials-ca&id=urn:contentItem:5KCD-S0K1-JGPY-X16V-00000-00&context=).

**Case Summary**

**Employment standards — Wrongful dismissal — Damages — Tort of negligent misrepresentation — Employee with cystic fibrosis sought assurances of eligibility for LTD benefits prior to accepting job with employer — Employee applied for LTD benefits when his health deteriorated, and he was informed by insurance company that his benefits would be limited for failing to fill out health questionnaire on hiring — Action for damages for negligent misrepresentation allowed — Employer owed duty of care to prospective employee — Reasonable for employee to believe employer's statement that benefits would be available after working three continuous months for employer, without having to fill out questionnaire — Representation by employer was inaccurate, untrue, and misleading, and statement was negligently made to employee — Employee entitled to benefits he would have received for 40 months, along with $10,000 for mental stress.**

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| **Facts:** Feldstein was 37 years old, and had cystic fibrosis. Given his condition, Feldstein sought employment that offered sufficient and appropriate long-term disability ("LTD") benefits that was not contingent upon the absence of a pre-existing health condition. When he was given six months' working notice from his former position, Feldstein interviewed for a position with 364 Northern Development Corporation ("364"). During the interview process, he inquired about LTD benefits, specifically the definition of "proof of good health" in order to qualify for benefits. He allegedly was informed that qualifying for benefits was tied to the successful completion of the three-month probationary period, without a medical questionnaire or examination. Based on this information, Feldstein accepted 364's job offer. Six months after he started working at 364, Feldstein's health began to deteriorate, ultimately resulting in him being unable to work while he awaited a double lung transplant. Having been informed by 364 that his pre-existing condition did not preclude access to benefits, Feldstein applied for LTD benefits. 364 terminated Feldstein after receiving assurances from the insurance company that termination would not affect his LTD benefits. Feldstein's LTD claim was approved, but he was informed by the insurance company that his LTD benefits would be restricted to $1,000 per month because he failed to fill out a health questionnaire when initially enrolled in the program. 364 unsuccessfully attempted to convince the insurer to extend excess LTD benefit coverage. Feldstein brought an action for damages for alleged negligent misrepresentation.  HELD: The action was allowed.  364 owed a duty of care to Feldstein as an employer making representations to a prospective employee in the course of pre-employment discussions. A reasonable person in the position of Feldstein would have believed, as a result of 364's statement, that LTD benefits would be available after working three continuous months at 364, without needing to complete a medical questionnaire or exam. The statement by 364 was inaccurate, untrue, and misleading. 364 did not take reasonable care to ensure the representations made during the hiring process were accurate and true. The person in charge of the hiring process knew, or ought to have known, that LTD benefits were an important, or even an essential, component of Feldstein's decision about whether to accept the employment. The person hiring Feldstein admitted he knew little about insurance policies and he took no steps to verify the accuracy of the information provided to Feldstein. As a result, the impugned statement was negligently made. Feldstein reasonably relied on the impugned statement in opting to accept 364's offer of employment, as he specifically entered into an employment relationship with 364 on the strength of the statement at issue, believing he had received a satisfactory, clear, and certain answer about LTD benefits; he would not have accepted the position if the LTD benefits were inadequate. 364 knew that Feldstein would rely on its representations about the LTD benefits, and the person responsible for hiring was in a special relationship with Feldstein. 364 benefited from hiring skilled workers such as Feldstein, and the statements were made deliberately, in the course of their business, and in the context of a specific inquiry related to a prospective employment relationship. Feldstein was entitled to recover the LTD benefits he would have received for 40 months, with a deduction for Canada Pension Plan benefits already received. He was awarded aggravated damages of $10,000 for mental stress. There was no express contract term in the employment contract precluding a common law duty of care tort claim, or liability for ***negligence***. |

**Counsel**

J.D. Wiegele for Feldstein; C.J. Overholt, Q.C. and J.S. Kwok for 364 Northern Development Corporation

**Reasons for Judgment**

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| **J.A. POWER J.** |

**Introduction**

**1**  The plaintiff, Cary Feldstein, claims for damages against his former employer, the defendant, 364 Northern Development Corp. ("364"), for an alleged negligent misrepresentation made by a representative of 364 during pre-employment discussions. Mr. Feldstein says that he suffered loss as a result of his reliance on that misrepresentation, which related to the limitations and attributes of the long-term disability ("LTD") benefits plan offered to employees of the defendant. Mr. Feldstein also claims that 364 failed to diligently administer the LTD plan.

**2**  The defendant 364 denies any misrepresentation of the LTD plan to Mr. Feldstein, and also takes the alternative position that the plaintiff has not satisfied the test for negligent misrepresentation, nor has he proven any damages suffered as a result of his reliance on the misrepresentation. The defendant 364 also submits that it at all relevant times diligently administered the LTD plan.

**3**  The main issue before me at trial is whether such misrepresentation occurred at all and whether or not the plaintiff relied unreasonably on it. I must also determine whether or not the plaintiff suffered any damages as a result

**4**  I have now considered the parties' submissions including written submissions that I requested and all of the evidence I heard at the trial. For the reasons that follow, I have concluded that the plaintiff's claim in negligent misrepresentation should succeed. I therefore consider it unnecessary to deal with the alternative claim relating to the defendant's administration of the LTD plan.

**Background**

**5**  The plaintiff, Mr. Feldstein, is 37 years of age. He received a diagnosis of cystic fibrosis, a chronic, degenerative disease primarily affecting the lungs, at the age of nine. At the time he received the diagnosis the life expectancy for the disease was 23. However, as a result of medical advances and with care a person can live much longer. Mr. Feldstein has throughout his life been diligent with respect to his personal health care. After the events that give rise to this litigation, Mr. Feldstein was the recipient of a double lung transplant which was successful.

**6**  Notwithstanding this difficult health challenge, the plaintiff has lived a mostly normal life. He obtained a University degree -- a Bachelor of Science in Computer Science from the University of British Columbia -- albeit in a slightly longer timeframe in order to address his health challenges. He is married with two daughters who were seven years of age at the time of trial. Mr. Feldstein has been meaningfully employed in his chosen field for his adult life.

**7**  Mr. Feldstein's education and expertise lie in the field of software engineering. He worked in that sector until his dismissal by 364, effective in early February 2014. Prior to being hired by 364, Mr. Feldstein worked as a software engineer for MacDonald, Dettwiler, and Associates Ltd. ("MDA") from 2006 until April 2012.

**8**  Mr. Feldstein's diagnosis of cystic fibrosis is a critical fact in the litigation. The plaintiff says that as a result of his condition, he would not accept employment unless it offered sufficient and appropriate LTD benefits. Mr. Feldstein testified at trial that acceptable coverage would have to provide a benefit equivalent to a significant portion of his monthly salary, and could not be contingent upon the absence of any pre-existing health conditions, as his lung condition would preclude him from accessing such benefits.

**9**  The plaintiff became eligible for various benefits through his employment at MDA, including an LTD plan which would pay, in the event of his disability, coverage amounting to 66.67% of the first $2,250 of the plaintiff's monthly base salary, plus 50% of the balance of his monthly earnings, to a maximum of $15,000. As the plaintiff earned $65,000 per year while at MDA, this would translate to an LTD benefit of $3,083.42. To become eligible for this benefit, Mr. Feldstein did not need to undergo a medical examination or health questionnaire, which would likely exclude him from coverage due to his cystic fibrosis condition. Rather, he merely had to successfully complete six months of continuous work at MDA.

**10**  The plaintiff remained relatively healthy while at MDA, and apparently did not need to access his LTD benefits during his tenure there.

**11**  On March 1, 2012, MDA provided the plaintiff with six months' working notice. As he had only recently purchased a home, and had a young family to provide for, Mr. Feldstein immediately sought out new employment. He sent out twenty applications or so in the following days, and received two interview offers, one from 364. He arranged to interview for the "Automated Test" position with 364 on April 10, 2012, at the defendant's offices in Vancouver (the "first interview").

**12**  Mr. Feldstein testified that he would not accept employment which offered lesser LTD coverage than what he had at MDA, because this amount approximated his mortgage payments and certain fixed expenses. He also required LTD coverage with similarly flexible eligibility requirements to those at MDA, as he would otherwise be unable to access coverage as a result of his cystic fibrosis condition. Mr. Feldstein testified that he knew based on the long-term prognosis for his condition that there would come a time when he would need to access those benefits because he knew that at a future point he would require a double lung transplant.

**13**  Despite that Mr. Feldstein received only two interview offers out of twenty applications, he testified that the employment market for software engineers was "hot" in April 2012. That evidence was later corroborated by witnesses for 364, including Mr. Nizker and Mr. Dykman.

**14**  Two representatives of 364 conducted the first interview of the plaintiff on April 10: Eugene Nizker, 364's Chief Information Officer, and Igor Dykman the Technical Team Leader for 364. The interview involved both technical and human resources components. Mr. Feldstein impressed both Messrs. Nizker and Dykman during the first interview, so much so that they invited him back for a further discussion on April 12, 2012, again to be held at the 364 offices (the "second interview").

**15**  The plaintiff does not allege that the defendant misrepresented the LTD plan during or in connection with the first interview.

**16**  During the second interview, Mr. Feldstein observed a meeting of the defendant's employees in the morning, met with individual team members, and then had a private discussion with Mr. Nizker. During that conversation, Mr. Nizker informed the plaintiff that an offer of employment would be forthcoming, and indeed, he emailed an offer to Mr. Feldstein later that afternoon.

**17**  At trial, Messrs. Feldstein and Nizker provided differing accounts of what passed between them during their private discussion on April 12.

**18**  The plaintiff testified that he inquired as to whether 364 offered employee benefits during the private discussion with Mr. Nizker. Upon learning that this was so, Mr. Feldstein says that he then asked to see a brochure detailing the benefits. Mr. Nizker did not have a copy of the brochure in his office, according to the plaintiff, and ultimately obtained one from Igor Dykman, who had a copy in his desk. Mr. Dykman testified that he did not recall this occurring.

**19**  Mr. Feldstein also gave evidence that he disclosed his cystic fibrosis condition to Mr. Nizker during the private discussion. He said he explained to Mr. Nizker that this would have a limited impact on his work at 364, requiring him to take an additional one or two weeks off per year to attend to his health. Mr. Feldstein testified that he did so because he already saw Mr. Nizker as a potential mentor, and that Mr. Nizker had already presented himself in a "fatherly" way, so that he would have "felt bad" if he had not disclosed. Further, Mr. Feldstein testified that Mr. Nizker had been forthcoming about difficulties he had in coming to this country so that Mr. Feldstein felt comfortable disclosing his health status. Mr. Nizker told Mr. Feldstein that his condition would not affect the forthcoming offer.

**20**  The plaintiff's wife, Kelly Gardin, testified that Mr. Feldstein had decided, prior to the April 12 interview, to disclose his health status to Mr. Nizker. In her evidence, she stated that this decision to disclose caused her concern, and said that historically her husband had been cautious about sharing that information. She said that Mr. Feldstein explained that he had a good feeling from Mr. Nizker, and that disclosure of his cystic fibrosis condition was the right thing to do. Although Ms. Gardin gave this evidence, I have given it no weight since she was not present at the actual meeting between Mr. Feldstein and Eugene Nizker.

**21**  On the other hand, Mr. Nizker testified that during the private discussion, he and the plaintiff only talked about Mr. Feldstein's prospective salary, vacation entitlement, start date, and parking. In his evidence, Mr. Nizker said that Mr. Feldstein never disclosed his cystic fibrosis condition during that conversation, nor did he request a copy of 364's benefits brochure. Rather, at the end of the discussion, Mr. Feldstein quickly asked whether 364 offered employee benefits, to which Mr. Nizker testified that he replied in the affirmative. Mr. Nizker also says he informed Mr. Feldstein that the benefits would take effect at the end of a three-month probationary period.

**22**  It is not controversial, however, that the plaintiff then left the 364 offices, and, as noted, received an emailed offer of employment from Mr. Nizker later in the day.

**23**  The plaintiff responded to the offer by email, informing Mr. Nizker that he intended to consider 364's offer, and stating the following: "I should have asked for a copy of the benefits brochure as I need its details to compare against my current plan. Is there any way you can email me a soft copy?" Mr. Nizker wrote back a short time later, stating that he could not provide him with a soft copy, but could give him a hard copy in the evening. They met in the parking lot of a Dairy Queen in the evening of April 12, and, without discussion, Mr. Nizker gave the plaintiff a document summarizing 364's benefits offerings through Sun Life (the "benefits summary").

**24**  The benefits summary included details of the LTD plan offered by 364. That plan provided for coverage of 66.67% of monthly earnings to a maximum of $5,000. As Mr. Feldstein ultimately negotiated a salary of $84,000 per annum with 364, this translated to a potential LTD benefit of approximately$4,669 per month, in the event he became disabled. The benefits summary also stated, under the heading "Proof of Good Health," that "[a]pproval is required for coverage in excess of $1,000, and any increase in that coverage of 25% or more of $5000, whichever is greater."

**25**  Mr. Feldstein and Mr. Nizker next spoke with one another on the following day, April 13, 2012. It is during this ten or fifteen minute conversation, which took place in the afternoon by telephone (the "telephone conversation"), that the alleged misrepresentation is said to have occurred. The accounts of the plaintiff and Mr. Nizker again diverge on this point.

**26**  Mr. Feldstein testified that, after reviewing the benefits summary, he had three specific questions in his mind regarding 364's package. In particular, he wanted to know whether the life insurance benefit could be increased, whether the benefits included short term disability benefits during the first four months of employment, and, most significantly, what constituted "Proof of Good Health" for the purposes of LTD benefits. Mr. Feldstein gave evidence that he asked each of these questions during the telephone conversation, and that Mr. Nizker answered, to his satisfaction, each of the inquiries.

**27**  Specifically, the plaintiff stated that Mr. Nizker told him that the life insurance benefit was fixed at $25,000, but that Mr. Feldstein might wish to explore the possibility of converting his MDA life insurance; that his employment at 364 did not include short term disability benefits or sick days, but that the odd sick day would be paid; and finally, that "Proof of Good Health" was tied to the three-month probationary period.

**28**  The plaintiff testified that Mr. Nizker explained during the telephone conversation that Proof of Good Health is related to the three-month waiting period needed in order to have the plan in effect. The plaintiff understood Mr. Nizker's explanation to mean that working at 364 for three months, without illness, would constitute "Proof of Good Health" for the purposes of obtaining LTD benefits under the 364 plan, notwithstanding his pre-existing condition or the lack of a medical exam or completed health questionnaire. Mr. Feldstein testified that Mr. Nizker gave this explanation immediately, with clarity and certainty. As he found the explanation to be credible and satisfactory, the plaintiff stated that he saw no need to make any further inquiry.

**29**  Mr. Nizker, however, only recalls discussing Mr. Feldstein's prospective salary, vacation, start date, and parking during the telephone conversation. He testified that Mr. Feldstein did not raise anything to do with the LTD plan during that discussion. Mr. Nizker denies making the statement about "Proof of Good Health" attributed to him by the plaintiff.

**30**  Not long after the telephone conversation, Mr. Nizker sent a revised offer to Mr. Feldstein, with salary set at $84,000 per year, three weeks' vacation time, a start date of April 30, 2012, and some details about parking. Mr. Feldstein accepted that offer, by email, on April 15, 2012. The offer, which eventually became the contract of employment, included the following clause at s. 4.02:

Benefits. The Employee shall be entitled to participate in all rights and benefits under any life insurance, disability, medical, dental, health and accident plans maintained by the company for its employees generally[.] In addition, the Employee shall be entitled to participate in all rights and benefits under other employee plan or plans as may be implemented by the Company during the term of this Agreement.

**31**  The plaintiff then began work at 364 as planned on April 30, 2012. He enrolled in the benefits program on the first day, completing the forms provided to him by 364. He inquired about how to know when his benefits would take effect, and testified that Mr. Nizker told him that this would be confirmed by receipt of his drug card. Mr. Feldstein received his drug card some time later, and confirmed that his benefits were active by submitting a drug claim shortly thereafter.

**32**  Mr. Feldstein's health began to deteriorate as a result of his cystic fibrosis condition in mid-November 2012. He missed numerous days of work in November and December as a result, prompting an email from Mr. Nizker on December 20, 2012 advising that the plaintiff hold off on his return to work until the New Year. It is apparent, from emails between Mr. Nizker and Jason King, the President of 364, that there was some concern over Mr. Feldstein working less than full-time workdays and workweeks during this period. Both Messrs. Nizker and King expressed the desire to keep Mr. Feldstein out of the office until he could return to work full-time.

**33**  Mr. Feldstein then returned to work on January 9, 2013, presenting 364 with a medical note clearing him to do so.

**34**  On April 26, 2013, Mr. Feldstein informed Mr. Nizker that he anticipated being assessed for suitability for a double lung transplant. The plaintiff told Mr. Nizker that this would require an increased number of absences for medical appointments in the subsequent months, as well as for absences caused by the health challenges which prompted the assessment for a transplant, and an extended period necessary to recuperate from the transplant procedure itself.

**35**  The plaintiff's lung functioning declined suddenly and drastically around May 2013. He missed work on numerous occasions thereafter, generally providing advance notice by email where possible, and substantiating the medical basis for his absences with doctor's notes.

**36**  On October 4, 2013, Mr. Feldstein wrote to Mr. King, the owner of 364, stating that he had made inquiries with Sun Life concerning the LTD plan, but had been told that he would have to speak to the representative assigned to 364. Mr. Feldstein asked Mr. King for assistance, or to provide the plaintiff with the representative's contact details. He also said the following:

I am worried that I somehow majorly messed up or I misunderstood the details of the plan and I'm ineligible for coverage. There is a clause in the LTD section titled "Proof of Good Health" but there is no definition of how to provide that or if that has been satisfied by default by working 3 months or 12 months for the company. Given my latest health status, I doubt I'd be able to get that "proof" now but may have gotten it when I started with the company. Were we supposed to have a medical exam of some sort or submit some paperwork? ...

**37**  By that time, Mr. King had already made inquiry with Sun Life respecting potential LTD coverage for Mr. Feldstein. On April 29, 2013, he wrote Kevin Marlowe, a Client Service Administrator for Sun Life, asking whether there was a "pre-existing condition" clause in 364's contract with Sun Life, and how much 364 would be "liable for" in respect of an employee that has a pre-existing condition. Mr. Marlowe reproduced the clause from the contract in his response, which stated:

We do not pay benefits if your disability results directly or indirectly from a condition which existed on or before the date your coverage began. However, this limitation will not apply to you if:

1. you have been covered for Long Term Disability with your employer for at least 13 weeks during which you have been actively working continuously (up to 3 days of absence does not count) and you have not been treated by a doctor, or any medical personnel under the direction of a doctor, for the condition, or
2. you became totally disabled more than 12 months after your coverage began.

With regards [sic] to long term disability coverage the policy is set up with coverage at 66.67% of a member's salary up to $1,000 per month unless the member applied for excess coverage which could go up to $5,000 per month if the salary is $90,000 per year.

**38**  In response to Mr. Feldstein's October 4 inquiry, Mr. King wrote to Paul Shipton asking whether the plaintiff was eligible for benefits under the LTD plan, or whether his illness precluded such coverage. On October 8, 2013, Mr. King wrote back to Mr. Feldstein, providing him with an application form for LTD benefits. After further discussions between Mr. King, Mr. Shipton, and Lauren Martelli, a representative of Sun Life in the following days, Mr. King informed Mr. Feldstein, by email, that as a result of the general health of the group, the plaintiff's pre-existing condition would not preclude his access to benefits. Mr. Feldstein then applied to Sun Life for LTD benefits.

**39**  The defendant 364 terminated Mr. Feldstein's employment on November 6, 2013, effective February 2014. Prior to the termination, Mr. King received assurances from Sun Life that dismissing the plaintiff would have no effect on his entitlement to LTD benefits.

**40**  Sun Life sent the plaintiff a letter on February 3, 2014, confirming that his LTD claim had been approved, although this correspondence was not clear with respect to the amount payable under the benefit. He learned, after communicating with a Sun Life representative, that the benefit he would receive was the "Non-Evidence Maximum" of $1,000 per month, instead of the expected $4,669 monthly benefit. Sun Life advised Mr. Feldstein that he was not eligible for coverage in excess of $1,000 per month because he failed to fill out a health questionnaire when initially enrolling in the program in April 2012. He advised Mr. King of this on February 19, 2014.

**41**  Mr. King wrote an email to Mr. Shipton later that day, first pointing out that Mr. Feldstein had been denied coverage as a result of a lack of a completed medical form, and then stating:

Now this is NOT what I have been told all along by Sun Life (through the emails you have sent) and I know nothing about a medical form that was supposed to be filled out by the employees. To date I have simply given them the enrolment form which has been filled out and mainly submitted online.

I need to get some answers ASAP on what this claim rep is talking about, as if there WAS a form that needed to be filled out by the staff, and we didn't provide it and have them complete it, there could be some serious liability issues arising.

**42**  Mr. King continued to correspond with Sun Life in the following days, and from the tenor of those emails it appears he made strenuous efforts to convince the insurer to extend excess coverage LTD benefits to Mr. Feldstein. Those efforts fell short, however.

**43**  Mr. Feldstein currently receives only the $1,000 "Non-Evidence Maximum" monthly benefit. However, as he receives $963.44 per month in Canada Pension Plan benefits, which Sun Life deducts from his LTD coverage entitlement, his payments from Sun Life amount to a little less than $37 per month. Given that his wife, Ms. Gardin, works only part time as a teacher, this benefit falls short of Mr. Feldstein's needs, and he testified that he has undergone stress and financial strain as a result. He commenced the present action on August 1, 2014.

**44**  Mr. Feldstein underwent a double lung transplant procedure in late November 2014. His physicians state that he could consider seeking out employment again at the end of 2015, although this will depend on the course of his continued improvement.

**Credibility and Reliability**

**45**  I intend to first deal with the issues of credibility and reliability, given the divergent accounts of the various witnesses. The appropriate analysis for evaluating the credibility of witnesses in a civil trial is set out in the frequently cited decision of *Faryna v. Chorny,* [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.):

[11] The credibility of interested witness[es], particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

[emphasis added]

**46**  Mr. Feldstein, Mr. Nizker and Mr. Dykman gave evidence in a direct manner that suggested they were honestly trying to assist the court.

**47**  The defendant submits that the plaintiff cannot be considered a more truthful witness merely because of his illness. I agree. Mr. Feldstein's credibility is neither enhanced nor diminished by the mere fact that he suffers from cystic fibrosis.

**48**  However, it seems clear to me that Mr. Feldstein's knowledge of his illness would have shaped his state of mind and decision-making at the relevant times. For instance, Mr. Feldstein knew that his health could suddenly decline without notice, depriving him of his ability to work, pay his mortgage, and provide for his family. Given this, it is not likely that the plaintiff would have accepted employment which did not offer adequate LTD benefits. It is also unlikely that the plaintiff would fail to seek assurances about 364's LTD offerings before taking a job there. I reach that conclusion based not only on what Mr. Feldstein said, but on common sense.

**49**  By contrast, the plaintiff, despite that he stood out sufficiently to be offered employment at 364, would have merely been one interviewee among a crowd to Messrs. Nizker and Dykman. Mr. Nizker interviewed a large number of persons for various positions prior and following his hiring of Mr. Feldstein at 364. Indeed, Mr. Nizker testified that he has hired thousands of people over the course of his career. In these circumstances, it seems to me more likely that Mr. Feldstein would accurately recall the details of the interview process, because of the significant personal stakes flowing from his health condition. I am of the view that it is less likely that Mr. Nizker would recall those same details.

**50**  The defendant, however, points to a number of further issues which it says undermine Mr. Feldstein's credibility or cast doubt on his version of events.

**51**  For instance, 364 points out that Mr. Feldstein initially testified that his benefits at MDA provided 66.67% of his salary, when in fact they provided 66.67% of the first $2,250 of basic monthly salary and 50% of salary over and above that amount. Mr. Feldstein then corrected his testimony when questioned specifically on the point. In my view, little can be made of this, as it would not be expected that the plaintiff would be able to accurately recall, years on, the details of his former employer's benefits plan, particularly as he never made a claim under that plan.

**52**  As well, the defendant also takes issue with the plaintiff's recounting of the second interview. The plaintiff says that he requested a copy of the benefits brochure during the second interview, and that Mr. Nizker obtained one from Igor Dykman. Mr. Dykman does not recall this, however, and Mr. Nizker denies this occurrence completely. The defendant points out that Mr. Dykman testified that he paid little attention to benefits, and says that, as a result, it would have been unlikely that Mr. Dykman would have had a copy of the benefits brochure at his desk a year after he was hired. I decline to draw that inference. In my view, Mr. Dykman's professed inattention to his benefits, if anything, makes it somewhat more likely that upon receipt of a benefits brochure he simply stowed it away in his desk and forgot about it until Mr. Feldstein's second interview.

**53**  The defendant 364 also submits that the plaintiff's request, by email, for a soft copy of the benefits brochure following the second interview substantiates Mr. Nizker's version of events. Specifically, the defendant says that this indicates that the issue of benefits was not discussed during the second interview, and that Mr. Feldstein did not request to see the benefits brochure during that interaction.

**54**  Again, I decline to draw any such inferences. I note that Mr. Feldstein, in his email, specifically requested a copy of "the benefits brochure" [emphasis added]. He did not ask for "a benefits brochure" or generally for information about 364's benefits. In my view, either of these latter phrasings would be more consistent with Mr. Feldstein not having previously requested or seen the benefits brochure. Instead, the plaintiff requested a copy of a specific document, which in my view implies that the existence of that document had been established during the second interview. This supports the plaintiff's account, in my view.

**55**  The defendant further points to the fact that Mr. Nizker testified that he knew little or nothing about insurance policies, and therefore would not have attempted to explain a complicated insurance concept like "Proof of Good Health" to the plaintiff during the second interview or the telephone conversation. I note, however, that Mr. Nizker's lack of knowledge on this point also makes it more likely that if he did provide information about 364's LTD plan to the plaintiff, that he did so misleadingly or erroneously. Moreover, Mr. Nizker acknowledged on the stand that he did touch on the issue of benefits at the end of the second interview, stating that 364 had benefits and that these would take effect after the probationary period. This tends to bolster the plaintiff's version of events, in my view.

**56**  A further credibility issue relates to Mr. Feldstein's testimony that he made inquiries, after the telephone conversation on April 13, 2012, but before accepting 364's offer on April 15, 2012, to ensure that he could convert his MDA life insurance to a private plan. Mr. Feldstein testified that he would not have accepted employment at 364 if this would limit his life insurance coverage to the $25,000 benefit offered through 364. The defendant notes that the period between April 13 and April 15, 2012 was a weekend, which would have precluded Mr. Feldstein from making any inquiries with MDA. There is no evidence, however, that Mr. Feldstein did not make the inquiries in question, nor that it would have been impossible for the plaintiff to make inquiries with MDA on the weekend, nor even that he did not make the inquiries in question immediately after the telephone conversation on Friday afternoon. As a result, little can be made of this.

**57**  More significantly, the defendant says that the plaintiff's explanation respecting his October 4, 2013 email to Mr. King is not reasonable or believable. In that email, Mr. Feldstein wrote, "I am worried that I somehow majorly messed up or I misunderstood the details of the plan and I'm ineligible for coverage" [emphasis added]. At trial, he testified that he meant to write "we somehow majorly messed up," [emphasis added], having used, as 364 submits, the wrong pronoun.

**58**  I do not agree that Mr. Feldstein's testimony on this point damages his credibility. To the contrary, his explanation in court was compelling that he was being polite or diplomatic, particularly as it seems from the tone of his email that Mr. Feldstein wished to avoid taking on an accusatory tone in dealing with Mr. King. That would be consistent with the plaintiff's use of "I" instead of "we," and with the circumstance of a disabled employee seeking to enlist the aid of his employer's CEO in accessing employment-related LTD benefits.

**59**  The defendant 364 points to two additional areas of concern in the plaintiff's evidence, one relating to his belief about whether he would be paid for short term sick days, and the other dealing with events surrounding the installation of air conditioners at 364's offices. The latter issue I will not examine in great detail, as it suffices to say that this issue is ancillary, and that any controversies in the evidence are explicable due to a lack of recall or the passage of time, rather than questions of credibility.

**60**  Concerning the sick days issue, the plaintiff says that Mr. Nizker explained during the telephone conversation that sick days (short of LTD) would only be paid "here and there." The explanation attributed to Mr. Nizker strikes me as consistent with the witnesses' description of the "informal" workplace at 364, and would explain both the plaintiff's surprise at being paid for the considerable number of sick days he took in November 2012, as well as Mr. King's plan to implement a better-defined sick day policy later in that month. In other words, Mr. Feldstein's evidence on this topic appears credible and externally corroborated.

**61**  Based on the demeanour of the witnesses at trial, their relative states of mind as regards the circumstances of Mr. Feldstein's hiring by 364 in April 2012, and, in particular, the consistency between Mr. Feldstein's recounting of the events and the external evidence, I prefer his evidence where it diverges from that of Messrs. Nizker, Dykman, and King. This is not to say that I found 364's witnesses to be in any way deliberately misleading the court. I decline to make any such finding. However, Mr. Feldstein had both inclination and motivation to pay particular attention to the circumstances of his hiring which the defendant's witnesses did not, and it is my view that as a result, his recall of the events is the most accurate, credible, and reliable.

**62**  I therefore accept that it is more likely than not that, during the telephone conversation on April 13, 2012, Mr. Feldstein asked about and Mr. Nizker attempted to define "Proof of Good Health" as it relates to the Sun Life LTD benefits offered to 364 employees. Mr. Nizker defined that concept by stating that it is tied to or related to successful completion of the three-month probationary period. In my view this finding is consistent with the circumstances, specifically that it is highly probable that Mr. Feldstein would have inquired with Mr. Nizker about his eligibility for LTD benefits, given Mr. Nizker's role in the hiring process, the significant likelihood that the plaintiff would need LTD benefits in future, and the fact that the benefits summary sheet, received the day previous, would have put the plaintiff on notice that some form of "approval" would be required for him to be eligible for LTD coverage over $1,000 per month. Moreover, Mr. Nizker concedes having made a similar statement concerning the availability of 364's benefits at the end of the second interview with Mr. Feldstein.

**63**  Given my conclusions on credibility, I am inclined to find that it is more probable than not that Mr. Feldstein did disclose his cystic fibrosis condition to Mr. Nizker during the second interview, although nothing turns on the point.

**64**  I will now deal with the merits of the plaintiff's claim.

**Negligent Misrepresentation**

**65**  The parties agree, properly in my view, that the requirements for a claim in negligent misrepresentation are those set out by Iacobucci J. at para. 33 of *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=), namely:

1. Is there a duty of care based on a "special relationship" between the representor and representee?
2. Is the representation in question inaccurate, untrue, or misleading?
3. Did the representor act negligently in making that representation?
4. Did the representee rely, in a reasonable manner, on that representation?
5. Did the representee incur damages as a result of that reliance?

**66**  As the misrepresentation resulted in the parties entering into a contract, I must also consider whether any express terms of that contract operate so as to prevent the plaintiff from pursuing an action in tort: *Cognos,* at para. 39.

**67**  I will deal with each of these issues in turn.

***Duty of Care***

**68**  The defendant 364 concedes that it owed a duty of care to Mr. Feldstein as an employer making representations to a prospective employee in the course of pre-employment discussions. That concession is apt, as such a duty of care is well-reflected in the case law: see *Cognos*, at paras. 43-44, and *Spinks v. Canada* [*(1996), 134 D.L.R. (4th) 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FJM6-603V-00000-00&context=) (F.C.A.), at paras. 14, 26.

***Inaccurate, Untrue, or Misleading***

**69**  As discussed, the alleged misrepresentation is Mr. Nizker's statement that "Proof of Good Health is related to the three month waiting period needed in order to have the plan in effect" (the "impugned statement").

**70**  The plaintiff says that the impugned statement misled him as to the eligibility requirements for 364's LTD plan through Sun Life, by causing him to believe in error that he would be eligible for coverage providing for 66.67% of his monthly salary, to a maximum of $5,000 per month, following completion of three months' continuous work at 364, without the need to complete a medical questionnaire or examination.

**71**  Subsequent events proved Mr. Feldstein's belief incorrect.

**72**  The defendant contends that the plaintiff could only have arrived at such a belief by making unwarranted interpretations and assumptions, and says that, on its face, the impugned statement merely means that benefits take effect after three months, and does not speak to eligibility for any benefit in particular.

**73**  As held by Iacobucci J. in *Cognos,* an implied representation may properly give rise to an action for negligent misrepresentation. The plaintiff's claim will not fail merely because it relies on an inference drawn from a representation made by the defendant. Rather, the question is whether a reasonable person in the circumstances of the plaintiff would have drawn that same inference (*Cognos,* at paras. 74-77). In much the same way, the court in *Spinks* found that the failure to divulge material information may in certain circumstances be equally as misleading as the provision of misinformation (para. 14).

**74**  In my view, it is more likely than not that a reasonable person in the circumstances of Mr. Feldstein would have believed, as a result of the impugned statement, that LTD benefits would be available upon completion of three months continuous work at 364, without the need for completion of a medical questionnaire or exam.

**75**  I accept Mr. Feldstein's evidence that Mr. Nizker made the impugned statement in response to the plaintiff's inquiry about what "Proof of Good Health" meant in the context of the LTD plan. In that circumstance, the most prominent, likely, and reasonable inference to be drawn from the impugned statement is that LTD coverage is contingent merely upon completion of the three-month probationary period. It was misleading and inaccurate to represent the LTD eligibility requirements as was done in the impugned statement, particularly given the omission of additional, more stringent, criteria inconsistent with the thrust of Mr. Nizker's representation.

**76**  I therefore conclude that the impugned statement was inaccurate, untrue, and misleading.

***Standard of Care***

**77**  The applicable standard of care requires that Mr. Nizker, in making representations to Mr. Feldstein in the context of the hiring process, took such reasonable care as the circumstances required in order to ensure that the representations he made were accurate and not misleading: *Cognos,* at para. 55.

**78**  I have no difficulty in finding that Mr. Nizker's conduct fell below the requisite standard of care.

**79**  At the relevant time, he was in charge of 364's hiring process, a role which made him the central point of contact between Mr. Feldstein and the prospective employer. He knew that Mr. Feldstein had stable, relatively well-paying, though time-limited employment at MDA. He knew or ought to have known, whether from Mr. Feldstein's repeated inquiries on the subject or from disclosure of the cystic fibrosis diagnosis, that LTD benefits were an important, even essential, component of Mr. Feldstein's decision-making process with respect to his choice of employment.

**80**  As he admitted in his testimony, Mr. Nizker knew little and less about insurance policies, terms, and contracts in April 2012, whether those related to 364's employee LTD benefits or otherwise. Nevertheless, it appears that he took no steps to verify the accuracy of the information he provided to Mr. Feldstein regarding 364's LTD benefits, or, more specifically, the appropriate definition of "Proof of Good Health." Indeed, all of the evidence, in particular Mr. King's, also makes it clear that there was a widespread lack of knowledge within 364 about the nature of the benefits.

**81**  I therefore conclude that the impugned statement was negligently made.

***Reasonable Reliance***

**82**  Turning to reasonable reliance, the plaintiff says that he specifically entered into an employment relationship with 364 on the strength of the impugned statement.

**83**  The defendant contends that the plaintiff's reliance was not reasonable because he failed to make inquiries to ensure the accuracy of the impugned statement, because he knew or ought to know that Mr. Nizker was not an expert in insurance or human resources matters, and because Mr. Feldstein's conduct in the course of negotiations with 364 indicates that he was more interested in salary and opportunity than LTD benefits.

**84**  I decline to give effect to those arguments.

**85**  First, I accept the plaintiff's evidence that he believed there was no need to make further inquiries respecting LTD benefits, as he had received a satisfactory, clear, and certain answer from Mr. Nizker, a person he had no reason to distrust. Moreover, the LTD eligibility criteria described in the impugned statement closely resembled the LTD eligibility criteria at MDA, with the only difference being the length of the requisite continuous working period. Mr. Feldstein had every reason to believe that Mr. Nizker, in his position as the person in charge of hiring for the "Automated Test" position at 364, would provide accurate and complete details about 364's employee benefits. In these circumstances, there was no reason for Mr. Feldstein to believe that further inquiries were necessary.

**86**  Second, I have no doubt, given Mr. Feldstein's health status, and the several inquiries he made about LTD benefits in April 2012, that these issues were prominent in his mind during the employment negotiations with 364.

**87**  The plaintiff relies on the criteria for reasonable reliance adopted by Abella J.A. (as she then was) writing for the Ontario Court of Appeal in *Deraps v. Labourer's Pension Fund of Central and Eastern Canada* [*(1999), 124 O.A.C. 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD81-JJ6S-64WB-00000-00&context=), at para. 48:

1. The defendant voluntarily assumed responsibility for the misrepresentation.
2. The defendant knew or ought to have known that the plaintiff would reasonably rely upon the misrepresentation.
3. The defendant and the plaintiff were in a special relationship with one another.
4. The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
5. The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
6. The advice or information was provided in the course of the defendant's business.
7. The information or advice was given deliberately, and not on a social occasion.
8. The information or advice was given in response to a specific enquiry or request.

**88**  In my view, these factors militate in favour of a finding that the plaintiff reasonably relied on the impugned statement.

**89**  Specifically, the defendant knew or ought to have known that the plaintiff would rely upon his representations concerning the details of the LTD benefits, as discussed above under the standard of care; Mr. Feldstein and Mr. Nizker were in a special relationship with one another, as discussed above under the duty of care; Mr. Nizker stood to benefit financially, though only in an indirect sense, by attracting skilled workers such as Mr. Feldstein to 364; the impugned statement was made in the course of the defendant's business; the impugned statement was made deliberately, and in the context of a specific, non-social inquiry related to a prospective employment relationship.

**90**  Further, I accept, without reservation, Mr. Feldstein's testimony that he would not have accepted employment that did not provide him with what he viewed as adequate LTD benefits with acceptable eligibility requirements. Nor would he have left his position at MDA without first securing a position that would offer such benefits. His evidence on these points is compelling in light of his health status.

**91**  I therefore find that Mr. Feldstein reasonably relied on the impugned statement in opting to accept 364's offer of employment.

***Damages***

**92**  The plaintiff seeks damages for at least 30 months of lost LTD benefits and aggravated damages for mental distress.

**93**  As noted at para. 65 of *Watson v. Taylor*, [*[1996] B.C.J. No. 2138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S18B-00000-00&context=) (S.C.), damages for negligent misrepresentation are determined by comparing the position of the plaintiff, having acted on the misrepresentation, with the position that the plaintiff would have occupied if the misrepresentation had never been made (see also, *Deraps,* at para. 62; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [*[1991] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6045-00000-00&context=), at para. 20).

**94**  Unfortunately, the evidence as to the position Mr. Feldstein would occupy if the impugned statement had not been made is far from clear. I do note, however, that the Supreme Court of Canada held in *Rainbow* that the burden of proof to show that the plaintiff would have occupied a position other than the *status quo ante* lies with the defendant: para. 24.

**95**  On all of the evidence, including: Mr. Feldstein's assessment, corroborated by Mr. Nizker and Mr. Dykman, that it was a "hot" employment market for software engineers in April 2012; Mr. Feldstein's impressive skills, experience, and work ethic; the fact that both Mr. Dykman and Mr. Nizker felt that Mr. Feldstein was a strong candidate; the evidence that other employers in that industry offered benefits similar to MDA's; the possibility that Mr. Feldstein might have found alternative employment within MDA; the fact that he negotiated a significantly higher base salary with 364 than he received at MDA; and, the importance of obtaining sufficient LTD benefits to Mr. Feldstein in particular, I think it is practically certain that the plaintiff, absent the impugned statement, would have found gainful employment as a software engineer with benefits similar or better than those he enjoyed at MDA.

**96**  In the result, I find that the plaintiff is entitled to recover the amount of LTD benefits coverage he would have received, at the MDA LTD benefits rate, for a period of forty months. I think that this period of time is appropriate given the uncertainty associated with Mr. Feldstein's health and his prospective return to work.

**97**  The defendant argues that I must deduct from this award both Mr. Feldstein's $1,000 per month Sun Life LTD benefit as well as his $963.44 CPP benefit. The plaintiff, on the other hand, refers me to a number of cases in which courts have declined to deduct CPP and similar benefits from awards for future wage loss, including *Sarvanis v. Canada,* [*2002 SCC 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4C3-00000-00&context=), at para. 33, and *Kean v. Porter*, [*2008 BCSC 1594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2X0-00000-00&context=), at para. 111.

**98**  The difficulty with the defendant's position is that the plaintiff's Sun Life LTD benefit is set off against his CPP benefit, meaning that the plaintiff only actually receives $36.56 per month from Sun Life. The plaintiff's current LTD coverage provides him with $1,000 per month, including both the Sun Life and CPP benefits. He does not receive the sum of both benefits, which would be $1,963.44. It would be unjust to deduct that figure from the plaintiff's award when he does not actually receive it.

**99**  On the other hand, the case law referred to me by the plaintiff deals with the deductibility of CPP benefits from an award for future wage loss, where the damages are compensating injuries that "actually caused or contributed to the relevant disability" (*Sarvanis,* at para. 33). That is very different from the present case, where Mr. Feldstein seeks compensation for a misrepresentation which caused him to lose LTD coverage which he otherwise would have had. As held in *Rainbow,* Mr. Feldstein is entitled to be returned to the position he would have occupied if the misrepresentation had not been made. Presumably, LTD benefits at MDA or another employer would also have been subject to a deduction for CPP benefits. I say presumably, because the LTD plan at MDA is not before the court, and there is no evidence before me on the point. Given that CPP benefits are deductible under 364's plan with Sun Life, however, and the fact that the burden rests with the plaintiff, I find it appropriate to deduct the CPP benefits from Mr. Feldstein's award.

**100**  As noted earlier, Mr. Feldstein currently receives a benefit of $1,000 per month, less his CPP entitlement of $963.44 per month, for a total of $36.56 per month. At the MDA LTD benefits rate, the plaintiff would have received $3,083.42 per month, less his CPP benefit (presumably), for a total of $2,119.98 per month. Therefore, the difference between what the plaintiff currently receives as LTD benefits, $36.56 per month, and what he would have received if the impugned statement had not been made, $2,119.98 per month, amounts to $2,083.42 per month. Multiplied by forty, this gives a total award under this head of $83,336.80. This, in my view, will return the plaintiff to the position that he would have occupied had the impugned statement not been made.

**101**  The plaintiff also claims for aggravated damages. As held in *Vroom v. Retirement Living Communities International Inc.*, [*2000 BCSC 1355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B167-00000-00&context=), an award under this head compensates the plaintiff for intangible injuries, including distress and humiliation, which arose as a result of the defendant's misrepresentation (para. 48). While medical evidence is not a prerequisite for an award under this head, a lack of sufficient evidence may limit the plaintiff's recovery to merely nominal damages: *Keddy-Waldie v. Lawson,* [*2015 BCSC 853*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G44-J3J1-JT42-S3KR-00000-00&context=), at paras. 133-134.

**102**  The plaintiff did not tender medical evidence to substantiate his claim for aggravated damages. Throughout Mr. Feldstein's employment at 364, it appears to me that Messrs. Nizker and King did what they could, within the limited resources of a small business, to accommodate, assist, and assure the plaintiff in relation to his employment situation and LTD benefits. In doing so, they surely reduced the mental distress placed on the plaintiff.

**103**  On the other hand, it was certainly a reasonably foreseeable consequence of the impugned statement that Mr. Feldstein would suffer mental distress.

**104**  In *Fidler v. Sun Life Assurance Co. of Canada*, [*2006 SCC 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B175-00000-00&context=), the Supreme Court of Canada recognized that disability insurance offers protection against financial and emotional stress and insecurity, noting that unwarranted delays in receiving such protection can be "extremely stressful" (paras. 58-59).

**105**  I find it more likely than not that the plaintiff did suffer considerable stress and anxiety as a result of the impugned misstatement and resultant loss of LTD coverage. At the relevant time, the plaintiff bore the burden of a serious, chronic health condition and the responsibilities of providing for his family. I accept his evidence that he therefore took great care in arranging his affairs to ensure financial stability should his health take a turn for the worse. Indeed, this is an eventuality against which Mr. Feldstein has been guarding for nearly his entire life. Disruption of his carefully laid plans contemporaneous with a sudden and drastic deterioration of his health, as occurred during the plaintiff's employment at 364, must have been extraordinarily distressing indeed to Mr. Feldstein.

**106**  Uncertainty concerning the plaintiff's entitlement to LTD first arose in October 2013. That uncertainty blossomed into knowledge of disentitlement in February 2014, a state which then continued until the date of trial.

**107**  Taking into account this period of time, the absence of medical evidence, the conduct of the defendant, and the circumstances of the plaintiff, I am of the view that an appropriate award for aggravated damages is $10,000.

**108**  In total then, I award the plaintiff $83,336.80 for the loss of LTD benefits, for a period of forty months, occasioned by his reasonable reliance on the impugned statement of Mr. Nizker, and $10,000 for the mental distress this caused Mr. Feldstein, for a total of $93,336.80.

***Whether Contract Precludes Tort Claim***

**109**  One remaining issue is the question of whether the plaintiff's action can be sustained in tort in light of the fact that the parties entered into a contract governing the employment relationship.

**110**  As noted in *Cognos*, the mere fact that the parties entered into a contract subsequent to the making of the impugned statement does not necessarily extinguish the ability of Mr. Feldstein to pursue a claim in tort. The question is whether there is a specific contractual duty, created by an express term of the contract, which is co-extensive with the common law duty of care (paras. 37-39). No such express term is apparent in the contract in this case.

**111**  Moreover, there does not appear to be any term of the contract which expressly excludes liability for ***negligence***, particularly one which would prevail over the explicit, specific representation made by Mr. Nizker: see *Zippy Print Enterprises Ltd. v. Pawliuk,* [*[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=) (B.C.C.A.), at paras. 34, 42-45. The only relevant clause in the contract, at s. 4.02, appears to merely confirm Mr. Feldstein's entitlement to employee benefits, nothing more.

**112**  As a result, I find that the contract does not extinguish the plaintiff's right to pursue his claim in tort.

**Conclusion**

**113**  In the result, I have found that Mr. Nizker, during pre-employment discussions with Mr. Feldstein, made an erroneous statement about the eligibility requirements for the defendant's LTD plan through Sun Life. In so doing, Mr. Nizker acted negligently, as he knew Mr. Feldstein would likely rely on his description of 364's benefits plan, but took no steps to verify the accuracy of that description. Mr. Feldstein entered into employment with 364 on the strength of Mr. Nizker's statement, and, as a result, incurred a loss of LTD benefits which he otherwise would have had when his health deteriorated. This caused the plaintiff significant mental distress.

**114**  No term in the contract precludes or extinguishes the plaintiff's right to pursue a claim in tort. As a result, I award the plaintiff $83,336.80 as compensation for 40 months of lost LTD benefits, and $10,000 for aggravated damages, for a total of $93,336.80.

**115**  Costs may be spoken to if they are not agreed to between the parties.

J.A. POWER J.

**End of Document**

[***Foster v. Kindlan, [2012] B.C.J. No. 936***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3NG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.E.D. Savage J.

Heard: February 20-24, 27-29, March 1-2, 5-6, 8-9 and 12,

2012.

Judgment: May 11, 2012.

Docket: M094347

Registry: Vancouver

**[2012] B.C.J. No. 936** | 2012 BCSC 681

Between Tracey Lynn Foster, Plaintiff, and Carolyn Marie Kindlan and Justin Thomas Pineau, Defendants

(133 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Leg injuries — Ligaments and tendons — Considerations impacting on award — Pre-existing injury — Action for damages for 2007 and 2009 motor vehicle accidents allowed in part — 47-year-old plaintiff had previous hip complaints but labral tear was caused by 2009 accident — Soft tissue injuries caused by 2007 accident and aggravated by 2009 accident — Plaintiff experienced pain at work but was able to continue recreational activities — $75,000 non-pecuniary loss — Plaintiff's nursing job physically demanding and she was at increased risk for injury and may have to retrain — $125,000 loss of earning capacity and $65,500 past income loss — Plaintiff also awarded $19,336 future care and $17,563 special damages.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Contingencies — Considerations — Employment status — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Medical — Medications — Therapy and rehabilitation — Non-pecuniary loss — Pain and suffering — Action for damages for 2007 and 2009 motor vehicle accidents allowed in part — 47-year-old plaintiff had previous hip complaints but labral tear was caused by 2009 accident — Soft tissue injuries caused by 2007 accident and aggravated by 2009 accident — Plaintiff experienced pain at work but was able to continue recreational activities — $75,000 non-pecuniary loss — Plaintiff's nursing job physically demanding and she was at increased risk for injury and may have to retrain — $125,000 loss of earning capacity and $65,500 past income loss — Plaintiff also awarded $19,336 future care and $17,563 special damages.**

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| Action for damages for injuries sustained in 2007 and 2009 motor vehicle accidents. The defendants admitted liability for the accident, both of which involved rear-ending the plaintiff's vehicle. Prior to these accidents, the plaintiff was involved in two previous accidents and had a workplace injury between accidents. The defendants denied they caused any of the plaintiff's current complaints. The attacked the plaintiff's credibility and argued she was a crumbling skull. The 47-year-old plaintiff worked as a health care aide until 2004, was a personal trainer from 2004-2007 and was now a licensed practical nurse. The plaintiff sought $100,000 non-pecuniary damages, $500,000 loss of earning capacity, $118,000 past income loss, $36,301 cost of future care and special damages.  HELD: Action allowed in part.  The plaintiff was testifying about events occurring over a seven-year period and at times may not have understood nuances. While there were some misunderstandings, there were no serious inconsistencies or misrepresentations in her evidence. The most serious injury claimed was the labral tear to the plaintiff's left hip. The plaintiff had previously complained to physicians about hip pain but the expert evidence established there was no labral tear pathology prior to the 2009 accident. The defendants' arguments that the plaintiff's shoulder, neck and back injuries were caused by overuse were purely speculative. The evidence established these soft tissue injuries were caused by the 2007 accident and aggravated by the 2009 accident. While the plaintiff sustained a knee injury in the workplace accident, it had healed and there were no further complaints until the 2009 accident. Prior to the 2007 accident, the plaintiff had a high level of fitness. However, the reduction in fitness level was also attributable to the change of career. The plaintiff had pre-existing back injuries and a previous knee surgery. The plaintiff was not prevented from engaging in recreational activities and would likely not require surgery. The plaintiff experienced pain at work. The plaintiff was awarded $75,000 non-pecuniary loss. The plaintiff's assumptions she would have worked significant overtime until age 70 but for the accident were not supported. The plaintiff had been performing the duties of an LPN with shift work and extra hours for five months but she claimed this was not sustainable. The medical evidence established a real and substantial possibility of future income loss. The plaintiff's job was physically demanding and she was at an increased risk for injury and may have to retrain in a different field if she could not continue. The plaintiff was awarded $125,000 for loss of earning capacity. The past loss award was based on the plaintiff's previous work history. She missed one-and-a-half to two years of work, but the award was reduced for time recovering from elective surgery and her history of absences. The plaintiff was awarded $65,500 gross past income loss. The plaintiff was awarded $19,336 for future care costs for medications, devices, physiotherapy and the possibility of surgery. The plaintiff was awarded $17,563 special damages for expenditures. Student loan costs were too remote to be recovered. The total award was $302,489. |

**Statutes, Regulations and Rules Cited:**

Insurance (Motor Vehicle Act) Regulations, [*B.C. Reg. 447/83, s. 88*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VWW-WY51-F2F4-G2PN-00000-00&context=)(1), Part 7

Law and Equity Regulation, [*B.C. Reg. 352/81, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC81-DYMS-639H-00000-00&context=)(a)

**Counsel**

Counsel for the Plaintiff: M.A. Kazimirski, P. Gardikiotis.

Counsel for the Defendants: L.G. Harris, Q.C., K.R. Tonge.

**Reasons for Judgment**

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| **J.E.D. SAVAGE J.** |

**I. Introduction**

**1**  The Plaintiff Tracy Lynn Foster ("Ms. Foster") alleges she was injured in two motor vehicle accidents which are admitted to be the result of the ***negligence*** of the Defendants. She is currently a licensed practical nurse ("LPN") but was formerly employed as a personal trainer and exercise instructor.

**2**  The first accident occurred in Maple Ridge on September 25, 2007 when a vehicle owned and negligently driven by the Defendant Carolyn Marie Kindlan rear-ended Ms. Foster's vehicle (the "2007 Accident"). The second accident occurred in Port Coquitlam on May 5, 2009 when a vehicle owned and negligently driven by the Defendant Justin Thomas Pineau rear-ended Ms. Foster's vehicle (the "2009 Accident").

**3**  Prior to the 2007 Accident Ms. Foster had been in two earlier motor vehicle accidents, one in 1999 and one on February 1, 2005. Between the 2007 Accident and the 2009 Accident Ms. Foster had been in a workplace incident on November 3 2008 in which she sustained an injury while restraining a combative patient (the "2008 Workplace Incident").

**4**  The Defendants deny that the 2007 Accident or the 2009 Accident are related to any of Ms. Foster's current complaints. The Defendants say that Ms. Foster is a "crumbling skull", having sustained pre-accident injuries of a significant nature, which had effects that were still symptomatic at the time of the accidents. Alternatively, the Defendants say that Ms. Foster is a "thin skull" and causal issues related to pre-existing and subsequent conditions are relevant.

**5**  The Defendants say that one of Ms. Foster's injuries, a hip injury, was not caused by either the 2007 Accident or the 2009 Accident, but was either caused by a the 2008 Workplace Incident, or by prior unrelated causes. Thus the parties are far apart on the various heads of damage including non-pecuniary damages, past wage loss, loss of earning capacity, the cost of future care and special damages.

**II. Issues**

**6**  The primary issues are (1) whether the Plaintiff's injuries were caused by the 2007 Accident and 2009 Accident or by some other cause; and (2) the damages suffered because of the two accidents. Fundamental to the position of the Defendants is the Plaintiff's credibility.

**III. Background**

**7**  Ms. Foster is 47 years old. She is a single parent who lives with her 18 year old daughter in Maple Ridge, B.C. Prior to 2004 she worked as a health care aide. From November 2004 to 2007 she was employed as a personal trainer and fitness instructor at Good Life Fitness in Pitt Meadows, B.C.

**8**  On February 1, 2005 Ms. Foster was involved in a motor vehicle accident (the "2005 Accident") which is not the subject of this action. When stopped, her vehicle was struck by another car. She saw her family physician Dr. Sam 3 days after the 2005 Accident. Her major complaints at that time were a sore neck and shoulder and stiffness in her lower back. Ms. Foster had x-rays of her lumbar spine and pelvis and hips in August 2005. By January 2006 she reported that she was 60-70% recovered. Ms. Foster continued with her exercise classes but at reduced intensity. By the end of 2006 Ms. Foster had made significant recovery from these injuries. She continued, however, to see a chiropractor, Dr. Pollard, for periodic "tune-ups" and was not completely asymptomatic.

**9**  In July 2007 Ms. Foster commenced a Licensed Practical Nurse ("LPN") course at Vancouver Career College in Abbotsford, B.C. This is a yearlong course which she completed in July 2008. Nursing had long been a goal of hers as her mother had been a registered nurse, but she put this ambition on hold while raising her daughter. She took out student loans to help finance the course. She ceased most personal training and fitness instructing in 2007 and has worked as an LPN since she received her certification.

**10**  The 2007 Accident occurred on September 25, 2007 on the Lougheed Highway near the intersection of Dewdney Trunk Road, in Maple Ridge, B.C. The Defendant Carolyn Kindlan was driving a 1997 Honda Civic that "rear-ended" Ms. Foster's 2005 Honda Civic. The damage to both vehicles, including labour, was less than $3,000. The parties had a polite interaction at the scene and Ms. Kindlan recalls receiving a phone call from Ms. Foster later inquiring after her health. Ms. Kindlan, who is now 25, was not injured.

**11**  Ms. Foster saw Dr. Sam on October 4, 2007 following the 2007 Accident. She complained of soreness to her neck, mid back and right arm; pain with head and shoulder movement; and low back stiffness although she had good range of movement in her head and shoulder. Ms. Foster saw various care providers after the 2007 Accident including a physiotherapist, a massage therapist, a personal trainer and her chiropractor, Dr. Pollard.

**12**  On July 24, 2008 Ms. Foster was hired as a casual LPN at Ridge Meadows Hospital ("RMH"). Effective August 25, 2008, she obtained a permanent part-time position as an LPN at RMH, which was .43 of a full time equivalent ("FTE") position. She later obtained a .91 FTE position, followed by a .73 FTE position that afforded her less physically demanding tasks.

**13**  On November 3, 2008 Ms. Foster was involved in a Workplace Incident. A "code white" was called when a patient in withdrawal tried to escape and became fractious. She was pushed forcefully to the floor while standing near the patient, landing on the left side of her body. Ms. Foster felt pain in her left knee, left buttock area, left lower back and left side of her neck. A WorkSafe BC incident report was completed. As a result of her injuries she missed shifts on November 5-8, 2008, for which she received wage loss benefits.

**14**  She saw Dr. F.S. Lim regarding the Workplace Incident. His diagnosis was of "Contusion L buttock, lower back strain". He estimated that Ms. Foster would be off work for one to six days. Under the heading "Clinical Information", he wrote: "Fell at work while trying to take down an agitated patient. Landed on buttock. Onset of pain L buttock + L knee thereafter. Worked yesterday + worse. Tender L buttock over ischial tuberosity. SLR [normal]. Tender L [sacroiliac joint]. L hip - internal rotation [caused] pain in groin. L knee- ROM full - stable. Rx advil ...".

**15**  In 2009 before the 2009 Accident, Ms. Foster obtained a temporary 0.84 position at the Gardenview unit of RMH. This was a temporary position and intended to continue until August 2009 at which time she would return to her .43 FTE position. In the spring of 2009 Ms. Foster also took motorcycle training. She obtained her licence and in April 2009 went to Victoria to pick up a 1300 CC motorcycle which she had purchased.

**16**  On May 5, 2009 she was involved in the 2009 Accident. This was also a rear-end collision. The Defendant Justin Thomas Pineau was 18 at the time of the 2009 Accident. He was driving a 1996 Nissan Altima that collided with Ms. Foster's 2005 Civic, which was stopped on the Mary Hill Bypass in Port Coquitlam, B.C. Damage to the Defendant's vehicle was estimated to be $1,943.47 but the older vehicle was determined to be a total loss. There was damage and cracking to the rear bumper of Ms. Foster's vehicle. Mr. Pineau testified that he saw Ms. Foster throw her hands up in the air after the collision in evident frustration. Despite this, they had a polite exchange after Mr. Pineau called his father on his cell phone. Mr. Pineau was not injured.

**17**  On May 6, 2009 Ms. Foster attended at the RMH Care Clinic. She complained of a sore neck, upper back and low back, left and right knee, stiff muscles and a headache. She said she would not miss work. On May 19, 2009 she attended Dr. Sam's office. She complained of pain to the left knee, left hip and neck, and low back soreness.

**IV. Credibility of the Plaintiff**

**18**  The Defendants raise as an issue the credibility of the Plaintiff. The Defendants say that there are at least 12 different matters that give rise to significant questions about the credibility and veracity of the Plaintiff's evidence, including (1) false statements she made to Workplace BC, (2) statements made concerning the hours worked, (3) failing to disclose her full medical history to her examining doctors, (4) misrepresenting her health immediately before the 2007 Accident, (5) misrepresenting a health care provider as doing a study on her condition, (6) blaming weight gain on the accidents, (7) blaming her financial circumstances on the accidents, (8) activities she did while on disability, (9) misrepresenting her mental state, (10) acting inconsistently, (11) testimony about hours worked, and (12) her manner of giving evidence.

**19**  The Plaintiff, *contra*, says that while there may be occasional inconsistencies, it is an error to give too much weight to them, as the circumstances testified about occurred years before, and the record taker may have differing concerns. For example, in considering inconsistencies between testimony and clinical records in *Carvalho v. Angotti*, [*2007 BCSC 1760*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21YJ-00000-00&context=), N. Smith J. noted that "it is a rare case ... where such inconsistencies cannot be found" (see paras. 14-16). Parrot J., in *Burke-Pietramala v. Samad*, [*2004 BCSC 470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B283-00000-00&context=) at para. 104 found "little surprising in the variations of the plaintiff's history ... given the human tendency to reconsider, review and summarize history in light of new information". I agree with those observations, although I note that it is entirely appropriate that such matters be pursued in cross-examination, as was done here, as part of the pursuit of truth.

**20**  The first matter concerns a statement made to WorkSafe BC on July 13, 2011, following a back injury suffered while moving a patient on July 3, 2011. Ms. Foster was off work from July 4 until she returned to work July 12, 2011. The WorkSafe BC record contains the following statements: "Worker denies any prior problems to her back", "She stated she was in a MVA in 2009 but injured her hip and pelvis" and "Worker stated she has not sought medical treatment or lost time from work in the past due to back problems". It is apparent that Ms. Foster has had prior back problems. The context of this report must be borne in mind. The concern was the immediate injury for which she had been off work for a very limited time, for a period commencing a few days earlier, and following which she had already returned to work. The statements do not purport to be direct quotes, nor do we know the questions asked.

**21**  The second matter concerns a statement recorded in notes made by Derek Nordin, a vocational rehabilitation consultant, that she had worked 3,000 hours in the ten months between July 2008, when she commenced work, and May 5, 2009, the date of the 2009 Accident. Ms. Foster acknowledged that if the statement was recorded in the notes she must have made it, but the statement is obviously wrong. This statement is clearly and obviously in error, as can readily be shown by employment records. Ms. Foster did not remember making it. The Defendants say "The statement amounts to a knowing misrepresentation by the plaintiff of her work history to her vocational expert on a significant point". Why Ms. Foster would want to mislead her vocational expert on a significant but readily verifiable point is not said. Ms. Foster suggested she may have added up wrongly the workplace records. The workplace records produced by Ms. Doutaz were confusing, so much so that the Defendants themselves reformatted that information into a much more readily understandable format, which was of benefit to all of the parties and the Court. I cannot conclude that Ms. Foster deliberately misled anyone on this point, or that the vocational expert fell into error because of it.

**22**  The Defendants say that Ms. Foster failed to disclose her full history to her examining doctors. In particular, she failed to disclose evidence of long-standing problems in the general hip area. This is important as the etymology of the labral tear in her left hip is the main issue in this trial. There is evidence of hip pain in the records, in particular the documents found in tabs 1-6, 8-11 in Ex. 46. The Defendants say that "The plaintiff attempted to explain these records by stating that 'when I said 'hip', I really meant 'lower back and glute ...' However, there are enough obvious references by medical practitioners to the 'hip joint' to suggest that this is a later attempt to cover up her inaccurate history."

**23**  The Plaintiff's theory of the case is that the labral tear was caused by the 2009 Accident. The 2009 Accident is the first occasion that the plaintiff complains of anterior hip pain, pain in the area on the anterior aspect where the thigh meets the pelvis (the "anterior hip"). The Defendants argue that this is not so, pointing to the above referenced evidence and the important evidence of Dr. Lim. They say that evidence belies the Plaintiff's assertion that she had never experienced pain in the anterior hip. Dr. Lim's evidence concerns the Workplace Incident, which occurred in November 2008. At that time, the Plaintiff presented with pain in the left buttock and left knee. On internal rotation of the left hip she experienced pain in the groin. Dr. Lim's diagnosis, however, was "Contusion L buttock" and "lower back strain", not any injury to her hip. Nor does the record indicate that she presented complaining of any pain in her hip; rather, on Dr. Lim performing the internal rotation he elicited a report of pain in the groin.

**24**  It is apparent that Ms. Foster saw a variety of physicians and health care providers over an extended period for her various complaints. I cannot conclude, however, that by not providing a "full history", as revealed by a thorough analysis of all of her clinical records, that she ever sought to mislead her examining doctors as the Defendants allege.

**25**  The Defendants argue that Ms. Foster was misleading in describing her pre-2007 Accident condition. Specifically, they say that the evidence of Dr. Pollard shows that she continued to have symptoms following her 2005 Accident at the time of the 2007 Accident. Dr. Pollard considered a once-a-month visit a "tune up". Her records show that Ms. Foster attended at her clinic on two occasions in May 2005, three occasions in June 2005, 3 occasions in July 2005, 5 occasions in August 2005, 3 occasions in September 2005, 3 occasions in October 2005, once in January 2006, once in March 2006, twice in May 2007, twice in June 2007, once in August 2007 and once in September 2007 until the 2007 Accident. The records reveal that she was attending Dr. Pollard with declining frequency. On balance these records reveal that Ms. Foster was *at or near* what Dr. Pollard would describe as a "tune-up" schedule prior to the 2007 Accident.

**26**  The Defendants say that Ms. Foster misrepresented to her physician that Dean Kotopski was doing a study on labral tears. As a result Dr. Sam recommended she see Mr. Kotopski. This is significant because she had earlier seen Robert Gander who had recommended that "Ms. Foster would benefit from participating in an occupational rehabilitation program (OR) as a precursor to an eventual GRTW program". Based on Mr. Gander's report she "could have returned to work by July 6, 2010 and should have returned to work at the latest by August 15, 2010". This then delayed Ms. Foster's return to work which belies her assertion that she was anxious to return to work.

**27**  It is agreed that Mr. Kotopski was not doing a study on labral tears. It is unclear to me why Ms. Foster would have thought this. Mr. Kotopski did testify that he focused on hip injuries and had a lot of experience with labral tear injuries, so it is possible that Ms. Foster was confused. In any event, there is no evidence before me that any misstatement was made with the intent to deceive. The proposition that one is asked to infer from this, however, is not supported by the evidence.

**28**  With respect, I do not read Mr. Gander's report as supporting the propositions alleged. While Mr. Gander supported participating in an occupational rehabilitation program, he said that "... consideration should be given to Ms. Foster's potential barriers to realizing a relatively expeditious and durable return to work. ..." She "... requires re-gaining her confidence in her capacities to perform the full scope of her pre-disability LPN duties and establishing her durability, via undertaking graduated exposure to potentially provocative activities. She would benefit from increasing the strength and functioning of her low back and left hip musculature with the aim of improving her function and durability. ..."

**29**  In abiding her family physician's advice, Ms. Foster was doing no more or less than attending to her long term medical care giver's recommendations. The consequence of failing to abide such advice, in other contexts, can result in negative inferences: See *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=), [*8 B.C.L.R. (4th) 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=), at para. 57; *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=), [*17 B.C.L.R. (5th) 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=); *Wahl v. Sidhu*, [*2012 BCCA 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626S-00000-00&context=) at para. 31-32.

**30**  The Defendants say that Ms. Foster is incorrect that her weight gain is consequential on the motor vehicle accidents. In support they reference the surveillance photographs taken in August 2009 which they say "suggest the plaintiff has roughly the same physical appearance as she has today". Try as I may, I am quite unable to draw the conclusion the Defendants seek based upon my courtroom observations.

**31**  It is asserted that Ms. Foster wrongly blames her poor financial circumstances on the accidents. In doing so, the Defendant's reference, in part, her earnings in 2007 and 2008. Of course in half of each of those years she was not working because she was taking the LPN training, so those years are not good comparators. Nor do I infer that Ms. Foster's blames her financial situation on the accidents. There is a confluence of circumstances that include her age, her previous work history, her marital status, her existing debt and her late entry into a new career. All those circumstances were acknowledged to contribute to her stress.

**32**  The Defendants further attack Ms. Foster's credibility saying that she "marshalled activities around disability", or the collection of disability benefits. It is agreed that Ms. Foster was on short-term disability from June 16, 2009, to September 14, 2009. Further she was on long-term disability from November 17, 2009, to April 18, 2011. The activities so marshalled included motorcycle trips, a holiday, and elective breast-reduction surgery.

**33**  During these periods Ms. Foster did go on a couple of significant motorcycle trips with friends. The Defendants introduced surveillance video showing Ms. Foster riding her motorcycle. There is no suggestion that Ms. Foster ever denied taking such trips or being capable of doing so. There is no medical opinion evidence before me that a person with her injuries is or should be incapable of such trips. It was Ms. Foster's evidence that she found riding her motorcycle easier than driving an automobile. She and her companions testified about these trips. They stopped every hour or hour and a half to rest and stretch.

**34**  Also while on disability, Ms. Foster took a three-week holiday in the Philippines to attend her brother's wedding. She also had elective breast-reduction surgery in November 2010. However, as counsel for the Plaintiff notes, Ms. Foster was also undergoing various treatments during the disability period, although not immediately following recovery from the breast reduction surgery. Those treatments are referenced in the treatment records of Golden Ears Orthopaedic & Sports Physiotherapy, Westgate Wellness, and Kotoposki Physio.

**35**  Ms. Foster testified that during her disability period she was at times despondent and emotional. Some of her friends testified that she was absent from their lives and was not herself. She returned to work in April 2011. Another friend, Susan Taylor, testified that she attended a birthday party for Ms. Foster in 2011 which was a good party with socialization and dancing. Although the Defendants admit that this is "a small detail", they say it is "wholly inconsistent" with the evidence of an emotional withdrawal prior to her return to work. I agree that this is a small detail. An occasional cheerful episode is not inconsistent with the weight of the evidence that Ms. Foster had periods of general malaise while off work during this period.

**36**  In 2011 Ms. Foster applied for and accepted a full time job at Chilliwack Hospital. This was a permanent full-time job. After reflection Ms. Foster declined to take the job. She said she was concerned about her ability to do what the job demanded. Although these decisions show prevarication on her part on an important matter, this speaks less about general credibility than to her ability for self-assessment.

**37**  The Defendants assert that the records show some discrepancy between the hours Ms. Foster says she is capable of working, and the hours she actually worked. The Defendants make special mention of the hours worked in October, November, and December 2011. They say that this shows that Ms. Foster is capable of more work effort than she claims to be capable of. As I understand the evidence, however, her financial circumstances made it incumbent on her to work more, and she did so by taking the less eventful night shifts. This matter will be elaborated on further in the reasons which follow.

**38**  As a general point, the Defendants say that less weight should be given to Ms. Foster's evidence because of leading questions and matters raised on re-examination. Both parties at times used leading questions with their witnesses. It is, of course, not always immediately apparent that part of what otherwise appears to be narrative touches on a matter that is in issue. In this case the Plaintiff was testifying as to matters which occurred over a relatively protracted period, at times as early as seven years before. At other times the Plaintiff may not have understood the nuance of the questions and was directed to the topic at hand. Of course, witnesses vary in perspicacity. Ms. Foster is who she is. I am not prepared to draw an adverse inference simply from the manner or method of questioning in this case.

**V. Causation**

**A. Generally**

**39**  In this case there is a serious issue regarding causation. The parties agree that the test for causation in the law of ***negligence*** is the "but for" test. The Plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendants the injury would not have occurred: *Resurfice Corp. v. Hanke*, [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at para. 21.

**40**  The "but for" test is not one demanding scientific certainty but is to be proven on a balance of probabilities. It must be more likely than not that without the tort the injury or medical condition would not have occurred: *Tsalamandris v. MacDonald*, [*2011 BCSC 1138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6201-00000-00&context=), per Griffin J. at paras. 143-144, *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. 16.

**41**  In determining liability it is not necessary to show that a defendant's tortious conduct is the sole cause of the injury: *Athey* at para. 17. However, the Plaintiff must establish that there is a substantial connection beyond the *de minimus* range between the injury and defendant's ***negligence*** in order to find a defendant liable: *Sam v. Wilson*, [*2007 BCCA 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=) at para. 109, *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at paras. 10-11.

**B. The Medical Opinions on Causation**

**42**  There are opinions on causation from four physicians.

**43**  Dr. Janie Sam is a general practitioner and has been Ms. Foster's family physician since 1991. She attributes Ms. Foster's right shoulder injury to the 2007 Accident and the labral tear of her left hip to the 2009 Accident.

**44**  Dr. Russell O'Connor is a physiatrist. In his opinion the 2007 Accident caused musculoligamentous strain to Ms. Foster's neck, mid-back and low back, and the 2009 Accident caused left knee pain and left hip pain and was the cause of the labral tear of her left hip.

**45**  Dr. Gilbart is an orthopaedic surgeon. It is Dr. Gilbart's opinion that "... the condition of Ms. Foster's right shoulder, neck and upper back pain is related to the first motor vehicle accident of September 25, 2007". He continues "Ms. Foster then suffered from an aggravation of her neck and upper back pain, as well as a new injury and pain in the left side of her low back, left hip, left knee, left ankle and left foot during the second motor vehicle accident of May 5, 2009". In a second opinion Dr. Gilbart said "... I cannot see any evidence of her medical notes of documented clinical findings consistent with labral pathology that pre-existed this May 5, 2009 motor vehicle accident".

**46**  Dr. Brian Day is a highly qualified orthopaedic surgeon who pioneered labral surgery. Based on his review of the clinical records he "could not find any direct correlation between her apparent ongoing disability with respect to the left hip joint and the motor vehicle accident of May 5, 2009". Following examination he continued of this view, noting that "There appears to be a significant history of recurrent hip problems that preceded the accident of May 5, 2009" and "There are also documented clinical findings consistent with labral pathology that pre-existed the motor vehicle accident". It was his opinion that the 2009 Accident was not the cause of the labral hip tear although he conceded in cross-examination that it may have aggravated a pre-existing injury.

**47**  The Plaintiff says that her experts' opinions are to be preferred because her experts took a more detailed history, at least when confronted with the causation issue. That history revealed facts that allow them to pinpoint the cause of the labral tear as the 2009 Accident. The Plaintiff says that Dr. Day produced his opinion without seeing her or taking a history, and when he did examine Ms. Foster he did so inevitably trammelled by his previous conclusion.

**48**  The Defendants say that the opinion of Dr. Day is to be preferred over the other expert medical witnesses because he formed his opinion only after having done a more thorough review of the clinical records. Dr. Sam is Ms. Foster's long time general practitioner and more an advocate than an independent expert. Drs. O'Connor and Gilbart ignored the evidence of previous hip pathology and accepted unreliable accounts from Ms. Foster concerning her history, which might be summarized as "when I said 'hip' I really meant 'lower back'".

**C. Discussion and Analysis**

**49**  The causation issue concerns the most serious of Ms. Foster's injuries, the labral tear to her left hip. The clinical records show that Ms. Foster had previously reported pain in her hips to her family physician, Dr. Sam and to her chiropractor, Dr. Pollard.

**50**  Dr. Sam testified that, prior to the 2009 Accident Ms. Foster's prior hip complaints involved pain in the posterior aspect of the hip and in the area of the low back. Following the 2009 Accident Ms. Foster's complaints were of pain in the anterior aspect of the hip and in the groin.

**51**  Ms. Foster's reports eventually led Dr. Sam to suspect a labral tear in the left hip such that she ordered an MRI, which was done on February 1, 2010. The results of the MRI eventually crystallized in the diagnosis of a labral tear, a diagnosis with which all the medical practitioners agree.

**52**  While I accept that Dr. Sam is Ms. Foster's long-time general practitioner, and for that reason a sympathetic listener, I do not consider her testimony before the Court to have been tainted by this fact. I also accept the evidence that complaints about non-specific pain in the hips can actually reference injury to the back.

**53**  The previous complaints of hip pain date to late 2005 and early 2006. At that time Ms. Foster was a fitness instructor. There is no reference to hip pain following 2006, except in the record of Dr. Lim in November 2008 following his examination of Ms. Foster consequent to the Workplace Incident. That was not a matter of Ms. Foster presenting with a complaint of anterior hip pain, but rather Dr. Lim eliciting a report of hip pain on him performing interior rotation of the joint. Despite this report, Dr. Lim did not diagnose any injury to the hip.

**54**  Ms. Foster was back to work within a few days of the Workplace Incident and there were no further reports of hip pain until after the 2009 Accident. When Ms. Foster returned to work in November 2008 she reported that she was able to perform all of the duties of an LPN as she had prior to the Workplace Incident. She continued to perform those duties until the 2009 Accident, and for several weeks thereafter. The employment records bear this out.

**55**  These facts led to the opinions of Dr. O'Connor and Dr. Gilbart that the 2009 Accident, not the Workplace Incident, caused the labral tear in the left hip. Dr. Gilbart said that "Although she clearly did have some intermittent documentation of low back and 'hip' pain, I cannot see any evidence of her medical notes of documented clinical findings consistent with labral tear pathology that pre-existed this May 5, 2009 motor vehicle accident".

**56**  Concerning the mechanism of injury, Dr. O'Connor considered Ms. Foster's reported leg position in the vehicle at the time of the 2009 Accident. Although the Defendant emphasized the nature of the collision as a factor for consideration, it has not been opined that such collision was incapable of creating the injury.

**57**  On balance I accept the opinion evidence of Drs. O'Connor, Gilbart, and Sam over that of Dr. Day. On the evidence before me I find that, on a balance of probabilities, the 2009 Accident caused the labral tear in Ms. Foster's left hip. I accept the opinions of the physicians that the historical evidence of what Ms. Foster was able to do both before and after the 2009 Accident, in the context of the factual matrix of this case, proves on a balance of probabilities that the labral tear occurred at the time of that accident.

**58**  Concerning her other injuries there is no opinion evidence contrary to that of Dr. Sam, Dr. O'Connor and Dr. Gilbart. If I were to accept the Defendants submission that these injuries were overuse injuries that pre-existed the accidents, it would be based on speculation rather than evidence. I accept the evidence of the Plaintiff's experts that the right shoulder, neck and back injuries were caused or contributed to by the 2007 Accident. Ms. Foster experienced improvement in those injuries leading up to the 2009 Accident. Those injuries were also aggravated by the 2009 Accident.

**59**  With respect to the knee injury, Ms. Foster reported a knee injury to Dr. Lim following the Workplace Incident. Dr. Lim noted that the knee was stable and had full range of motion. Thereafter Ms. Foster did not report any further left knee pain to her treatment providers until after the 2009 Accident. In my opinion her left knee injury is as a result of the 2009 Accident.

**VI. Non-Pecuniary Damages**

**60**  The rationale for non-pecuniary damages is articulated by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at p. 262. There the Court acknowledged that restitution is impossible and thus "[m]oney is awarded because it will serve a useful function in making up for what has been lost in the only way possible" since what has been lost cannot be directly replaced.

**61**  In *Lindal v. Lindal*, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) the Court emphasized at p. 637 the need to appreciate the individual's loss, eschewing a 'tariff' and noting that the need for solace will not necessarily correlate with the seriousness of the injury, a matter emphasized by McLachlin J., as she then was in *Milina v. Bartsch*, [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=). The need for a particularized award was emphasized by the Court of Appeal in *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=). However, a plaintiff's stoicism should not penalize or minimize consideration of the injury: *Giang v. Clayton, Liang and Zheng*, [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) at paras. 54-55.

**62**  The parties are significantly apart on non-pecuniary damages. The Plaintiff argues that non-pecuniary damages should be set at $100,000, relying on *Grant v. Gonella*, [*2008 BCSC 1454*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2N0-00000-00&context=) ($70,000), *Bove v. Lauritzen*, [*2009 BCSC 1698*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24RW-00000-00&context=) ($70,000), *Gosal v. Singh*, [*2009 BCSC 1471*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B267-00000-00&context=) ($95,000), *MacKenzie v. Rogalasky*, [*2011 BCSC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2RP-00000-00&context=) ($100,000), *Fox v. Danis*, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=) ($100,000), *Gosselin v. Neal*, [*2010 BCSC 456*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62NV-00000-00&context=) ($100,000), *Foran v. Nguyen et. al.*, [*2006 BCSC 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B20P-00000-00&context=) ($90,000), and *Crane v. Lee*, [*2011 BCSC 898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22H1-00000-00&context=) ($100,000).

**63**  The Defendants say that non-pecuniary damages should be in the $40,000 to $60,000 range, distinguishing the cases cited by the Plaintiff and relying on cases such as *Pavlovic v. Shields and Pavlovic v. Dickinson*, [*2009 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3YF-00000-00&context=) ($40,000), *Wilkinson v. Whitlock*, [*2011 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1BF-00000-00&context=) ($40,000), *Fortin v. Lowden*, [*2009 BCSC 1123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6257-00000-00&context=) ($50,000), *Grant v. Gonella*, [*2008 BCSC 1454*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2N0-00000-00&context=) ($70,000).

**64**  In this case the Plaintiff suffered soft tissue injuries to the neck, back, knee, and shoulder and a labral tear to her left hip. Prior to the 2007 Accidents she led a physically demanding lifestyle working as a fitness instructor, and had a high level of physical fitness. She was, however, transitioning out of this employment at the time of the 2007 Accident, by training for career as an LPN that would not involve fitness as part of her daily employment activity.

**65**  Ms. Foster was not entirely asymptomatic from her 2005 Accident at the time of the 2007 Accident. It is also apparent that she has had ongoing back issues that required periodic chiropractic treatment unrelated to the 2007 Accident and 2009 Accident. She also had an earlier knee injury that required surgery. These factors affect the "original position" to which Ms. Foster must be returned by the award of damages.

**66**  I find it unlikely that Ms. Foster will have surgery to the labral tear, based on the opinions of Dr. O'Connor and Dr. Gilbart, whose opinions are to be preferred over that of Dr. Sam. Dr. O'Connor and Dr. Gilbart have more specialized experience in this area than Dr. Sam, who is a general family physician. While Ms. Foster experiences pain during her physically demanding employment activities, she is able to take extended (one week or longer) motorcycle trips without any impairment that is apparent to her companions. The videotape evidence shows a cautious rider but not one prevented from enjoying this pursuit.

**67**  Ms. Foster has suffered emotionally during periods where she has not been able to work. However, her emotional state has not prevented her from taking foreign holidays and motorcycle trips to the Sunshine Coast, Tofino, the East Kootenays and Idaho, and local trips to Chilliwack, Harrison Hot Springs and the Tri-cities area. Moreover, her emotional issues have had a variety of causes, including relationship issues which are admittedly unrelated to the two accidents.

**68**  I have reviewed the cases provided by counsel. There are aspects of those cases that are helpful, but there are also differences that prevent direct application. The Defendants' cases generally involve less seriously injured persons. Many of the cases submitted by the Plaintiff involve a prognosis for chronic daily pain. That is not the prognosis for Ms. Foster. In the circumstances, I award $75,000 in non-pecuniary damages.

**VII. Loss of Capital Asset / Earning Capacity**

**69**  Ms. Foster claims damages for future loss of earning capacity in the amount of $500,000. It is argued that the medical evidence shows Ms. Foster has a permanent partial disability and "cannot sustain her present occupation" such that it is anticipated that she "will have to go to part time hours, she will be seeking light work whenever it is available, and she will not be able to work overtime in any meaningful/longterm capacity".

**70**  On the other hand the Defendants say that Ms. Foster's recent record of employment shows that she is able to work in excess of 40 hours a week for successive weeks, including more than 50 or 60 hours a week on a "not-infrequent basis". Since she returned to work in May 2011, she has not had any time loss owing to the issues she says were due to the accidents. According to the Defendants, Ms. Foster either has not shown any diminishment in earning capacity, or if she has shown a substantial likelihood of sustaining pecuniary loss, it is minimal at best.

**71**  The Plaintiff's estimate of loss of earning capacity involves certain assumptions, including working to age 70 and sustaining overtime work over much of that period. Neither of those assumptions, in my opinion, has been proven on a balance of probabilities as a reasonable assumption to apply to Ms. Foster but for the accident. That is, nothing in her past work history in my view supports these assumptions over the long term, nor is there statistical evidence that suggests these are reasonable assumptions to make for LPNs generally.

**72**  Regarding capacity, in Dr. O'Connor's report of April 7, 2011 he opined that "At present, I do think that is capable of returning to work at her previous position in a graduated return to work fashion" although he also said that it is "too early to determine if she will be able to remain a durable employee at either part-time or potentially full-time intensity". Although there would be a challenge for her to maintain her physical condition and work he noted that "... she has made such good progress with the active strength and conditioning, there is quite a good chance that she will be able to cope with this with the passage of time".

**73**  In fact, since Ms. Foster returned to work in May 2011, she has worked the hours set out in Schedule 1(although she also testified that such a schedule was not sustainable).

**74**  This recent history certainly supports the proposition that Ms. Foster is capable of performing the duties of an LPN with extra hours over a period of 4-5 months, including work on night and evening shifts. I note that the work on evening shifts involves some of the heavier duties of an LPN. Ms. Foster says that she did this motivated in part by financial pressures. She also says this is not sustainable for a combination of reasons.

**75**  The legal approach to considering such claims is aptly described in the decision of Garson J.A. in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at paras. 25-32, which I summarize as follows:

1. A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
2. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
3. A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
4. An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
5. It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
6. If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
7. Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
8. An earnings approach will be more useful when the loss is more easily measurable;
9. The capital asset approach will be more useful when the loss is not easily measurable.

**76**  In my opinion the Plaintiff has met the initial burden of proof. That is, she has shown, based on her evidence and the medical opinions, that there is a real and substantial possibility of a future event leading to an income loss.

**77**  The Plaintiff, although doing the job presently, is still impaired from performing the most difficult physical tasks of an LPN, which probably go beyond the de facto job description. She is at an increased risk for injury. Such an injury could entail time missed from work or even a period of retraining in some other area of the health care industry.

**78**  Robert Carson, an economist, testified on behalf of the Plaintiff. Part of his evidence included what he called a "multiplier table", which could be used to calculate the present value of any pattern of future earnings or loss of earnings. The multipliers were calculated using an annual discount rate of 2.5%, the rate required by s. 1(a) of the *Law and Equity Regulation*, [*B.C. Reg. 352/81*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5K1-F5KY-B027-00000-00&context=). Madam Justice Deschamps explained it this way in *Townsend v. Kroppmanns*, [*[2004] 1 S.C.R. 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10G-00000-00&context=), [*2004 SCC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B10G-00000-00&context=) at para. 5:

Compensation aims at restoring the victim to the position that person would have been in had no loss been incurred. Compensation is awarded in the form of a lump sum payment. The dollar amount received for future costs is actually lower than projected costs because it is assumed that the amount paid will be invested and will earn income before being used for future needs. The same reasoning applies for loss of future income. The victim is awarded a lower amount for income than that person would have actually earned at a future date. In other words, the amounts are discounted to reflect the present value of the expenses incurred or the income earned at a future date, taking inflation adjustments into consideration. The purpose of the discount rate is thus to insure that victims will be fully compensated but that defendants will not be called on to overpay.

**79**  Although this methodology might be useful in some cases I do not find it helpful here in determining this loss. What I am considering are future or hypothetical possibilities. The method requires that I forecast losses into the future work period. There is simply no evidence before me that is capable of supporting the specific projections which would allow me to instantiate the variables in this method.

**80**  This methodology, in another context, is known as a "discounted cash flow". Instead of calculating the present value of future losses, the method is applied to calculate a present value of a stream of income. The method, while appearing mathematically precise, invites one to be captive of the method instead of exercising the broad judgment necessary for determination of such losses: see, for example, in another context the decision in *Cypress Anvil Mining Corp. v. Dickson* [*(1986), 8 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7G6-61XP-00000-00&context=) (C.A.).

**81**  In British Columbia, it has long been established that the Court's task 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=). The Court of Appeal for British Columbia explained the method of assessing loss of future earning capacity in *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at paras. 10-11:

[10] 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:

[1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;

[2] whether the plaintiff is less marketable or attractive as an employee to potential employers;

[3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

[4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[11] The task of the court is to assess damages, not to calculate them according to some mathematical formula: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (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.

**82**  Mr. Carson estimated the current average full time earnings of LPNs working in public heath care facilities to be $49,900. Ms. Foster's LPN program took one year to complete although it is now a two-year program. Were some future event to require her to retrain she could lose up to twice that amount of annual income.

**83**  There is some cost associated with retraining, however, these funds would be expended in the future, and these losses would occur in the future, so some discounting would apply. There are, of course, other contingencies that might cut short her working life, as well as positive contingencies. In the circumstances, in my view an award of $125,000 is appropriate in this case.

**VIII. Past Loss of income**

**84**  Ms. Foster claims past loss of income in the amount of approximately $118,000. This is based on her working full time plus an additional 10-15 hours a week. Past income loss is calculated from May 5, 2009. The hours worked leading up to the accident of May 5, 2009 are set out in Schedule 2.

**85**  Based on this information, and the other income figures in evidence I am not prepared to base past income loss on full-time work and doing an additional 10-15 hours per week. Although Ms. Foster said that absent her injuries she would have worked full time hours plus taken as much overtime as available, in my view the best indicator of that is past work history, rather than stated intentions. Of course, the availability of overtime work is something outside the control of the employee.

**86**  Nor do I think it fair to base past wage loss on Ms. Foster's most recent work history. She indicated that she was in need of funds and worked exceptionally hard in the months leading up to trial. She also indicated that such a level of work was not sustainable. I do not think it appropriate to project that period backwards to calculate past wage loss.

**87**  As I see it, the correct approach in this case is to base the award on Ms. Foster's previous work history, but reduce it by the period of time she was off work during elective surgery, and for an amount based on her history of unrelated work absences.

**88**  In total, Ms. Foster was off work for between one and a half and two years, including accident-related sick days following her return to work. She should be compensated for those days, as well as for the loss of her employer-paid pension contributions, which are not paid while an employee is on long term disability leave. That amount must be reduced for any time Ms. Foster would not have worked due to her unrelated surgery and occasional sick days.

**89**  In my opinion, her gross past income loss is $65,500, and I award damages based on this amount.

**IX. Cost of Future Care**

**90**  An award for cost of future care is a pecuniary claim for those expenses that may reasonably be expected to be expended in returning the injured party to the position she would have been in if she had not sustained the injury: *Andrews* at p. 241. The standard of proof is the balance of probabilities: *Athey* at para. 28.

**91**  In *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), [*[2002] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), the Court explained the method of assessing damages for future care at paras. 21-22:

Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 *L.Q.R.* 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

**92**  Because the overriding principle is returning the Plaintiff to the position she would be in had the injury not occurred, it is important that the Plaintiff not be overcompensated by an award of future care costs that includes costs that the Plaintiff would have incurred despite the accident. Accordingly, in cases like this one where the plaintiff will continue to lead basically be same life had she not been injured, but with the aid of additional assistance and physical facilities, Courts will total the cost of the extra assistance and facilities that the Plaintiff will require: *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=) at para. 187. As I see it, this means that if a Plaintiff would have chosen to expend funds on recommended care in any event, those costs should not be included in the award for future care.

**93**  The parties are again far apart on the cost of future care. The Plaintiff claims $36,301 in future care costs, although that initial position was revised during final argument. In final argument, the Plaintiff conceded that the cost of future care award should not include the cost of a gym pass because Ms. Foster would likely have maintained a gym pass despite the accidents. I accept that concession, and will not include the gym pass in the award for cost of future care.

**94**  The Plaintiff primarily relies on the recommendations made in an expert report prepared by Mr. Russell McNeill, an occupational therapist and work evaluator.

**95**  The Defendants takes issue with many of Mr. McNeill's recommendations, and suggest an award of $2,500.

**96**  Mr. McNeill recommends that Ms. Foster attend a gym to perform pool-based exercises. He recommends six ninety-minute sessions with a kinesiologist to review and outline a light program for her. He advises that this will result in a total cost of $540.00 plus mileage, travel time and applicable taxes. The Defendants point out that Ms. Foster indicated that she does not like the water and would not be likely to participate in a water-based program. If the evidence shows that a Plaintiff would not accept or use recommended care, that is a relevant consideration in determining the amount of a future care award: *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at para. 60. Based on Ms. Foster's own evidence, she would not be likely to use a pool-based fitness program if one was designed for her. Accordingly, I decline to award Ms. Foster the cost of kinesiology sessions.

**97**  Dr. O'Connor opined that Ms. Foster will require intermittent use of Tylenol or Advil. Mr. McNeill agreed, and estimated the cost at $18.00 per month. The Defendants point out that Ms. Foster did not produce any receipts for Advil in her list of special damages. Accordingly, in the Defendants submission, payment for the cost of Advil is not justified.

**98**  Although Ms. Foster did not produce receipts I accept that she had some of this expense. On the other hand, a physically active person, such as she was, and is, is likely to require use of this medication in any event. I would allow one half of this expense.

**99**  Mr. McNeill recommends pain management devices such as hot and cold gel packs and a hot medicated patch to provide temporary relief or to reduce neck and back pain at a yearly cost of $145.60 per year. Mr. McNeill also recommends several devices to assist Ms. Foster with her pain while sleeping: an aerus memory foam topper at a cost of $429.99 to be replaced every three years; a contoured cervical pillow at a cost of $89.95 to be replaced every year; a full body pillow at a cost of $157.85 to be replaced every three years; and a back wedge at a cost of $119.45 to be replaced every 5 years.

**100**  The Defendants point out that Mr. McNeill admitted that each of these devices could be purchased at a much more reasonable cost from other suppliers. They also say that no physician has recommended these items, and that the Plaintiff may have been able to seek funding for these devices through her disability carrier. I decline to award any of these amounts.

**101**  Mr. McNeill also recommends a back support for home and vehicle use at a cost of $144.99 to be replaced every five years. I accept this item as a reasonable expense.

**102**  Mr. McNeill recommends that Ms. Foster purchase a portable TENS machine at a cost of $186.99, to be replaced every 10 years. The Tens machine would include that additional cost of replacing TENS electrodes at a cost of $19.04 per year. He also opines that Ms. Foster would need six physiotherapy sessions to instruct her how to use the machine, for a total cost of $360.00. The Defendants say that this is an extravagant recommendation, and point out that none of Ms. Foster's treating physicians have recommended this. They further say that the physiotherapy treatments to address the TENS machine are "overkill".

**103**  Ms. Foster also claims for ongoing physiotherapy. In my view this claim overlaps with the claim for a continuation of physiotherapy.

**104**  Ms. Foster asks for continuation of physiotherapy on an intermittent basis as recommended by Dr. Gilbart and Dr. O'Connor. She specifically requests 12 sessions per year at $60.00 per session, for a cost of about $720.00 per year for the balance of her working life. The Defendants say that Ms. Foster has already had a considerable amount of therapy. I allow this amount, based on a working life to age 65, and decline to award the costs associated with the purchase of a TENS machine

**105**  Ms. Foster also requests homemaking expenses under the future care costs. She explains that her daughter has helped with many heavier household tasks. She says that in the future her daughter will no longer live with her, and Ms. Foster will require some assistance. Mr. McNeill recommends some homemaking assistive devices that will assist her in the future: a telescopic handy scrub, at a one-time cost of $20.95; a telescopic handy scrub replacement head at a cost of $15.95, to be replaced every year; a long handle toilet brush at a cost of $14.95 to be replaced every two years; and a feather light vacuum at a cost of $59.99 to be replaced every three years. The Defendants concede that these are appropriate expenses. I therefore accept that these are appropriate future care expenses.

**106**  Finally, it is possible that Ms. Foster will require surgery to the labral tear of her left hip. If that circumstances arises, then Mr. McNeill recommends the following: three physiotherapy sessions per week for sixteen weeks, for a total cost of $2,880.00; six sessions with a kinesiologist to create an exercise therapy program at a cost of $540.00, plus mileage and travel time; four hours of homemaking assistance per week for four months for a cost of $1,547.00; a bathtub seat or shower char at a one-time cost of $129.99; a hand held shower at a one-time cost of $73.25; a bathtub grab bar at a one-time cost of $98.95; a shower grab bar at a one-time cost of $229.00; non-slip bath mat at a one-time cost of $189.99; and a Hip Kit at a one-time cost of $123.85. The Defendants say that since future surgery is unlikely, any recommendations concerning care after such surgery should not be given any weight.

**107**  The proper approach to awarding damages for hypothetical future events is set out in *Athey*. There, Mr. Justice Major explained that damages should be adjusted for contingencies. Hypothetical events need not be proven on the balance of probabilities. Instead, so long as they are real and substantial possibilities and not mere speculation, they are given weight according to their relative likelihood. Accordingly, if there is a 30% chance that a plaintiff will require surgery, then the damages award will be increased by 30% of the costs associated with that surgery: *Athey* at para. 27.

**108**  In this case, Dr. O'Connor opined that there is a 10-20% chance that the Plaintiff will require surgery to repair the labral tear to her left hip. Accordingly, I will award her 15% of the future care costs associated with that surgery.

**109**  However, I am not satisfied that all of the costs outlined by Mr. McNeill are reasonable. For example, Mr. McNeill opined that Mr. Foster would require a non-slip bath mat at a cost of $189.99. In my view, this is an unreasonably high cost for a bath mat. I will accordingly reduce the cost of these items to values that I believe to be more reasonable.

**110**  Unlike the quantification of loss of earning capacity, these ongoing costs are matters that are appropriate to apply the methodology suggested by Mr. Carson. I have evidence before me of the precise type of care that Ms. Foster may require in the future. The "multiplier tables" can be used to reduce the overall amount of this award to account for contingent future events, as well as discount the probable cost to a present value. The amounts are set out in Schedule 3, below. In my opinion, Ms. Foster is entitled to $19,336.09 for the cost of her future care.

**X. Special Damages**

**111**  Consistent with the governing precept that an individual is to be restored to the position she would have been in had an accident not occurred (*Milina* at 78), the Plaintiff is entitled to recover for those reasonable expenses she incurred before trial arising out of the Defendants' ***negligence***.

**112**  The Plaintiff claims $40,418.71 in special damages. She originally also included in her claim transportation costs. However, the Plaintiff conceded that the cost of transportation to and from appointments should be offset against the cost of not traveling to work, a concession that I accept. The amount of $40,418.71 does not include the transportation costs.

**113**  The Defendants accept a number of the Plaintiffs claims for special damages. Specifically, they agree to pay the costs of 18 physiotherapy sessions with Shannon Blackburn at a cost of $270.00; as well as the cost of the MRIs.

**114**  The Defendants also agree to compensate the Plaintiff for those benefits that she paid herself while on leave following the second accident, but asks that those benefits be pro-rated to account for the fact that the Plaintiff should have returned to work sooner. I have already rejected the argument that the Plaintiff ought to have returned to work sooner to mitigate her loss. Accordingly, I decline to pro-rate the costs of the self-paid benefits as requested by the Defendants.

**115**  The Defendants say that a number of other expenses were not reasonably incurred or attributable to either accident.

**116**  The Plaintiff also claims for expenses related to chiropractic visits with Westgate Wellness. The Defendants say that they should not be responsible for the fees associated with many of those visits because the Plaintiff has a history of attending physiotherapy on a regular basis, and would have attended chiropractic sessions despite the accident. The Defendants also say that some of the physiotherapy visits should be attributed to the Plaintiff commencing her employment with Ridge Meadows Hospital. Accordingly, the Defendants submit that they should not be liable for half to two-thirds of the 26 visits in 2008; the three visits in 2009 that pre-date the second accident; half the remaining visits in 2009; and all visits in 2010 or 2011.

**117**  I accept that the Plaintiff would have attended chiropractic sessions at a "maintenance" level- or one session per month- if the accidents had not occurred. As such, I will reduce the number of chiropractic sessions for which the defendants are liable by one per month since the First Accident.

**118**  The Plaintiff claims expenses arising out of regular massage therapy treatments between November 2007 and December 2007, then again in February, March, May and June 2008, and sporadically thereafter until November 2009. The Defendants submit that only the first ten sessions, between November 2007 and December 12, 2007, are appropriate out of pocket expenses.

**119**  The Defendants say that the latter sessions are not attributable to the accidents. In that respect, the Defendants rely on the notations in the chart from the latter visits indicating that the Plaintiff reported stress and the Workplace Incident to her massage therapist. The Defendants also rely on the long gap between the second accident and any massage therapy treatments for the proposition that the visits subsequent to the Second Accident cannot be attributed to that event.

**120**  Ms. Foster did not have a history of attending massage therapy as she did for chiropractic visits. She sought a variety of treatments at various times in the course of her recovery. It should not be held against her that she only attended massage therapy sporadically as her condition improved. That said, she did report other incidents to her massage therapist that may have related to her decision to attend treatments. I would therefore allow the treatments between November 2007 and January 2008, and then half of the treatments thereafter.

**121**  The Plaintiff claims expenses for pilates sessions commencing in March 2009. The Defendants dispute those expenses on the basis that they are not therapeutic treatments provided by a registered professional, relying on *Raguin v. Insurance Corporation of British Columbia*, [*2011 BCCA 482*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22KK-00000-00&context=). The Defendants also say that the Plaintiff only began attending the sessions nearly a year and a half after they were initially recommended by Dr. Sam, which they say supports the therapy is not properly attributed to the accidents.

**122**  In *Raguin*, the Court considered whether massage therapy was a treatment that ICBC was obliged to pay for under s. 88(1) of the *Insurance (Motor Vehicle) Act Regulation*, [*B.C. Reg. 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=). That provision provides that ICBC is obliged to pay reasonable expenses for physical therapy, amongst other types of therapy. The gravamen of that decision is that massage is included in physical therapy for the purposes of the *Insurance (Motor Vehicle) Act Regulation*. Of course, claims for special damages are not as limited as Part 7 "no-fault" benefits provided pursuant to statute and an insurance contract. Notably, however, in reaching their decision, the Court said at para. 59:

In this case, the respondents' doctor recommended massage therapy as part of the infant plaintiffs' recovery. There is no suggestion that the recommended treatment was unnecessary or provided by someone other than a registered massage therapist, or that the expense was unreasonable.

**123**  In this case, pilates was recommended by Dr. Sam as part of the Plaintiff's recovery following the first accident. Ms. Foster declined to heed Dr. Sam's advice for some period of time. However, she did begin the program because of her discussions with Dr. Sam in an attempt to improve her physical condition following the accidents. I am therefore satisfied that the cost of the classes was reasonably incurred.

**124**  The Plaintiff claims special damages for the expense of receiving naturopathic treatments at Kotopski Physiotherapist Corporation/naturopathic including B12 injections, herbal laxatives and energy formulas. The Defendants say that these treatments cannot be reasonably attributed to accidents. However, I note that Ms. Foster attended Kotopski Physiotherapy at the suggestion of her physician. I accept that these treatments assisted her rehabilitation and would allow this expense.

**125**  The Plaintiff additionally seeks compensation for the cost of her student loans. In her submission, had the accidents not occurred, she would have been able to work at Fraser Canyon Hospital and had her loans forgiven. The Defendants oppose those expenses, saying that the Plaintiff is still physically capable of returning to work at Fraser Canyon Hospital. They also point out that the Plaintiff had not applied for the loan forgiveness program at the time of the Second Accident. Further, in their submission, the Plaintiff has received a taxable benefit arising out of the payment of interest on the loans.

**126**  I agree with the Defendants. The loss of ability to apply for a student loan forgiveness program is too remote of a possibility to qualify as special damages. The loans are not a reasonable expense incurred before trial as a result of the Plaintiffs' injuries. Moreover, it is not clear to me that Ms. Foster might not still qualify for such loan forgiveness.

**127**  Special damages are also sought for payments made by Great West Life. These include physical therapy sessions with Momentum Therapeutics, which the defendants agree to pay since causation is proven for the labral tear.

**128**  The fees paid by Great West Life also include user fees paid to Kotopski Physiotherapy, which the Defendants dispute because Dr. Sam should not have recommended the therapy in light of the fact that Mr. Kotopski was not, in fact, doing a study on labral tears. I have already explained why I believe that it was reasonable for Ms. Foster to attend that therapy, and the Defendants will be liable to Great West Life for the associated costs.

**129**  Great West Life also paid benefits to Maureen Chapman for counselling services. The Defendants oppose paying for those expenses because the Plaintiff discussed matters with Ms. Chapman that are unrelated to either accident. While this is true, I also accept that the accidents caused Ms. Foster some mental and emotional distress for which some counselling was necessary. Accordingly, the Defendants will be liable for one half of the fees associated with the counselling sessions.

**130**  The Defendant did not address the benefits the Plaintiff paid herself during her leave. I accept that those are reasonable out-of-pocket expenses.

**131**  A summary of those fees is included in Schedule 4, below. In total, the Plaintiff is entitled to $17,563.09 in special damages.

**XI. Summary**

**132**  The Defendants are liable for all of Ms. Foster's injuries. In summary, in my opinion, the Plaintiff has established that she is entitled to the following damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Description** | **Amount** |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages: | $75,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Capital asset/ | $125,000.00 |  |
|  | Earning Capacity: |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Income Loss: | $65,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Future Care: | $19,336.09 |  |

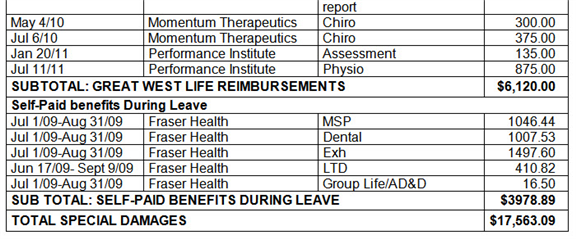
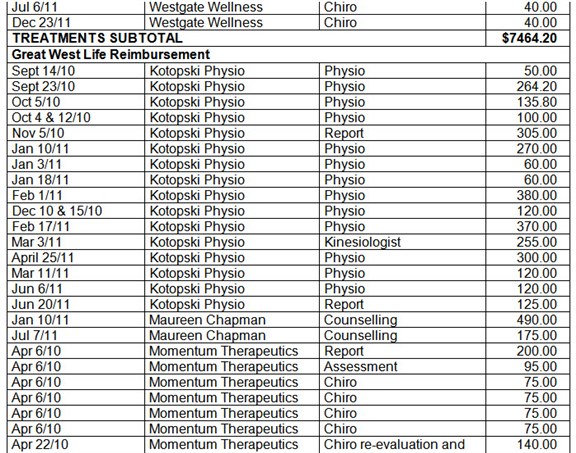
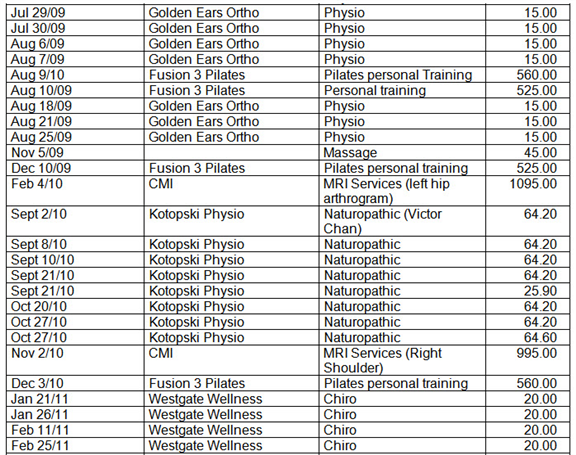
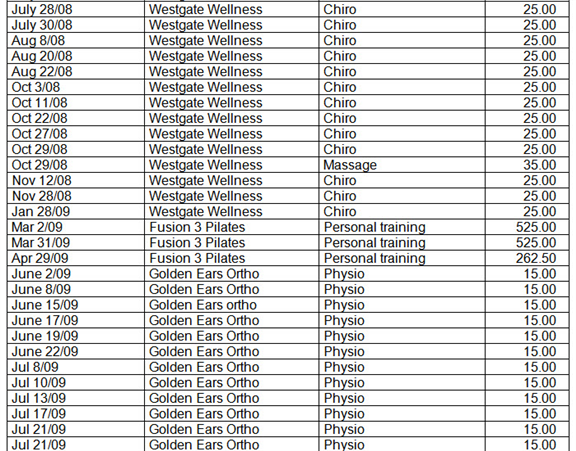
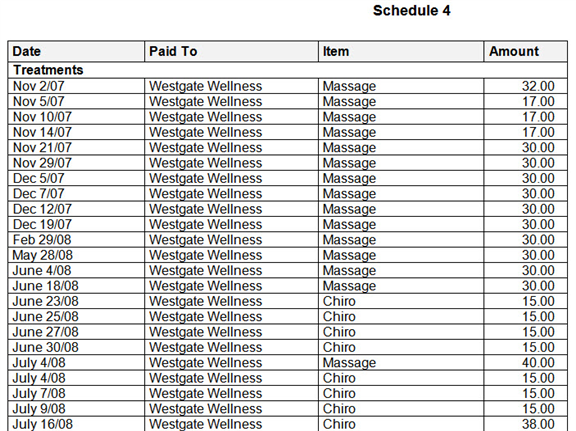
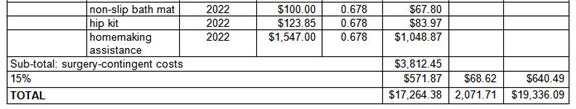
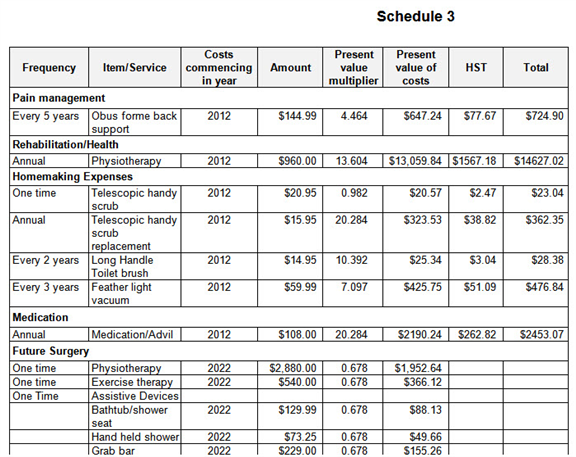
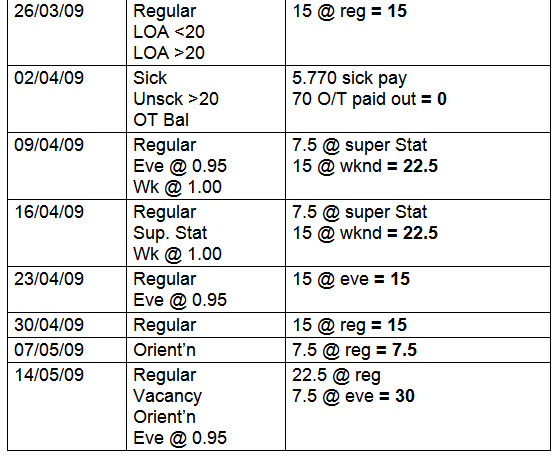
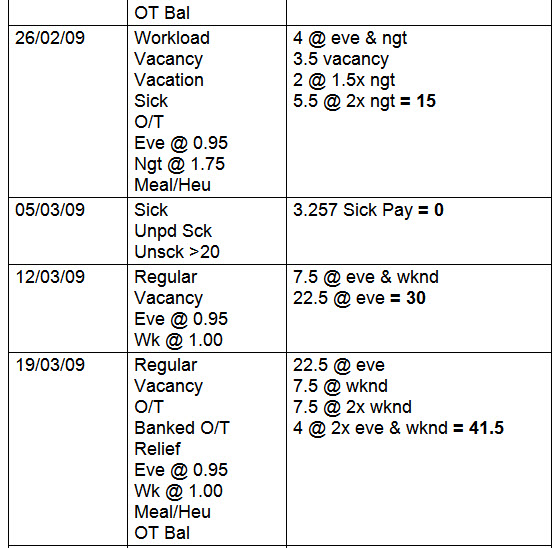
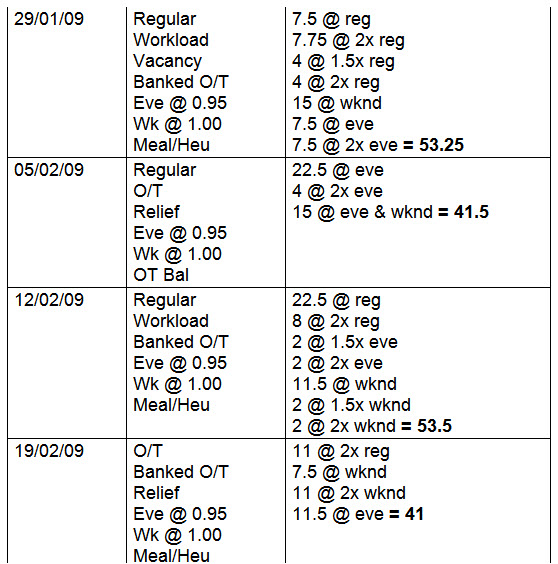
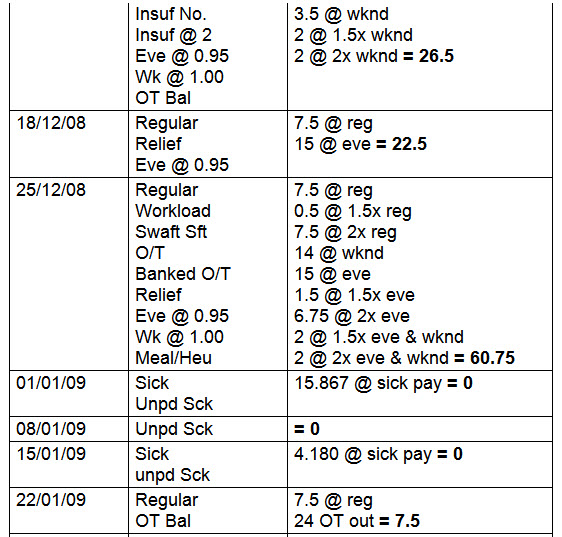
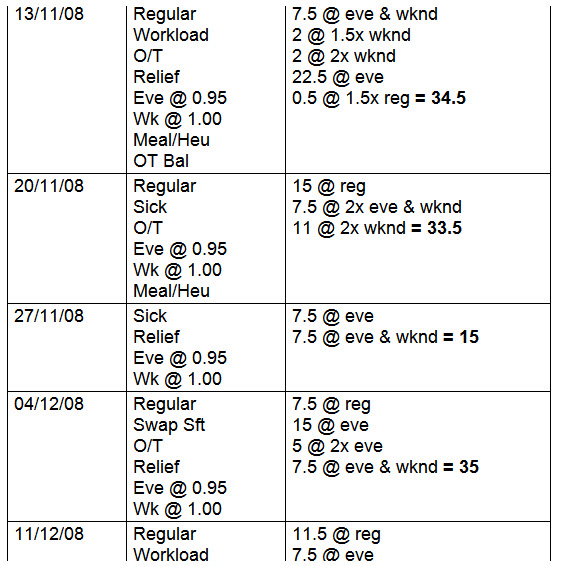
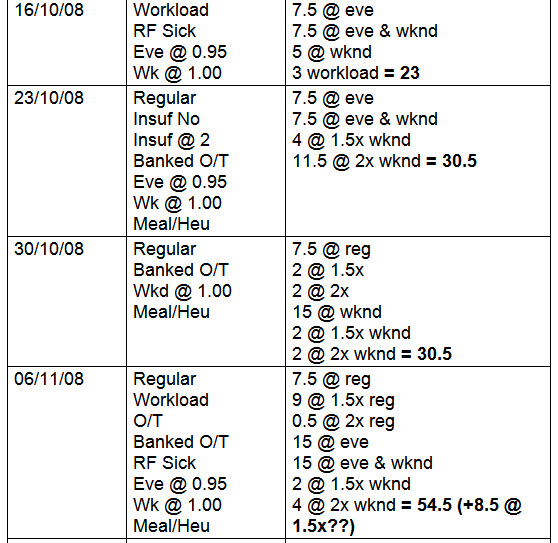
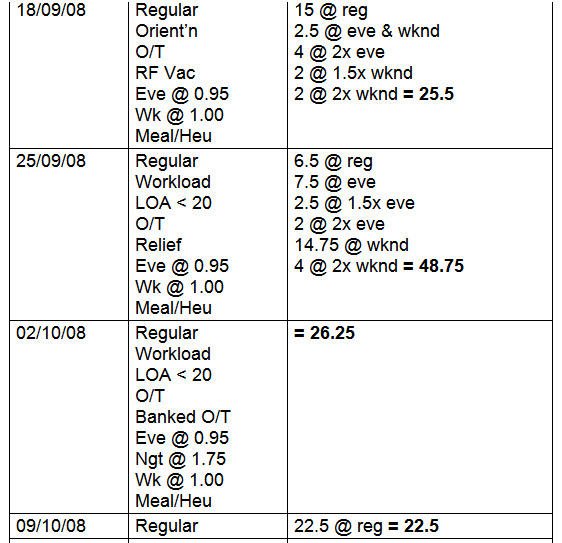
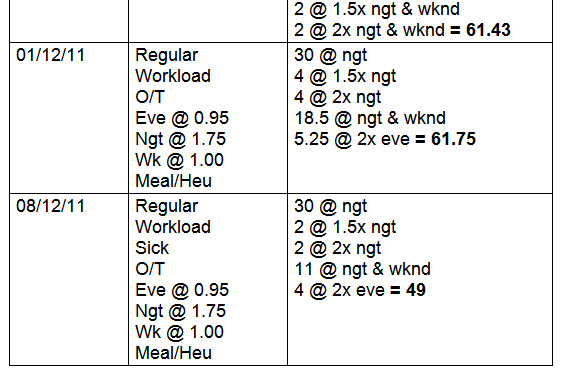
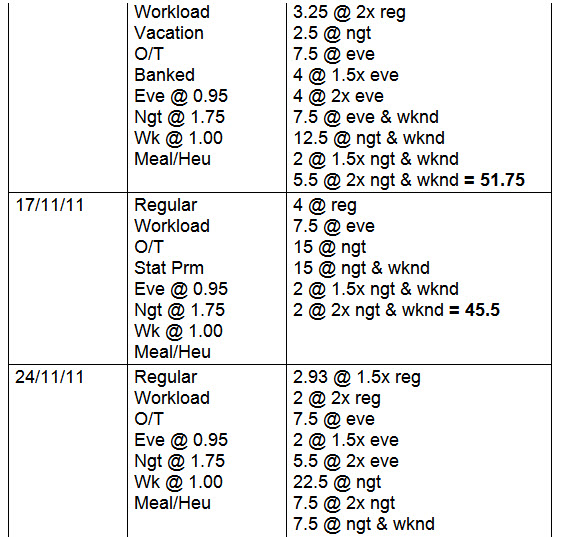
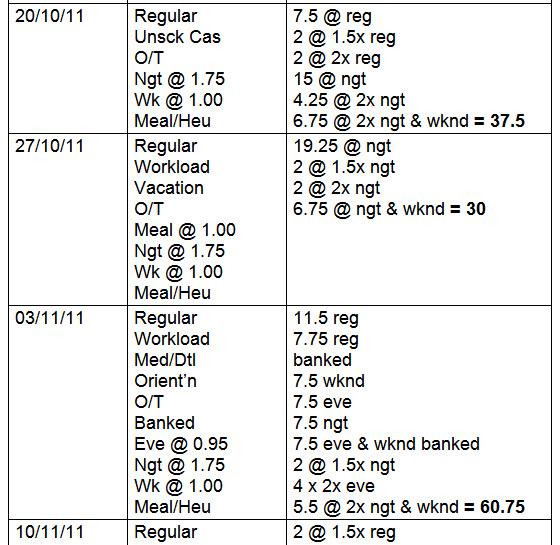
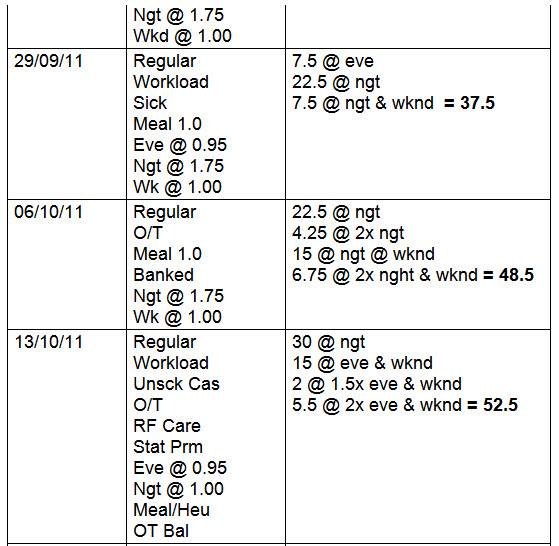
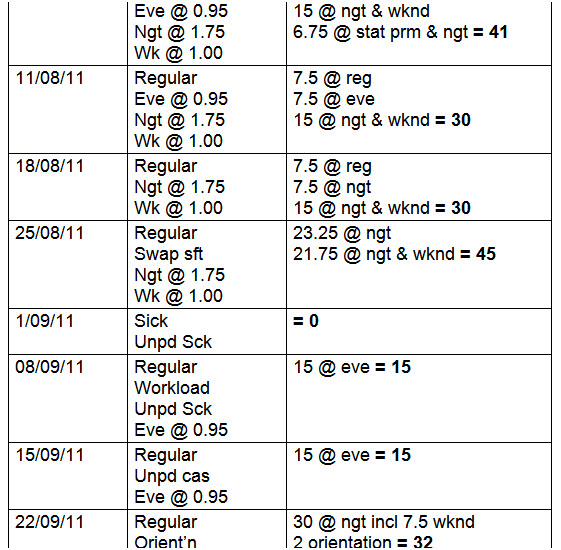
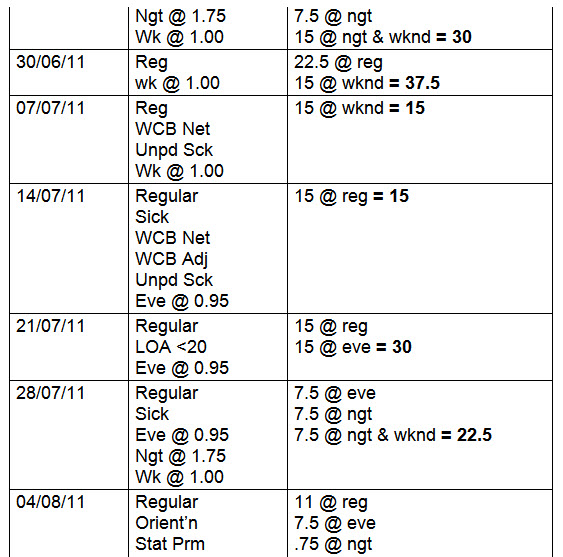
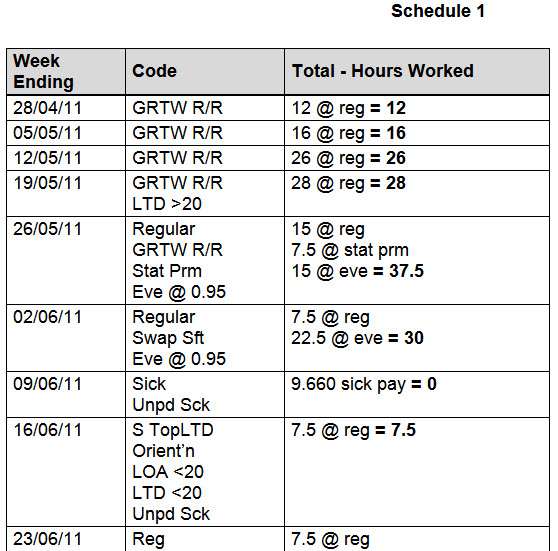
|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages: | $17,653.09 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL:** | **$302,489.18** |  |

**XII. Costs**

**133**  Unless counsel wish to bring to my attention some matters of which I am unaware, the Plaintiff is entitled to her costs on a party and party basis.

J.E.D. SAVAGE J.



**End of Document**

[***Frankson v. Myre, [2008] B.C.J. No. 1156***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G30P-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.E.D. Savage J.

Heard: June 3-5, 2008.

Judgment: June 19, 2008.

Docket: M070361

Registry: Vancouver

**[2008] B.C.J. No. 1156** | 2008 BCSC 795 | 168 A.C.W.S. (3d) 790

Between Shaun Frankson, Plaintiff, and Jean R. Myre and TMS Transportation Management Services Ltd., Defendants

(62 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Chest — Back and Spine — Neck — Arm injuries — Wrist — Leg injuries — Knee — Action by the plaintiff for damages arising out of a motor vehicle accident allowed and damages awarded in part — The defendant was solely liable for the accident — Plaintiff awarded non-pecuniary damages in the amount of $45,000, $2000 for future costs of care, $20,000 for delayed entry into workforce — Special damages and past loss of income awarded in the amounts of $1,624 and $6,353 respectively, as agreed by the parties — In trust claim arising out of the care provided by the plaintiff's mother not allowed as the services provided by the mother did not go behind what might be performed out of a sense of love, friendship or family duty and she suffered no economic loss — The plaintiff's claim for loss of opportunity not allowed as his income earning capacity had not been impaired and there was no real possibility of future income loss.**

**Damages — Types of damages — General damages — Categories of — Loss of income — Loss of opportunity — For personal injuries — Cost of future care — Special damages — Past loss of income — Non-pecuniary loss — Action by the plaintiff for damages arising out of a motor vehicle accident allowed and damages awarded in part — The defendant was solely liable for the accident — Plaintiff awarded non-pecuniary damages in the amount of $45,000, $2000 for future costs of care, $20,000 for delayed entry into workforce — Special damages and past loss of income awarded in the amounts of $1,624 and $6,353 respectively, as agreed by the parties — In trust claim arising out of the care provided by the plaintiff's mother not allowed as the services provided by the mother did not go behind what might be performed out of a sense of love, friendship or family duty and she suffered no economic loss — The plaintiff's claim for loss of opportunity not allowed as his income earning capacity had not been impaired and there was no real possibility of future income loss.**

**Tort law — *Negligence* — Motor vehicles — Rules of the road — Action by the plaintiff for damages arising out of a motor vehicle accident allowed and damages awarded in part — The defendant was solely liable for the accident — Plaintiff entitled to rely on the assumption that other vehicles would observe rules regarding traffic — Plaintiff awarded non-pecuniary damages, future costs of care, damages for delayed entry into workforce, special damages and past loss of income.**

|  |
| --- |
| Action by the plaintiff for damages arising out of a motor vehicle accident. The plaintiff made a left-hand turn at an intersection when he was hit by the defendant who travelled through the intersection on a red light. The plaintiff argued that the defendant was solely responsible for the accident and that he was entitled to rely on the assumption that other vehicles would observe the rules regulating traffic. At the time of the accident, the plaintiff was 21 and enrolled in college. As a result of injuries he suffered in the accident, he had to drop all of his courses. Before the accident, the plaintiff was involved in a variety of recreational activities. The plaintiff claimed non-pecuniary damages, future costs of care, delay in education and entering the work force, loss of capacity, past loss of income in trust and special damages. The parties agreed to the amount of special damages and past loss of income. The plaintiff suffered general body trauma, bruising and soreness, and soft tissue injuries of the neck, chest, wrist and knee and an injury to his back. For two weeks following the accident, the plaintiff was bedridden and in pain. The plaintiff's mother, a registered nurse, essentially provided nursing care to the plaintiff for the first three days after the accident. Approximately one month after the accident, the plaintiff's injuries slowly began to resolve such that the plaintiff was able to begin physiotherapy. Ten months after the accident, there were still ongoing problems to the neck, back and left knee and the other injuries were resolved. Three years post-accident, the plaintiff continued to suffer significant pain in his back and prolonged sitting causes soreness and pain. It was recommended to the plaintiff not to pursue recreational activities of a physical nature.  HELD: Action allowed, damages awarded in part.  The defendant was solely liable for the accident. Non-pecuniary damages in the amount of $45,000 were awarded. The plaintiff was also awarded $2000 for future costs of care in relation to his rehabilitation. Damages for delayed entry into workforce in the amount of $20,000 were awarded, taking into consideration the plaintiff's delayed entry into the work force and contingencies with respect to the time it would take for him to complete his studies and what he might have earned following graduation. Special damages and past loss of income awarded in the amounts of $1,624 and $6,353 respectively, as agreed by the parties. The in trust claim arising out of the care provided by the plaintiff's mother was not allowed as the services provided by the mother did not go behind what might be performed out of a sense of love, friendship or family duty and she suffered no economic loss. The plaintiffs claim for loss of opportunity was not allowed as his income earning capacity had not been impaired and there was no real possibility of future income loss. |

**Statutes, Regulations and Rules Cited:**

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

**Counsel**

Counsel for the Plaintiff: A.K. Khanna.

Counsel for the Defendants: G. Murphy.

**Reasons for Judgment**

|  |
| --- |
| **J.E.D. SAVAGE J.** |

**Introduction:**

**1**  This is a personal injury action for damages arising out of a motor vehicle collision which occurred on March 13, 2005 at the intersection of Fraser Highway and Highway No. 10 in Langley, British Columbia.

**2**  The plaintiff, Shaun Frankson, was driving his 1989 Fort Mustang, travelling south-eastbound on Fraser Highway intending to make a left turn onto Highway No. 10. As he made his turn, he was in a collision with the defendant, Jean R. Myre, who was travelling in a 1999 Ford F250 pick-up, travelling north-westbound on Fraser Highway.

**3**  Liability and damages are in issue.

**4**  Damages are claimed by the plaintiff under the headings of non-pecuniary damages, future cost of care, delay in education and entering into the work force, loss of capacity, past loss of income, an in trust claim, and special damages.

**5**  Special damages are agreed at the sum of $1,624.38. Past income loss is agreed at $6,353.75. All other matters are in issue.

**The Plaintiff:**

**6**  The plaintiff is currently 24 years of age. He was 21 at the time of the accident, single, and enrolled in Douglas College. The plaintiff was enrolled in four courses in pursuit of his business degree. As a result of the injuries suffered in the accident, all of these courses had to be dropped.

**7**  Before the accident, the plaintiff was involved in a variety of recreational activities. He played basketball, baseball, football and was a snowboarder. He was also active as a musician in a small band.

**The Accident:**

**8**  The accident occurred between 8:00 pm-8:30 pm on the evening of March 13, 2005. The conditions were dry and visibility was good, as the intersection was well lit.

**9**  The plaintiff was driving his 1989 Ford Mustang south-eastbound on Fraser Highway. He intended to make a left turn to proceed north-eastbound on Highway No. 10.

**10**  The defendant was driving his employer's 1999 Ford pickup truck, travelling north-westbound on Fraser Highway. He was intending to proceed through the intersection on Fraser Highway.

**11**  The intersection of Fraser Highway and Highway No. 10 was described by several witnesses at trial. It is best depicted in the photograph in Exhibit 1 at Tab 5. The intersection is a large one and well travelled. There are two through lanes in both the north-west and south-east direction on the Fraser Highway along with dedicated left turning lanes and right merge lanes.

**12**  On Highway No. 10, at the intersection, there are similarly two through lanes north-eastbound and south-westbound, dedicated left turn lanes and right merge lanes.

**13**  The plaintiff's evidence was that he had stopped at the intersection while the light in his direction of travel was red. He was the first vehicle in the left turn lane. The light turned green and he pulled forward into the intersection. He waited in the intersection for oncoming traffic. The lights went through their cycle and turned to amber. He saw one oncoming vehicle in the middle through lane; that vehicle came to a stop and the light turned red.

**14**  The plaintiff testified that he saw no other traffic approaching and proceeded with his left turn. He was completing his turn when struck by the defendant's vehicle, which had come through a red light. The impact was primarily to the front right of the plaintiff's vehicle. The vehicle damage was severe and the vehicle was a total loss.

**15**  The plaintiff's evidence was that he saw the defendant's vehicle shortly before impact but had no chance to take evasive action.

**16**  The driver of the vehicle that stopped at the intersection was driven by Jody Segran who was with her husband, Chad Segran, a passenger. They witnessed the accident and gave evidence at trial.

**17**  Ms. Segran was driving a Pontiac Sunfire. Ms. Segran's evidence was that as she approached the intersection the light changed to amber, she slowed and came to a complete stop. There were no cars in her lane in front of her or in the lane to her right.

**18**  Ms. Segran's evidence was that the plaintiff's vehicle stopped in the intersection signalling a left turn. After she stopped, the plaintiff proceeded with his left turn. As his vehicle crossed the lane of traffic in front of her, Ms. Segran noted that the light had turned red. At that time another vehicle came from the lane to her right. It was travelling at a fast rate of speed and struck the plaintiff's vehicle.

**19**  Ms. Segran's evidence was that she was travelling at a speed of approximately 50 kmph while approaching the intersection. She was able to come to a normal stop after the light turned amber at the intersection.

**20**  The defendant stated that when he saw the light turn amber he was in the position of the fourth vehicle in the right hand lane proceeding north-west on Fraser Highway, as noted in Exhibit 1, Tab 5. The defendant testified that he could have stopped before the intersection. He noted that the light turned amber but did not slow down. His explanation for not stopping or slowing was because of his concern for vehicles behind him. There were none.

**21**  Although the defendant had a concern for vehicles behind him, he did not check his rear view mirror or look to the rear to determine if there were any vehicles behind him.

**22**  The defendant states that he did not see the plaintiff's vehicle until just before impact. He explained that his vision was blocked by the vehicle in the lane to his left that had stopped for the amber light.

**23**  Carol Ciccone gave evidence as an independent witness to the accident. Mrs. Ciccone turned right off Highway No. 10 and was proceeding to merge with traffic on the Fraser Highway.

**24**  Mrs. Ciccone testified that she looked behind her and observed the defendant's vehicle when the light was green. She did not see the traffic light turn amber and believed that the light was green when the defendant proceeded through the intersection. Her evidence is at odds with the other witnesses' evidence, including the defendant's evidence that the light had turned amber well before he approached the intersection.

**25**  In my view, given her position near the intersection and her ability to observe the scene, Mrs. Ciccone had the least favourable vantage point from which to observe the events. In the circumstances, I give little weight to Mrs. Ciccone's evidence.

**26**  The defendant adduced evidence that there was an advance green turn signal at the intersection. The plaintiff gave evidence that he did not see an advance green allowing for a left hand turn. Ms. Segran, who is familiar with the intersection, gave evidence that the advance green will not trigger if only one vehicle is sitting at the intersection. The advance green at that intersection requires three vehicles.

**27**  Ms. Segran has travelled the route many times over the past four years as she picks up her husband every day from work at approximately the same time, between 8:00 pm-8:30 pm. I was impressed with Ms. Segran as a witness and accept her evidence that an advance green light was not triggered if only one vehicle was present at the intersection. I accept her evidence that the light had turned red before the defendant entered the intersection.

**Liability:**

**28**  It is the plaintiff's submission that the defendant was 100 percent responsible for the subject accident. The plaintiff argues that he was entitled to proceed on the assumption that all other vehicles will do what their duty is, namely observe the rules regulating traffic.

**29**  The plaintiff relies on a decision of the British Columbia 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=) (C.A.). ***Kokkinis*** is a case with similar circumstances to this one. The accident in ***Kokkinis*** occurred at Granville and King Edward Street in Vancouver, a similarly busy and large intersection, when the plaintiff was turning left and was struck by the defendant who proceeded through the intersection when he should have stopped.

**30**  The Court in ***Kokkinis*** noted:

9 This discussion, however, detracts from the more important question of *law*, which is whether Mrs. Kokkinis was on one hand entitled reasonably to assume that Mr. Hall would stop before entering the intersection or on the other hand, whether she can be faulted for failing to see his van "until it was on top of her", i.e. constituted an immediate hazard. In this regard, Mr. Johnson cites *Feng v. Graham* [*[1988] 5 W.W.R. 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-604Y-00000-00&context=) (B.C.C.A.), (not a left turn case), for the principle that the plaintiff's entitlement to assume that other traffic will obey the law, is "subject to the proviso" (in counsel's phrase) that where it is apparent or should be apparent that an oncoming driver is not going to yield the right-of-way, then at that point the other driver must act reasonably and cannot simply proceed into the collision, as it were. At the least, Mr. Johnson says, it was open to the trial judge to find that in the circumstances, Ms. Kokkinis failed to exercise reasonable care for her own safety and the safety of others, and that she must therefore bear some responsibility for the accident.

10 I must say this argument has given me pause; but ultimately I resolve it by asking whether in law Mrs. Kokkinis 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 Mr. Hall would stop, and because she checked cross-traffic, would in my view subvert the duty on Mr. Hall 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.

11 Accordingly, notwithstanding the principle (which I do not doubt) that questions of apportionment are generally questions of fact with which we should interfere only in exceptional cases, I would conclude that the issues I have referred to are ones of law and that the learned trial judge erred in law in placing too high a standard on the plaintiff and in failing to consider the assumptions she was entitled to make. I would not apportion any of the fault to her and would apportion 100 percent to Mr. Hall.

**31**  The defendant raises s. 174 of the ***Motor Vehicle Act***, *R.S.B.C. 1996, c. 318*. The defendant says that under the ***Motor Vehicle Act***, the left turn driver is in a servient position and must yield to the straight through driver where the straight through driver is so close that he constitutes an immediate hazard.

**32**  The Court of Appeal in ***Kokkinis*** comments on s. 176 of the ***Motor Vehicle Act*** (now. s. 174) as follows:

1. A more recent case from this Court along similar lines is *Brucks v. Caslavsky*, (19 April 1994) Vancouver Registry CA016390 [reported [*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=)], which apparently was not cited to the trial judge. There, this Court rejected the argument that the onus placed by s. 176 of the Act is "absolute" and that in deciding whether an oncoming car constitutes an "immediate hazard", a left-turning driver must consider the possibility that any oncoming motorist may intend to speed through an intersection and disobey the traffic signal. Taylor, J.A. for the Court quoted the well-known statement of principle of Lord Atkinson in *Toronto Railway v. King*, [*[1908] A.C. 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4SM-00000-00&context=), at 269:

... traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less on the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

**33**  The defendant cites the decision of the Court of Appeal in ***Pacheco (Guardian ad litem of) v. Robinson*** [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (C.A.). In my view this decision is distinguishable as by the exercise of reasonable care; the defendant could have brought his vehicle to a stop as did Ms. Segran instead of passing her stopped vehicle and proceeding into the intersection against a red light.

**34**  The defendant testified that he was approximately 30 feet away from the intersection when he saw the amber light. This estimate of distance, however, is inconsistent with where he places his vehicle in the photograph in Exhibit 1, Tab 5. In that photograph, he indicated his vehicle being about the same distance from the intersection as the fourth vehicle in the right hand lane proceeding north-west on Fraser Highway.

**Damages:**

**35**  There is no real disagreement between the parties concerning the extent of injuries suffered by the plaintiff.

**36**  The injuries suffered were general body trauma, bruising and soreness, and soft tissue injuries of the neck, chest, wrist and knee. The most significant ongoing injury is that to his back.

**37**  At the accident scene, the plaintiff was immediately in pain and had difficulty breathing. He had pains in the front of his chest, left knee, and right wrist. He had trauma to his head.

**38**  Following the accident, he was transported by ambulance to Langley Memorial Hospital. The hospital was busy and the plaintiff was held in a holding area of the emergency ward as no separate beds or rooms were available. The next day he was released into the care of his parents; the plaintiff's mother is a registered nurse.

**39**  For the first two weeks following the accident, the plaintiff was substantially bedridden. He was in pain and was on two painkillers, Tylenol 3 and Advil, as well as a muscle relaxant, Flexeril.

**40**  During the first three days, Mrs. Frankson, the plaintiff's mother, essentially provided him nursing care. This entailed checking his pupils to see if they were dilated, checking his abdomen to see if there was any unusual swelling, assisting him with medication use, and feeding him.

**41**  Over the ensuing month, the plaintiff was largely sedentary, staying most of the time in the house and unable to move freely because of soreness. By mid April the injuries slowly began to resolve such that the plaintiff was able to commence a course of physiotherapy treatment. The treatment initially consisted of passive treatment and thereafter turned to a more active rehabilitation program.

**42**  Ten months after the accident, there were ongoing problems to the neck, back and left knee and the other injuries were resolved. The back injury was and continues to be the most significant injury.

**43**  Three years post-accident, the plaintiff continues to have significant pain from his back. Any prolonged activity, such as sitting in a lecture hall or traveling in a sitting position over 45 minutes causes soreness and pain. The plaintiff is not recommended to pursue recreational activities of a physical nature such as football, which he had formerly done.

**Non-pecuniary Damages:**

**44**  The plaintiff seeks an award for non-pecuniary damages of $55,000 relying on the decisions in ***Peterson v. Ram***, [*2008 BCSC 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1RF-00000-00&context=), and ***Kahle v. Ritter***, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=). The defendant suggests an appropriate range of damages of $30,000-$35,000 relying on ***Weinmuller v. Tait***, [*2006 BCSC 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23VM-00000-00&context=), ***Bains v. Prasad***, [*2005 BCSC 1694*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2RF-00000-00&context=), and ***Amberiadis v. Groves***, [*2005 BCSC 1270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1G8-00000-00&context=).

**45**  After reviewing the authorities cited by the plaintiff and the defendant, in my opinion an appropriate award for non-pecuniary damages is $45,000.

**Future Cost of Care**

**46**  The plaintiff, as part of his rehabilitation, undertook a fitness regime to strengthen his back. I would allow his claim for $2000 as an allowance for the future cost of care.

**Past Income Loss:**

**47**  The parties agreed that the past income loss is $6,353.75.

**Delayed Entry into Workforce:**

**48**  The plaintiff contends that this accident forced his withdrawal from four courses at Douglas College and he lost a semester. The defendant does not dispute that. The plaintiff further alleges that because he was forced to withdraw from those courses, he was delayed a year in entering the career path that he had chosen. The defendant disagrees. In assessing his claim, I am mindful of the decision of 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=). Major J. said as follows:

1. 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.).

**49**  In my view while the plaintiff had determined to set upon a course of action that would lead to his admission to Royal Roads University there are a number of contingencies with respect to the time that it would take including his probable course load, the history with which he pursued his academic studies up to that point, and his involvement with other activities. There are also contingencies regarding what he might have earned following graduation. Considering all of these factors, in my view, an award of $20,000 is reasonable.

**"In Trust" Claim:**

**50**  The law of "in trust" claims is governed by the principles set out by the British Columbia Supreme Court in ***Bystedt (Guardian ad litem of) v. Hay*** [*2001 BCSC 1735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4GD-00000-00&context=) at para. 180, aff'd [*2004 BCCA 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3NW-00000-00&context=).

**51**  The six relevant factors are:

1. the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
2. if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
3. the maximum value of such services is the cost of obtaining the services outside the family;
4. where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
5. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
6. the family members providing the services need not forego other income and there need not be payment for the services rendered.

**52**  An example of the application of the factors in ***Bystedt*** occurs in ***Dufault v. Kathed Holdings Ltd.***, [*2007 BCSC 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3VD-00000-00&context=). In ***Dufault***, the services provided by the plaintiff involved toileting, bathing, transfer from wheelchair to shower and toilet, laundry, cooking, feeding, and taking the plaintiff to visit health care providers.

**53**  In his analysis, Cohen J. sets out the factors. He reviews the various "in-trust" decisions at paragraphs 175 and 176, and concludes that the services provided to the plaintiff did not go above and beyond what would be expected to be performed out of a sense of love, friendship or family duty. In the result, the "in trust" claim in ***Dufault*** was dismissed.

**54**  The "in trust" claim in the case at bar arises from the care provided by the plaintiff's mother, Mrs. Frankson, to the plaintiff during the time period following the accident.

**55**  In the circumstances here, even if services went beyond that which might be performed out of a sense of love, friendship or family duty, which in my opinion they did not, the plaintiff's mother suffered no opportunity loss, that is, she did not suffer any economic loss as a result of caring for the plaintiff since she was off work on medical leave and under full salary.

**56**  This is not to belittle the services performed by Mrs. Frankson or to suggest that they were not important or necessary to the plaintiff's recovery. Since the services do not exceed what was expected from a family relationship, and there was no opportunity loss, no award can be made under this head.

**Special Damages:**

**57**  The parties agreed to special damages at the sum of $1,624.38.

**Loss of Opportunity/Capacity:**

**58**  The plaintiff argues that as a result of his injuries certain occupations are no longer available to him. It is argued that he could not resume heavy labour. The plaintiff is young. He has embarked on a program leading to a B.Com. degree and is achieving excellent results.

**59**  I was very impressed with the plaintiff's manner and consider it unlikely that a physical labouring occupation will ever represent the apex of his earning capacity.

**60**  I have considered the decisions 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=), ***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.), and the decisions referred to therein. In my view his income-earning capacity has not been impaired and there is no "real possibility" of future income loss.

**Summary:**

**61**  The damages awarded are as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages | $45,000.00 |  |
|  | Future Cost of Care | $ 2,000.00 |  |
|  | Past Income Loss | $ 6,353.75 |  |
|  | Delayed Entry into Workforce | $20,000.00 |  |
|  | Special Damages | $ 1,624.38 |  |
|  |  | ---------- |  |
|  | TOTAL: | $74,978.13 |  |

**Costs:**

**62**  Costs would normally follow the event at Scale B. If there is any issue as to costs the parties may seek to address the court.

J.E.D. SAVAGE J.

**End of Document**

[***Global Pacific Concepts Inc. v. Owners, Strata Plan NW 141, [2013] B.C.J. No. 2641***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S46X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P. Rogers J.

Heard: November 21, 2013.

Judgment: November 29, 2013.

Docket: S102121

Registry: Vancouver

**[2013] B.C.J. No. 2641** | 2013 BCSC 2190

Between Global Pacific Concepts Inc., Plaintiff, and The Owners, Strata Plan NW 141, Defendant, and Century 21 Seaside Realty, Geoffrey Lloyd and Heather Atkinson, Defendants by Counterclaim, and Shawn Smith, Third Party

(23 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Third party procedure — Striking out or setting aside — Third party defence — Judgments and orders — Summary judgments — Evidence — To dismiss action — Application by third party to dismiss third party notice dismissed — Plaintiff and defendants were involved in contract dispute and defendants retained third party lawyer, whom they now claimed failed to meet his professional duties — Defendants and third party disputed scope of retainer — Both parties claimed defendants' agent who retained third party gave discovery evidence that supported their position — Discovery evidence could only be used against party who gave it and it would be unjust to allow third party to take advantage of agent's refusal to swear affidavit and deprive court of important narrative on key issue.**

**Legal profession — Barristers and solicitors — Retention of counsel — Retainer — Duties with respect to retainer — Liability — Standard of care and *negligence* — Application by third party to dismiss third party notice dismissed — Plaintiff and defendants were involved in contract dispute and defendants retained third party lawyer, whom they now claimed failed to meet his professional duties — Defendants and third party disputed scope of retainer — Both parties claimed defendants' agent who retained third party gave discovery evidence that supported their position — Discovery evidence could only be used against party who gave it and it would be unjust to allow third party to take advantage of agent's refusal to swear affidavit and deprive court of important narrative on key issue.**

**Professional responsibility — Self-governing professions — Duties — Contractual duties — Agreeing to act — Duty of care — Practice standards — Liability — Standard of proof — Professions — Legal — Barristers and solicitors — Application by third party to dismiss third party notice dismissed — Plaintiff and defendants were involved in contract dispute and defendants retained third party lawyer, whom they now claimed failed to meet his professional duties — Defendants and third party disputed scope of retainer — Both parties claimed defendants' agent who retained third party gave discovery evidence that supported their position — Discovery evidence could only be used against party who gave it and it would be unjust to allow third party to take advantage of agent's refusal to swear affidavit and deprive court of important narrative on key issue.**

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| Application by the third party to dismiss the third party notice. The plaintiff's claim against the defendant owners arose from remediation work required by the strata development. A dispute arose about the cost of work, and the defendants retained the third party lawyer. The defendants claimed it was the third party's professional responsibility to do more than just look at the memorandum of understanding, and he should have investigated the terms of the underlying contract. The defendants claimed the third party would then have discovered they had resolved to enter a fixed price contract but their agent signed a costs plus contract and had the third party performed his duties, the defendants would have acted differently. In the third party claim, the defendants sought damages for monies paid and owing under the memorandum of understanding. The third party asserted his retainer was limited to advising the defendants whether the memorandum of understanding would cap their liability. The agent who retained the third party on the defendants' behalf did not swear an affidavit but both parties claimed his discovery evidence supported their position.  HELD: Application dismissed.  Rule 12-5(46) provided discovery evidence could only be used against the party who gave it. The agent's evidence was likely relevant and it would be unjust to allow the third party to take advantage of his recalcitrance and deprive the court of an important narrative on a key issue. The third party's liability could not be summarily determined. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 12-5(46)

**Counsel**

Counsel for the Defendant: R.E. McLarty, L. Fung, Articled Student.

Counsel for the Third Party: K.A. Murray.

No other appearances.

**Reasons for Judgment**

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| **P. ROGERS J.** |

**Introduction**

**1**  The issue in the application by Mr. Smith to dismiss the Owner's third party notice is whether the matter is suitable for summary disposition. For the reasons that follow, I have concluded that it would not be just to decide the matter on a summary basis.

**The Litigation**

**2**  In order to give context for the present application, I will summarize my understanding of the litigation and the issues that lie between the parties. My summary should not be taken as a finding of fact on those issues; I mean only to give some sense to the matter that is before me. The reader needs to be patient - it will be some time and a few paragraphs before Mr. Smith will come into the picture.

**3**  Global Pacific's claim against the Owners arises out of remediation work that the Owners' strata development required. At all material times Century 21 and Mr. Lloyd and Ms. Atkinson were under contract with the Owners to act as property managers for the strata development. Mr. Lloyd acted as the Owners' agent in their dealings with Global.

**4**  In or around April 2009, the Owners contracted with Global to perform some limited remediation on their property. That work was estimated to cost on the order of $85,000 to $90,000.

**5**  A month or so into the project, Global advised the Owners that the development required more remediation than originally thought. The Owners resolved to spend as much as $800,000 on a fixed price contract to do that work.

**6**  Later still, in November 2011, Global gave the Owners to understand that the remediation work would require them to spend yet more money. The Owners resolved to spend a further $322,000 for a fixed price contract to complete the work.

**7**  Finally, in early February 2012, Global advised the Owners that it had done even more work and that, in addition to what had already been paid, the Owners owed Global $426,968.16 for that work. Global went on to advise the Owners that in order to do the tasks necessary to finish the remediation work, the Owners would have to pay Global a further sum of $233,700.

**8**  On or about February 1, 2012, Global sent to the Owners a memorandum of understanding setting out the terms it proposed for the completion of and payment for the necessary work. The memorandum of understanding stipulated that the Owners already owed Global $426,968.16 for the work actually done and would have to pay another $233,700 for work that needed to be done in order to complete the project. The memorandum of understanding went on to require the Owners to pay not less than $350,000 against the amounts owing on or before February 15, 2012. The Owners did not immediately capitulate to Global's terms.

**9**  On February 5, 2012, Global's lawyer, Mr. McWhinnie, sent a letter to Mr. Lloyd. In that letter, Mr. McWhinnie pointed out that the Owners had not yet agreed to the memorandum of understanding and that Global wished for the matter to be resolved. Mr. McWhinnie put Mr. Lloyd, and through him the Owners, on notice that if the Owners did not agree to the terms of the memorandum of understanding by noon February 8, 2012, Global would withdraw its offer to resolve its claims on the terms proposed. Mr. McWhinnie warned the Owners that if Global withdrew the offer in the memorandum of understanding, Global would treat the Owners' behaviour as a repudiation of the contract. In that event, Global would file liens against the Owners' properties and would leave the site with the work unfinished.

**10**  In his capacity as agent for the Owners, Mr. Lloyd decided that he should get some legal advice on the memorandum of understanding. He went to see Mr. Smith for that purpose. Mr. Smith is a lawyer, and he had acted in a very limited capacity for the Owners in the past. In the morning of February 8, Mr. Lloyd and Mr. Smith met to discuss the memorandum of understanding.

**11**  The content and quality of the interaction between Mr. Lloyd and Mr. Smith during that meeting forms the crux of the Owners' third party claim against Mr. Smith. Reduced to its simplest terms, the Owners say that it was Mr. Smith's professional responsibility to do more than to simply look at the words written in the memorandum of understanding and to advise the Owners whether the memorandum of understanding would effect an end to the remediation work and to Owners' financial liability to Global. The Owners say that Mr. Smith ought to have investigated the terms of the contract that underlay the memorandum of understanding. Had he done so, the Owners say that, among other things, Mr. Smith would have learned that the Owners had resolved to enter into fixed price contracts with Global but that Mr. Lloyd had, on their behalf, signed cost plus contracts with Global. The Owners assert that had Mr. Smith carried out his professional responsibility to them, they would have acted differently with respect to the memorandum of understanding. They claim damages against Mr. Smith for, among other things, the money they paid and may have to pay pursuant to the memorandum of understanding.

**12**  Mr. Smith says no, that his retainer was limited to advising the Owners through Mr. Lloyd on whether the memorandum of understanding would cap the Owners' liability to complete the project at the numbers noted in the agreement. Mr. Smith maintains that at no time was he advised that the Owners were dissatisfied with the work that Global had done or the price that Global was asking for doing that work. Mr. Smith says that because he was not asked to look into the issue of whether the memorandum of understanding made business sense or was a reasonable compromise of a dispute between the Owners and Global, he was not professionally or otherwise required to look beyond the four corners of the memorandum of understanding.

**13**  The alert reader will have noted by now that I have referred only to assertions made by the Owners and by Mr. Smith. That is because on this application the only admissible evidence comprised affidavits sworn by Mr. Smith and by the Owners' representative Mr. Toews. Mr. Lloyd's side of the story, and in particular his evidence concerning the meeting he had with Mr. Smith on February 8, is missing. I am advised by counsel on this application that it is missing because, on the advice of his counsel, Mr. Lloyd declined to provide affidavit evidence in support of or in opposition to the summary trial.

**14**  The Owners and Mr. Smith did put before the court various excerpts from their respective examinations for discovery of Mr. Lloyd. Each party asserted that Mr. Lloyd's discovery evidence supported their position. Both parties agree, however, that strictly speaking in the context of a summary trial, Mr. Lloyd's discovery testimony can only be used against Mr. Lloyd - it cannot be used to establish facts or issues as between the Owners and Mr. Smith. This proposition is in keeping with the *Supreme Court Civil Rules* and with the Court of Appeal's decision in *Pete v. Terrace Regional Health Care Society*, [*2003 BCCA 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X2WP-00000-00&context=).

**The Issue**

**15**  The thorny issue on this summary trial application is whether it would be just to decide the issue of the scope of Mr. Smith's retainer and the standard of care that he owed to the Owners on the strength of Mr. Smith's evidence alone.

**The Parties' Positions**

**Mr. Smith**

**16**  Mr. Smith says that when the entirety of Mr. Lloyd's discovery evidence is taken into account, the court must come to the conclusion that should this matter proceed to a conventional trial, Mr. Lloyd is very unlikely to say anything to contradict Mr. Smith's evidence about what was said during the February 8 meeting. If that is so, then, according to Mr. Smith, the scope of his retainer is most likely going to be held to be as limited as he says it was and the duty of care that he owed to the Owners will likewise be so limited that he cannot be found to be liable to the Owners. Mr. Smith says that if that prediction can be confidently made, then it would be just and convenient to dismiss the third party claims against him now. He says that dismissing the claim now would achieve a speedy and efficient resolution of the issues raised in the third party notice.

**The Owners**

**17**  The Owners maintain that Mr. Lloyd's discovery evidence reveals that contradictions exist between Mr. Lloyd's and Mr. Smith's recollections of their meeting on February 8. They argue that it cannot be just to resolve those conflicts by comparing Mr. Smith's affidavit evidence to Mr. Lloyd's discovery evidence. For that reason, the Owners say that the third party notice is not suitable for summary disposition.

**The Law**

**18**  Rule 12-5 (46) of the *Supreme Court Civil Rules* provides that discovery evidence may be used only against the party who gave the testimony. Here is an example of the application of that rule: Joe's evidence on discovery that Mr. Bad-Temper assaulted Mr. Victim cannot not be used by Mr. Victim to prove that Mr. Bad-Temper assaulted him. If Mr. Victim wants to prove that proposition through Joe's evidence at a summary trial, the *Rules* require that Joe swear an affidavit testifying that he saw Mr. Bad-Temper assault Mr. Victim.

**19**  The rationale for this provision is not difficult to apprehend: only admissible evidence may be adduced at trial and that is so whether the trial is conventional or summary. *Viva voce* evidence is the usual mode for evidence taking in a conventional trial and affidavits are the conventional mode of evidence taking in a summary trial. Hearsay is conventionally not permitted into evidence in either mode of trial unless the hearsay fits into one of the well-accepted exceptions to the hearsay exclusion rule (or it satisfies the principled approach to hearsay exclusion - a concept that is not in play here). An admission against interest is conventionally accepted as an exception to the hearsay exclusion rule. When a party gives evidence against his interest in his discovery, that evidence may be admitted into evidence against him even though it is not at-trial testimony (i.e.: *viva voce* or by way of affidavit). However, discovery evidence that is not for use against the party giving it is not evidence against that party's interest. It is simply some story about what that party saw or heard. That story is, to put it bluntly, hearsay and it is not admissible for the truth of its content even though it was given under oath at a discovery. Only by putting the story into an affidavit and by swearing to its truth might the story become admissible evidence in a summary trial.

**Discussion**

**20**  I have purposefully not described Mr. Lloyd's discovery testimony in any detail. I have taken that tack because his discovery testimony is not something to which I may properly pay attention on the merits of this summary trial. That leaves only Mr. Smith's evidence to illuminate the scope of the Owners' retainer. Yet, because I have seen something of what Mr. Lloyd might have to say were he to actually give evidence on that topic, I am left with the uneasy sense that his side of the story could help the court to understand the issue.

**21**  This is not a case where a party opposes a summary trial application on the ground that it has not yet performed some necessary step in the litigation. The Owners say, and I accept, that they would genuinely like to have put Mr. Lloyd's story before the court. The Owners say, and I accept, that Mr. Lloyd has rebuffed efforts to have him swear an affidavit for the purpose of the summary trial application. This is a case where, in order for the Owners to get Mr. Lloyd's story before the court, they must wait for Mr. Lloyd to take the witness stand and give his evidence *viva voce*.

**22**  To allow this summary trial to go ahead under the present circumstances would be to allow Mr. Smith to take advantage of Mr. Lloyd's recalcitrance, and thus deprive the court of a potentially important narrative on a key issue in the third party proceeding.

**Conclusion**

**23**  For these reasons, I find that it would not be just to determine the issue of Mr. Smith's liability on the third party notice in a summary fashion. Mr. Smith's application is dismissed. The costs of this application will follow the costs of the third party notice.

P. ROGERS J.

**End of Document**

[***K.T. v. A.S., [2009] B.C.J. No. 2396***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2JY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.K. Ballance J.

Heard: February 23-27, March 2-6, 9-13 and May 4-5, 2009.

Judgment: December 1, 2009.

Docket: M072024

Registry: Vancouver

**[2009] B.C.J. No. 2396** | [*2009 BCSC 1653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2S0-00000-00&context=) | [*2009 CarswellBC 3246*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2S0-00000-00&context=) | [*183 A.C.W.S. (3d) 117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2S0-00000-00&context=)

Between K.T., Plaintiff, and A.S., G.D., and R.M., Defendants

(292 paras.)

**Case Summary**

**Damages — Physical or psychological injuries — Physical injuries — Body injuries — Back and spine — Head injuries — Headaches — Leg injuries — Knee — Psychological injuries — Action by high-school student injured in motor vehicle accident against driver allowed — Plaintiff had pre-existing eating disorder which explained most of her psychological problems post-accident — Plaintiff entitled to non-pecuniary damages of $70,000 for soft-tissue injuries to back and knee and headaches which persisted two years after accident — Minor impact of injuries on employment prospects yielded $75,000 future income loss award — No award for past income loss — Special damages awarded to compensate plaintiff for medical and therapeutic expenditures.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Pre-existing medical conditions — Costs of future care — Loss of earning capacity — Children — Special damages — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Action by high-school student injured in motor vehicle accident against driver allowed — Plaintiff had pre-existing eating disorder which explained most of her psychological problems post-accident — Plaintiff entitled to non-pecuniary damages of $70,000 for soft-tissue injuries to back and knee and headaches which persisted two years after accident — Minor impact of injuries on employment prospects yielded $75,000 future income loss award — No award for past income loss — Special damages awarded to compensate plaintiff for medical and therapeutic expenditures.**

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| Action by KT against AS to recover damages for personal injuries sustained in a 2004 motor vehicle accident. KT was a high school senior at the time of the accident. She had been extremely active in several sports and had suffered from some pain for which she received therapy as a result of her athletics. She also suffered from an eating disorder and was treated for depression and panic attacks. AS was driving, with KT as front seat passenger and other girlfriends in the back, when she negligently entered an intersection and was struck by another vehicle. KT was hospitalized. The next day, she started complaining about back and neck pain, knee problems and headaches. Her anxiety problems escalated. When she started university, she was unable to take a full course load. She had to withdraw from her courses at one point. She continued to play soccer and was at one time assaulted during a tournament. She had several different part time jobs. At one of these, a customer bled on her and she became fixated on the incident to the point of anxiety. She took a few trips overseas where she participated in backpacking and some extreme sports. She also suffered a knee injury in 2007, which ultimately led to her quitting sports. Her mother, who was very observant of KT after her eating disorder came to light, testified she was a different person after the accident. She testified about pain KT suffered while traveling and after working. Friends of KT testified about her showing some pain symptoms and anxiety, although attributing her anxiety more to her eating disorder. Kt testified she had never been pain-free since the date of the accident. KT's prognosis for improvement to her pain condition was guarded. She claimed her injuries prevented her from realizing her dream to become a doctor, although her high school grades in math were less than stellar and she had not completed any university level courses in math or science.  HELD: Action allowed.  KT was awarded $70,000 in non-pecuniary damages, $75,000 for future income loss, and special damages for expenditures for pain medication, therapies and equipment. KT sustained long-lasting soft-tissue injuries from the accident. Her continued participation in athletics after the accident did not show she was not injured, but was attributable to her eating disorder and desire not to gain weight. These activities did cause her pain, especially over the first two years post-accident. Her mild driving apprehension post-accident did not interfere with her life in any significant way. KT's participation in extreme sports and the assault at the soccer tournament were not intervening events. Her 2007 knee injury was a major event that led to a cascade of problems for KT. The escalation of her eating disorder related more to the work-related incident than the accident. Her participation in extreme sports showed her symptoms from the accident were diminishing. It was not clear that KT's injuries seriously limited her career prospects, although the court awarded an amount for the mild diminishment of her future earning capacity. She did not establish a claim for past income loss related to the accident. |

**Counsel**

Counsel for Plaintiff: R.E. McCardell, S.K. Johal, D.J. Wallin.

Counsel for Defendants: D. Richardson, A. Leoni.

[Editor's note: A correction was released by the Court March 29, 2010; the change has been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

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| **S.K. BALLANCE J.** |

**INTRODUCTION**

**1**  On January 17, 2005, the plaintiff and two girlfriends were passengers in a car driven by their mutual friend, the defendant, A.S. All four occupants were in grade 12 and were heading to a restaurant to celebrate having had their graduation photographs taken earlier that afternoon. As the four teens moved into the intersection at Clarke and Broadway, they were involved in a forceful collision.

**2**  Cast broadly, the matters in issue centre on the causation of certain of the plaintiff's physical injuries and psychological injuries, as well as the amount of damages for all injuries. The plaintiff contends that the accident caused her neck, upper back and shoulder pain, headaches, an exacerbation of her sacroiliac joint dysfunction and chronic low back pain that is partially disabling. She contends that her injuries will prevent her from realizing her career aspiration of becoming a medical doctor. The psychological component of the plaintiff's claim is that the accident aggravated her eating disorder, heightened her baseline anxiety, and triggered debilitating panic attacks and other symptoms of post-traumatic stress, such as driving phobia. A hard-fought companion issue connected to these larger disputes, concerns the nature and extent of the plaintiff's pre-existing physical and psychological health.

**BACKGROUND**

***General***

**3**  The plaintiff was 17 years old at the time of the accident. She has been a physically active and athletic person throughout her life. From a young age, she began to participate in a wide variety of sports which expanded in number as she grew. She particularly enjoyed playing soccer, which she took up when she was four or five years old. The plaintiff also played basketball in elementary school and advanced to a life guard ranking in swimming. In high school, in addition to playing Silver A level soccer, she snowboarded periodically, played organized field hockey, and attended yoga class.

**4**  The plaintiff has encountered considerable challenges in the last number of years. Starting in about grade 10, she gradually developed an eating disorder. Within the same time frame, she began to exhibit symptoms of depression, anxiety and obsessive-compulsive tendencies. The plaintiff believes that most of her depression was connected to her eating disorder. In describing her anxiety, she stated that she has always been pretty "high strung" and anxious in general. She agreed that she is an anxious person who will never be relaxed. She is a fidgeter.

**5**  The plaintiff explained that as her eating disorder emerged and grew stronger, her ruminations about food and eating began to consume her. She experienced deep anxiety around food and her body image. She became belligerent, emotional, moody, sad, and overly focused on food and her eating disorder. She also engaged in self-cutting and other mutilating behaviours. Her mother, Mrs. T., found her daughter difficult to handle, and their relationship became strained and volatile in those years.

**6**  Near the end of grade 10 and continuing into the early part of grade 11, the plaintiff experimented with multiple illicit drugs. She also helped herself to liberal amounts of her father's painkillers, Tylenol and ibuprofen.

***Pre-accident Physical Complaints***

**7**  The plaintiff's evidence is that occasionally before the accident, she experienced discomfort in her knees, her hip and upper "butt" areas typically brought on from playing soccer. She periodically received physiotherapy treatment for those ailments which she says usually quickly resolved her discomfort.

**8**  More specifically, on April 22, 2003, she saw her physiotherapist, Lisa Price, for intermittent knee pain associated with running, playing soccer, prolonged sitting, climbing stairs and squatting. Ms. Price recommended that the plaintiff be fitted for customized orthotics and took a casting of her feet. In her clinical notes of May 15, 2003, Ms. Price recorded that the plaintiff had tight hip flexors. In the requisition form that she completed for the orthotics, Ms. Price noted knee and arch pain and low back pain. The plaintiff was questioned about the notation pertaining to her low back at trial. She testified that she was complaining of pain in her hips and "upper butt" region at that time. The orthotics helped her considerably.

**9**  Dr. Deirdre Smith had been the plaintiff's primary doctor for most of the plaintiff's life. In mid-September 2003, the plaintiff complained to Dr. Smith of having strained her left hip flexor three weeks earlier. She also reported continuing pain with soccer, jogging, walking, and especially with the flexion of her hip. Approximately nine days later, the plaintiff saw Dr. Smith's colleague, Dr. Cameron, complaining of a sore throat and fever for four days. At that time, Dr. Cameron also noted "myalgia back; neck". The plaintiff testified that she typically gets back pain when she is ill. Dr. Cameron was not called as a witness to explain his notation. His records do not indicate that he tested the plaintiff's range of motion or carried out any other testing that one would expect to see in response to a complaint of a back injury or dysfunction. I find that the plaintiff's complaints of neck and back pain that day were related to her sore throat and fever.

**10**  Around this time, the plaintiff returned to Ms. Price for physiotherapy. She reported having torn her left hip flexor from playing soccer and complained of pain in her left front hip, central thoracic/lumbar pain and pain with walking, climbing stairs and running. Ms. Price assessed hip flexor strain and sacroiliac joint dysfunction. At trial, Ms. Price explained that the sacroiliac joint is found between the sacrum which is at the base of the spine, and the ilium of the pelvis and essentially connects the spinal column to the pelvic bone. She testified that her treatment focused on the plaintiff's left hip flexor and sacroiliac joint.

**11**  The plaintiff had two additional physiotherapy sessions in October 2003. I find that her primary complaints continued to centre on her sore sacroiliac joint area and hip flexors. During those sessions, the treatment and recommended home exercises were aimed at mobilizing her sacroiliac joints and stretching and strengthening her hip flexors and core. On her final appointment that Fall, the plaintiff was told to attend on November 20 only if she continued to have pain with running. She did not find it necessary to return for that tentatively scheduled appointment.

**12**  The plaintiff next sought physiotherapy on March 20, 2004 and was seen by another of the physiotherapists at Ms. Price's clinic. It is difficult to decipher the notations made by that physiotherapist, who did not testify. What is clear is that the plaintiff's hips were identified as the treatment areas, and that she complained that one or both of them were aggravated by sitting and walking.

**13**  The plaintiff had two more physiotherapy treatments in 2004. On September 2, her left hip and right ankle were treated. During her session on November 25, she reported having sacroiliac joint pain since mid-September and received treatment for her hips. Core exercises and other indecipherable treatment recommendations were made. That was the plaintiff's last physiotherapy appointment before the accident.

***Eating Disorder***

**14**  By the fall of 2003, when the plaintiff was in grade 11, she had given up using illicit drugs. She says that abstaining from those drugs caused her eating disorder to become significantly more pronounced because the drugs had very effectively curbed her appetite. Still active in sports, she began to exercise excessively. By October 2003, her eating disorder was in full swing; she was both restricting her intake of food and purging up to ten times per day. She obsessed about food endlessly.

**15**  The plaintiff successfully concealed her eating disorder from both her parents for some time. However, her mother eventually grew suspicious, and insisted on taking her to see Dr. Smith on October 27, 2003. Dr. Smith referred the plaintiff to the eating disorders program at BC Children's Hospital ("Children's"). Dr. Smith also referred the plaintiff to Dr. V. Kesavan, a paediatrician. He saw the plaintiff in December 2003 and prescribed Prozac and a sleeping aid medication.

***Attendance at Children's***

**16**  Enrolment in the eating disorders program is not automatic. A formal assessment is carried out in order to determine whether a candidate ought to be accepted. The plaintiff attended Children's on January 28, 2004, for her intake assessment. As part of that process, she underwent a psychological consultation with the staff psychiatrist, Dr. Glen Freedman.

**17**  Dr. Freedman testified that his initial interview of the plaintiff was geared toward determining whether she had an eating disorder. According to the written summary of his assessment, the plaintiff reported experiencing numerous psychiatric symptoms. She described being "more or less" depressed, and complained of poor concentration and horrible sleeping patterns over the previous seven months. She told Dr. Freedman that her medications were helping.

**18**  The plaintiff testified that the intensity of her eating disorder was at its height when she met with Dr. Freedman. She stated that she was underweight and hungry virtually all of the time, and that most of the psychological difficulties identified by Dr. Freedman in his assessment were symptoms of her eating disorder. In terms of her concentration, the plaintiff testified that it was impaired because she was obsessed about and distracted by her food intake and weight, and other aspects of her eating disorder. According to the plaintiff's mother, Mrs. T., her daughter's low energy and any sleeping difficulty or poor concentration that she may have been experiencing at that time, was linked to the self-induced cannibalization of her body and nutrient deprivation incidental to her eating disorder.

**19**  During Dr. Freedman's assessment, the plaintiff also spoke about her feelings of anxiety. She told him that she had a tendency to worry about everything, such as her family, friends and what people thought of her. She described feeling anxiety around her present schooling and about her future post-secondary education pursuits. She revealed episodes in which she felt shaky with too many thoughts and of being "in her own world", lasting between 30 to 60 minutes, usually brought on by thinking about distressful subjects. In his written evaluation, Dr. Freedman characterized the plaintiff's features of anxiety as being generalized anxiety, anxiety attacks, and some obsessive-compulsive symptoms. At trial, he stated that those manifestations of anxiety are different from panic attacks. Dr. Freedman also clarified that had his consultation not focused on her eating disorder, he would have elicited more detail from the plaintiff about her bouts of anxiety including the frequency and intensity of her symptoms.

**20**  It was ultimately recommended that the plaintiff be admitted into the eating disorders program. She reluctantly agreed to follow that advice.

**21**  Dr. Freedman met with the plaintiff again on March 5, 2004, shortly before she was scheduled to begin the program. During this second consultation, the plaintiff told him that over the preceding week she had suffered two episodes of intense anxiety during which she experienced an increase in her heart rate and shallow breathing. She reported feeling significant anxiety in relation to her admission into the clinic and told him that those episodes had occurred in that context. At trial, the plaintiff explained that at that point her "entire world" revolved around controlling her food intake and weight. She felt coerced by her mother to attend the clinic, and was afraid of being forced to eat and compelled to address her disorder. She was terrified of putting on weight. I believe her and am satisfied that the impending forced confrontation of her eating disorder had triggered her elevated bouts of anxiety.

**22**  The plaintiff started the intensive regimen at Children's in mid-March 2004. She attended the program all-day, Monday through Friday. Her highly structured schedule required her to take part in various therapies throughout the day, in addition to doing her regular schoolwork. Although the plaintiff dreaded undergoing what she saw as the foisting upon her of treatment, and feared gaining weight, she found that once she began the program, her anxiety began to decrease.

**23**  In time, the plaintiff found that her eating began to normalize, and her mood improved. Then there was a set-back. In around late April 2005, she returned to her high school for a few days. The surrounding circumstances are not entirely clear, but it would seem that there was a strike at Children's which interrupted delivery of the program. The plaintiff believed that she could cope with reintegrating with her peers. Unfortunately, her return to school did not go smoothly. She felt overwhelmed when surrounded by her "pretty and skinny" friends. Sadly, she took an overdose of Prozac and other pills. Her mother rushed her to emergency. The plaintiff testified that she took the so-called overdose in order to "take a break -- a pause -- to wake up fresh", but did not intend to kill herself. That appears to be consistent with the notes of the emergency department psychiatrist. Those notes also record that the plaintiff had tried to commit suicide one year earlier.

**24**  The labour dispute at Children's was resolved by early May, enabling the plaintiff to resume participation in the program. The Children's records for May 12, 2005 indicate that the plaintiff felt anxiety about writing her grade 11 provincial exams and note "discussed anxiety? Panic attacks". I take this notation to mean that the staff psychiatrist queried whether the plaintiff was experiencing panic attacks around that time.

**25**  Other hospital records indicate that the prospect of writing her provincial exams was a source of anxiety and stress to the plaintiff. Her mother testified that she was ultimately exempted from writing them because of her time at Children's.

**26**  The plaintiff felt that her Prozac medication was counterproductive. On May 15, the treating psychiatrist at Children's prescribed Buspar for her anxiety in place of Prozac.

**27**  The records of Children's indicate that throughout the plaintiff's approximately three-month participation in the eating disorders program, she regularly complained of anxiety and poor concentration. However, the weekly reports which were partially filled out by the plaintiff and in part by those involved in her care, also record her progression and improvement. Those reports further identify as an ongoing issue the plaintiff's unwillingness to participate fully in the individual therapy sessions. They indicate that the plaintiff often left those sessions early and would not open up with the therapist, frequently answering "don't know" to the questions posed. The plaintiff explained that she did not "click" with the therapist and did not believe that anyone was genuinely interested in helping her.

**28**  The plaintiff's evidence is that the program at Children's helped her immensely. She testified that she continued to exercise a great deal and was only seldom purging her food. She stated that her mood, difficulties with sleeping and concentration, and her anxiety symptoms had improved significantly. The relationship with her mother became less combative.

**29**  I find that Mrs. T.'s discovery that her daughter had hidden her disordered eating and illicit drug use from her, prompted her to watch her very carefully following her discharge from Children's. Mrs. T. testified that she saw marked improvement in her daughter's emotions and mood after completion of the program. She testified that she was eating healthier and beginning to look forward to and planning her future. I accept that as true.

**30**  The plaintiff was considered to be sufficiently well to warrant being discharged from the program on June 14, 2004. Thereafter, she attended the clinic as an outpatient on at least two subsequent occasions for an update review.

**31**  Notes of the plaintiff's outpatient review dated September 28, 2004 describe her as doing very well, and state that her prescription for sleeping medication was finished, and that she may decide to discontinue her medications on her own. However, the PharmaNet records show that on June 15, 2004 the plaintiff filled a prescription for 60 sleeping pills, and between that date and August 27, 2004, she filled three separate prescriptions for her anti-anxiety medication for a total of 150 tablets. Presumably these would last her well into mid-November. After her discharge, she also persisted in abusing Tylenol and ibuprofen on occasion.

**32**  The plaintiff candidly admitted that while the program at Children's certainly helped to reform her disordered eating, it did not cure her disorder entirely. She believes that she will carry the residual effects of an eating disorder throughout her life. Her mother gave similar evidence about her understanding of the persistent nature of this type of illness.

***Trip to Italy - Summer 2004***

**33**  For approximately five weeks in the summer of 2004, the plaintiff and her mother travelled throughout Italy. They used an apartment in Rome as their home base and went sightseeing by foot for several hours each day. They took train trips of various durations to other destinations. Their combined evidence is that the plaintiff experienced no pain and demonstrated no physical limitations from any of the activities she engaged in during their trip. Indeed, the plaintiff testified that she found their extensive walking to be "fabulous" because it contributed to burning calories and helped her manage her weight. I accept that evidence.

***The accident - Grade 12***

**34**  As mentioned, the collision occurred in the late afternoon as the plaintiff and her three girlfriends were en route to a restaurant. The plaintiff was seat belted in the front passenger seat. They approached the intersection at Clarke and Broadway, travelling at about 60 kph. A.S. continued through the intersection and collided with a vehicle that was attempting to turn left across Broadway. A.S. estimated her speed to be about 40 kph on impact.

**35**  The photographs of the damaged vehicle suggest that the front passenger side where the plaintiff was seated absorbed most of the impact. The force of the collision was strong enough to jam the plaintiff's side door, forcing her to exit the vehicle by crawling over the back seat and through a rear passenger door. A.S.'s "big boat" of a vehicle was assessed as a total loss.

**36**  The plaintiff testified that on impact, her body jerked suddenly forward, and her left knee struck the console. She was too scared and emotional to focus on her physical state. At the time, her perception was that the most significant injury had been sustained by her knee. One of the other passengers, H.R., recalled seeing the plaintiff "bawling her eyes out" at the scene. The plaintiff said she was reacting to the comments of a firefighter who told her she may not have survived the accident had A.S.'s vehicle not been "such a beast".

**37**  It is common ground that three, and probably all four, girls were injured in the accident. Two of them, A.S. and another, were hospitalized for their injuries. The plaintiff also went to the hospital and was met there by her mother. She refused treatment at the hospital because she wanted to get home as quickly as possible. The plaintiff says that she began to have a headache, and her back and neck started to stiffen. She testified that she had a fitful sleep, struggling with pain and fear from her memory of the impact of the accident that night.

***Aftermath of the accident***

***2005***

**38**  The plaintiff saw Dr. Smith the day after the accident complaining of knee pain and pain at the back of her neck. Dr. Smith observed decreased flexion and extension of the plaintiff's cervical spine and neck. She recommended alternating heat and ice, exercises to improve range of motion, and ibuprofen for pain and inflammation. Dr. Smith told the plaintiff that she could try to play soccer and resume jogging. Within two days or so of the accident, the plaintiff attended a soccer practice and thereafter continued to play in regular games. In addition to playing soccer, the plaintiff also resumed field hockey, but she did not snowboard again.

**39**  Because the plaintiff's eating disorder had not completely resolved, daily commitment to exercise continued to be an important aspect of the self-regulation of her weight. I accept that, driven by her eating disorder, it was essential to her that she continue to exercise, even in the face of pain and discomfort.

**40**  On January 21, 2005, the plaintiff saw Dr. Smith's colleague, Dr. Cameron. He made these notations and recommended the plaintiff attend physiotherapy:

Has [headache] today - R side.

Has back pain; T-spine

low back ok @ present

neck ok.

**41**  The defence position is that these notes indicate that the plaintiff had not experienced any low back pain as a result of the accident at that point in time. The plaintiff testified that her low back had been symptomatic before seeing Dr. Cameron, but agreed that she may have told him that it was not bothering her at that time, meaning at the time that she saw him. She denied reporting that she had not suffered any low back pain at all since the accident. In my view, Dr. Cameron's notes are equivocal and are capable of supporting both interpretations.

**42**  The plaintiff testified that in the days and weeks following the accident, she found herself crying over nothing. Her shoulder, back, neck and knee caused her pain. At that stage in her life, the plaintiff commonly kept various journals. She decided to record her symptoms in a journal. That undertaking was short-lived. She made entries for three days only, from January 19 to 21. With the goal of impugning the plaintiff's credibility, the defence raised a concern about the fact that she had not shown her so-called accident journal to Dr. Smith or Dr. Cameron, and had not adequately explained why she decided to discontinue making entries nearly immediately after its inception. In my view, nothing of importance turns on this matter.

**43**  At the time of the accident the plaintiff had been working at her mother's place of employment on a part-time basis for which I find she received some credit at school. She performed ordinary office and clerical tasks and occasionally lifted and moved boxes. She testified that she missed only a couple of days of work after the accident due to her physical injuries. According to the plaintiff, after the accident she found that her back and neck symptoms worsened at work if she stood or sat for any length of time, or bent over to file or photocopy. She struggled moving boxes. She also had some spontaneous crying outbursts. The workplace was flexible and accommodated her need to take additional breaks and reposition herself for comfort. She had never before experienced such difficulties at work.

**44**  The plaintiff testified that after her soccer games, she would have considerable pain in the lower and mid-lying regions of her spine. She says that similar symptoms were triggered when she jogged independently of soccer. The evidence satisfies me that the plaintiff missed a few soccer practices and games in the 2005 season due to her injuries. I accept that she had seldom missed games in the past, even when she had been unwell. I also conclude that after the accident and because of it, the plaintiff's soccer style changed in that she was not as assertive and began to avoid the larger opposing players for fear of physical contact. I further accept that at some point, her coach switched her from defence to a mid-field position because she was not tackling as aggressively as before, and that she was subbed off the field more often than before the accident.

**45**  In late January 2005, the plaintiff participated in a soccer tournament in Victoria. She was the victim of a random assault where she was punched, kicked in the head, and "had the snot beat out of her". The plaintiff was not hospitalized as a result of the assault, and did not complain of any particular injury or ongoing symptoms of any kind connected to it. The defence urges that the physical assault amounts to a subsequent intervening event. Based on that reasoning, it submits that to the extent that the plaintiff's pain is ongoing, it is related to this incident as well as another intervening event, which I will discuss later. There is no cogent evidence to support a finding that the assault was an intervening event of the kind contemplated in the law of ***negligence***, and the point was hardly developed in submissions.

**46**  Within a month or so after the accident, the plaintiff found that due to her physical discomfort, she could no longer participate in both organized soccer and field hockey and therefore withdrew from the latter. She continued to play competitive level soccer until the close of the season sometime in February 2005. Thereafter, she participated in soccer competitions until June.

**47**  Pursuant to Dr. Cameron's recommendation, the plaintiff began physiotherapy with Dana Ranaham at the end of January 2005. She attended six appointments through to mid-March 2005. Throughout those physiotherapy sessions, it was recommended that she do selected exercises for the purpose of strengthening and stabilizing her lumbar spine.

**48**  Ms. Ranaham's records indicate that the plaintiff complained of central low back pain aggravated by sitting, walking, running, and laying on her back. The notation of her March 5 appointment says that the plaintiff was starting to feel better and was stronger at soccer. At trial, the plaintiff agreed that she had reported improvement to the physiotherapist on that date but added that, although she did feel better, she was by no means as well as she had before the accident.

**49**  It is clear from the medical records, including the physiotherapists' report to Dr. Smith, dated April 7, 2005 that the plaintiff's lumbar spine was the primary area of treatment after the accident. The plaintiff did not believe that these physiotherapy treatments ultimately benefited her in a significant way. Throughout her course of physiotherapy within this time frame it was recommended to the plaintiff that she do particular exercises and I find that she did so with reasonable diligence.

***The ICBC Statement***

**50**  On February 3, 2005 the plaintiff and her mother met with an ICBC adjuster to review what purported to be the plaintiff's statement about the accident and her injuries. It had been prepared by the adjuster for the plaintiff's signature. Among other things, the statement said that the plaintiff was making a claim for injuries to her neck, upper and lower back and her knees sustained from the accident. It made no mention of any psychological injuries or aggravation of the plaintiff's eating disorder.

**51**  The evidence establishes that neither the plaintiff nor her mother were entirely satisfied with the accuracy of the contents of the statement. The plaintiff felt the adjuster would not listen. Mrs. T.'s perception was that the adjuster had deliberately attempted to neutralize or minimize her daughter's response to the accident and was offended by the adjuster's portrayal. I am satisfied that Mrs. T. became agitated during the course of the meeting and the exchange between she and the adjuster became heated, upsetting the plaintiff who began to cry. The plaintiff says that she simply wanted to sign the statement and leave and did so hurriedly and without fully revising it.

**52**  The defence urges that the omission of any reference to post-accident psychological symptoms in this statement is significant and supports their contention that the accident did not cause her any such injuries. Given that the statement was provided fifteen days after the accident and before the plaintiff claims that the full load of psychological symptoms had emerged, I do not place any weight on her failure to recite those symptoms in her statement.

***Panic Attacks***

**53**  A particularly contentious feature of this case is the plaintiff's claim that the accident caused her to develop panic attacks as well as other less debilitating symptoms of post-traumatic stress.

**54**  According the plaintiff, her first panic attack came on after the accident while she was in class at school. She says that it surfaced out of the blue with no apparent trigger. It was not clear on the evidence just how soon after the accident this attack is said to have manifested. The symptoms included hyperventilating, sweating, shaking, and crying accompanied by an urge to run away. The plaintiff testified that thereafter and until relatively recently before trial, she endured such attacks a couple of times a week on average. They tend to emerge suddenly, grow quickly in intensity and then dissipate, leaving her feeling shaken. She says that they are obviously detectable to an observer.

**55**  The plaintiff is adamant that her post-accident panic attacks are vastly different in character and intensity than any bouts of anxiety or anxiety attacks that she experienced before the accident.

**56**  Mrs. T. testified that after the accident she noticed her daughter becoming visibly anxious, hesitant, and more tentative about things. She saw a sullen and increasingly belligerent daughter emerge after the accident, and says that their relationship reverted back to the stormy and distrustful days before the plaintiff's treatment at Children's. Mrs. T. also observed the revival of her daughter's eating disorder. She described these changes as striking.

**57**  Mrs. T. also spoke to the emergence of panic attacks after the accident. Strangely, she was not able to offer much in the way of detail. She was not able to recall the first time that she witnessed her daughter in the throes of one, although she believed that it occurred while they were driving in Mrs. T.'s car. Mrs. T. could not say whether or not it had happened before an incident that took place at a liquor store in December 2006, which I will describe later.

**58**  Mrs. T. could not recall her daughter having anxiety or suffering anxiety attacks before the accident. She professed to have no awareness of the plaintiff's litany of pre-accident complaints about difficulty sleeping, concentrating, anxiety, or of her taking Prozac or sleeping medication before her admission to Children's. Mrs. T. would not agree that anxiety was part of her daughter's inherent nature, and claims to have not observed any anxiety in her daughter prior to the accident.

**59**  While I found Mrs. T. to be a credible witness in most areas, her evidence on the vital matter of her daughter's natural anxiousness and the presence of her pre-accident anxiety was not plausible. Mrs. T. was an active participant in the family therapy sessions at Children's. Her daughter had made suicide attempts or gestures in the past, had a history of self-mutilation, and used prescription medication for anxiety and depression. Those factors, in combination with the plaintiff's own description of herself as a high strung and anxious person, make it inconceivable that Mrs. T. would have been unaware of her daughter's baseline anxiety prior to the accident. Mrs. T.'s credibility on the issue of her daughter's anxiety, before and after the accident, was irreparably tainted.

***June - November 2005***

**60**  The plaintiff and her mother both testified that the plaintiff curtailed her social life after the accident. Mrs. T. stated that her daughter began to isolate herself from friends. Although she attended her high school graduation in June 2005, the plaintiff says that she had lost all interest in that celebration. Her mother testified that her once enthusiastic daughter had to be badgered to buy a graduation dress. The plaintiff did travel to Whistler with her classmates and participated in after-grad festivities. There was some vague evidence that she cleaned or helped to clean up the morning after one of the parties.

**61**  The plaintiff next saw Dr. Smith on June 6, 2005. Dr. Smith did not note any complaint of physical injury from the accident or otherwise, and did not examine the plaintiff with respect to any accident-related symptoms. Dr. Smith's record shows a notation of "counselling" during that appointment. The plaintiff believes that her counselling was given with respect to the accident.

**62**  Dr. Smith testified that she does not ask about all of a patient's medical issues at each visit. She explained that it would be onerous to record all symptoms recited at every appointment and therefore her notes might not have captured all of the plaintiff's complaints. At the same time, however, she considered it likely that if her counselling had been related to the accident she would have clarified that in her notes. This June session with Dr. Smith was the first appointment the plaintiff had with a medical doctor since last seeing Dr. Cameron on January 21, 2005.

**63**  The next day, Dr. Smith filled out a CL-19 form provided by ICBC. On it, she reported that the plaintiff had made two office visits, both in January 2005, for accident-related complaints, and reported a grade II soft tissue injury of the plaintiff's neck and upper back. No reference was made to any mid or low back complaints even though Dr. Cameron had noted back pain in the plaintiff's chart on January 21, 2005. On the form, Dr. Smith wrote that she believed that the plaintiff was now recovered to pre-accident status. The plaintiff testified that at some later time Dr. Smith apologized to her for having completed the form without discussing the state of her health with her beforehand. Dr. Smith was not questioned about that matter at trial. I accept the plaintiff's evidence.

**64**  The plaintiff returned to physiotherapy in late October 2005 complaining of tight buttocks around her pelvis. She went back two weeks later complaining of pain in her hips. The plaintiff returned about one week after that complaining of pain in the front of her hip. There is a reference in the records of that session to her "SI" (which I take to mean her sacroiliac joint) feeling better. The plaintiff recollected that she had aggravated her hips while playing soccer around that time. In cross-examination she agreed that this was the same "upper butt" area that she had received physiotherapy treatment for prior to the accident.

**65**  The plaintiff saw Dr. Smith twice more in 2005. Dr. Smith did not record any symptoms related to the accident at those appointments. At trial, the plaintiff stated that she had not raised her ongoing symptoms with Dr. Smith on those occasions because she had been to physiotherapy and was still performing her exercises and assumed that her back pain would eventually go away.

***Trip to Australia - 2005/2006***

**66**  The plaintiff continued to work at her mother's place of employment from graduation until November 2005. She and her mother then took a planned trip to Australia and New Zealand. The decision to take this trip was not influenced by the effects of the accident.

**67**  The plaintiff says that before they set out for Australia she had been experiencing pain in her neck and upper back about once or twice a month. She testified that her low back pain had also continued with varying intensity, and that she regularly endured headaches.

**68**  Mrs. T. testified that her daughter's back was "killing her" from the airplane flight to Australia. She said that when they landed, the plaintiff was in pain and irritable. Mother and daughter travelled together for about five weeks. According to both Mrs. T. and the plaintiff, they had to modify how they explored Australia in order to accommodate the plaintiff's physical limitations and discomfort. They testified that they took in the sights at a slower pace than in the previous year when they travelled throughout Italy. They also rented a car and drove more. According to the plaintiff, when travelling any distance by car, they took frequent breaks to permit her to stretch and move around. Mrs. T recalls that her daughter would often have to lay out on her back to relieve her symptoms upon returning to their room after a morning of sightseeing. I accept this evidence.

**69**  The plaintiff took an ergonomic backpack on this trip given to her by her father. She agreed that it weighed between 35 and, at most, 45 pounds when fully packed. She tried to ensure a balanced distribution of weight by also wearing a daypack on her front to hold heavier items. The plaintiff explained, and I accept, that this was not a backpacking holiday in the sense of wearing her backpack throughout the day while she took in the sights. She testified that she would wear her backpack in short spurts, such as from a taxi to the hotel, or from the car to a push trolley at the airport. She claims that she seldom wore it for more than 45 minutes at a stretch. Even then, she says that it could cause pain to her lower back.

**70**  After her mother returned home in late December 2005, the plaintiff carried on travelling throughout Australia and into New Zealand on her own. She worked as a casual kitchen helper at a hostel a few days per week, usually for four hours each shift. She testified that she found standing and chopping food for more than approximately 20 minutes at a time aggravated her neck and back. When that occurred, the flexibility of the job permitted the plaintiff to relieve her symptoms by switching duties with a co-worker. I accept her evidence.

**71**  While on this trip, the plaintiff participated in the extreme sports of bungee jumping and sky diving; she also tried surfing. The plaintiff testified that she had researched the bungee jumping company for its safety record and asked all the questions that she believed were called for before deciding to participate. She concluded that giving a bungee jump a try would not be reckless or dangerous. The plaintiff testified that the bungee jumping did not cause her any back pain or a flare-up of her symptoms. She stated that she did not see a physician or receive any physiotherapy or other treatment for her physical symptoms while on this trip. There is no cogent evidence to the contrary and I accept her testimony.

***Return from Australia: May 2006***

**72**  The plaintiff returned home in May 2006. She took a summer position as a counsellor at Camp Howdy, an outdoor recreational camp for children and teens. Activities there included archery, canoeing, kayaking, arts and crafts, field games and campfire. The plaintiff testified that although she did take part in most of the activities, she was not required to participate as fully as the children. She explained that her chief role as a counsellor was more to demonstrate the techniques of each sport, instruct the children about safety and game rules, organize arts and crafts and supervise the children's movements across the board. Even with her limited participation, I accept that her symptoms would become aggravated from time to time.

**73**  Occasionally, the plaintiff led the children on a two-kilometre walk around a nearby lake. They would amble along at a leisurely pace and, because a number of the younger children took part, they would take regular breaks. According to the plaintiff, by the end of the walk, her back would bother her.

**74**  The plaintiff also resumed physiotherapy in June 2006 soon after her return from Australia, complaining of chronic hip and low back pain. Some months later, on September 11, 2006, she saw Dr. Smith, reporting chronic back pain since the accident. She also complained of bilateral hip pain which Dr. Smith said referred to the plaintiff's pre-accident hip pain stemming from a soccer injury. Although Dr. Smith did not particularize in her notes the location of the plaintiff's back pain, she sent the plaintiff for x-rays of her dorsal (thoracic) and lumbar spine. It is reasonable to infer that she did so because the plaintiff had complained of mid and low back pain. The x-ray findings turned out to be normal except for identifying a minor scoliosis of the plaintiff's lumbar spine.

***Simon Fraser University - 2006***

**75**  In the Fall of 2006, the plaintiff enrolled as an undergraduate student at Simon Fraser University ("SFU"). She took three courses, for a total of ten credits. She testified that she had wanted to take a full course load but that her accident-induced symptoms, and particularly her compromised sitting tolerance, impaired her ability to do so.

**76**  The plaintiff described how she was required to move her position while sitting in class in order to maintain comfort. She found that distracting and says it interfered with her ability to concentrate. Despite that, by working diligently, she achieved excellent marks in the three courses she took that semester. Around this time, she also rejoined competitive soccer and played until February of the following year.

**77**  The plaintiff also took a part-time job at a business where her mother's friend worked. Her position consisted of basic clerical work. I accept that although she found the static sitting and standing to be difficult because of her physical injuries, she was able to perform her duties because she had sufficient flexibility to change tasks and positions over the course of her shift.

**78**  The plaintiff returned to Dr. Smith on November 22, 2006, reporting that she had stopped attending physiotherapy in 2005 because it had not helped her pain to any large degree, and not because her pain had resolved. Dr. Smith could not recall the area of pain that the plaintiff was referring to when she spoke of the futility of physiotherapy. I infer that it was her back.

**79**  During the same session, Dr. Smith recorded complaints of severe "anxiety symptoms again, panic attacks, eating disorder again". Dr. Smith testified that by using the word "again" in relation to the plaintiff's anxiety symptoms, she was referring to the plaintiff's pre-accident anxiety difficulties. She did not give any evidence to indicate that the plaintiff had reported panic attacks to her before the accident. This marked the first time after the accident some 22 months earlier, that the plaintiff mentioned experiencing panic attacks to a health care provider. Dr. Smith re-prescribed Buspar for the plaintiff's anxiety. She noted as well that the plaintiff refused a referral to a psychiatrist or for counselling. She also referred the plaintiff to a dermatologist to address a molloscum on her face. The plaintiff followed through on that referral.

**80**  On December 14, 2006, the plaintiff saw Dr. Cameron about a stye on her eyelid. She mentioned that she was enjoying SFU, and wanted to go into medicine.

***Liquor Store Incident - December 2006***

**81**  In December 2006, the plaintiff took a seasonal position working at various liquor store outlets. She worked as a cashier, unloaded inventory, stocked shelves and the like. She averaged three to four, eight-hour shifts per week. The plaintiff testified that her requisite job duties, especially prolonged standing at the till, were incredibly painful. There was little opportunity for her change positions or stretch, and she often felt "crippled" at the end of her shift.

**82**  During one of her shifts, drops of blood from the wound of a "homeless" person fell onto the plaintiff's hand. As she put it, the event really "freaked her out". In the ensuing weeks and months, she could not stop herself from washing her hands obsessively and fretting about prospect of contamination from the drops of blood. The plaintiff recognized that her extreme reaction to the incident was disproportionate to the reality of what had occurred; yet still, she could not stop.

***2007***

**83**  The plaintiff enrolled in three courses (ten credits) in the spring semester at SFU.

**84**  She again consulted Dr. Cameron on January 29, 2007 about the persistent stye on her eye, and was referred to an ophthalmologist whom she saw two weeks later.

**85**  In February 2007, the plaintiff's left knee spontaneously swelled, causing her extreme pain. She visited a walk-in clinic and was sent for an x-ray. She concedes that the onset of that swelling and pain has no connection to the accident. After sustaining the knee injury, the plaintiff was not able to play soccer or jog.

**86**  The plaintiff next saw Dr. Cameron on February 26, 2007 complaining of thoracic spine pain at her shoulder blades and low back pain since the accident. She repeated what she had previously told Dr. Smith about having stopped physiotherapy because she felt she had not been improving from it.

**87**  When she returned to Dr. Cameron on March 29, 2007, the plaintiff told him about the onset of her left knee swelling and that the pain was persisting. He referred her to physiotherapy and she attended a few sessions with some benefit.

**88**  My impression is that the plaintiff downplayed the far-reaching impact that her knee injury had on her ability to jog, play sports and function generally. At one point at trial, she testified that her knee dysfunction alone had caused her to stop playing soccer. She also described it as the reason she had not tried jogging again until relatively recently. Yet, at another point, she claimed that it was her knee injury in combination with her back pain that prompted her to give up those activities.

**89**  I conclude that the plaintiff gave up soccer and jogging in February 2007 exclusively because of her knee difficulty. I find that her knee continued to cause her pain and difficulty well beyond the date that she was assessed by the functional assessment expert, Gerard Kerr, in October 2007.

***Referral to Dr. Surekha Patel***

**90**  At some stage in 2007, Dr. Smith retired from her medical practice and referred her patients, including the plaintiff, to Dr. Surekha Patel.

**91**  The plaintiff first saw Dr. Patel on April 17, 2007. Dr. Patel completed a form based on information supplied to her by the plaintiff authorizing the transfer of the plaintiff's medical file from Dr. Smith's office. It contains no reference to the accident or any neck or back pain, although the sports injury to her left knee was noted.

**92**  The plaintiff returned to Dr. Patel on April 20, accompanied by her mother, and described the liquor store incident in detail, her eating disorder and her past use of illicit drugs. I find that Mrs. T. attended this appointment because she had grown extremely worried that her daughter continued to be fixated on and deeply distressed over the liquor store incident.

**93**  The defence says that these and all of Dr. Patel's subsequent records are remarkable for their lack of any reference to complaints by the plaintiff of low back pain and other physical symptoms, and the absence of prescriptions for pain medications. The plaintiff insists that she had mentioned her ongoing symptoms from the accident to Dr. Patel, although she could not recall whether she had done so in the first or second appointment. She testified that from the outset Dr. Patel laid down the rule that she was not prepared to treat or otherwise deal with any of the plaintiff's injuries stemming from the accident. At trial, Dr. Patel supported the plaintiff's testimony. She confirmed that she had not been prepared to become involved in an ICBC case and had therefore accepted the plaintiff as a new patient with that explicit limitation.

**94**  Dr. Patel testified that she raised the matter of her refusal to take on an ICBC matter during the plaintiff's second visit, when Mrs. T. was also in attendance. The defence contends that the second visit took place on April 30. Although I find nothing turns on it, the second visit occurred on April 20, and not on the 30. In any event, I think it is obvious that the topic of the accident and the plaintiff's resulting injuries must have come up, at least in a general way, in order to prompt Dr. Patel to articulate her refusal to treat the plaintiff in that regard.

**95**  I conclude that the plaintiff accepted the imposition of Dr. Patel's restriction because she needed a new family doctor, and had a pressing need for medical attention in relation to her protracted obsessing and anxiety over the liquor store incident. I find as well that, at that juncture, the plaintiff's soft tissue symptoms had greatly improved and were of minor concern in comparison to the persistent ill-effects of the event at the liquor store.

**96**  The plaintiff returned to see Dr. Patel on April 30, still worried and crying about the liquor store incident. Dr. Patel made a note to refer her to a psychiatrist. However, the plaintiff had just completed her second semester at SFU and was about to depart on a holiday. Therefore, she did not see a psychiatrist at that time.

**97**  The plaintiff and her mother travelled throughout Spain and Portugal in May and June 2007. The plaintiff testified that her symptoms periodically flared up from all the walking on this trip. She recalled being unable to climb up a lengthy progression of stairs leading to a Gothic cathedral, and struggling to walk down a hill in Gibraltar, which caused her significant low back pain. She says that she found it frustrating to be young and supposed to be able to do those simple movements without difficulty, yet instead had to hop on the bus "with the rest of the seniors". Mrs. T. recited similar difficulties faced by her daughter during their travels that summer. While I accept that the plaintiff continued to experience pain and difficulties from her accident-induced injuries at that time, I find that her unresolved knee dysfunction also contributed to her movement difficulties and pain.

**98**  Upon returning home from Europe, the plaintiff recommenced her summer job at Camp Howdy. That summer, her high school friend, D.C., also worked there as a counsellor. He confirmed that the counsellor's duties were not physical strenuous, and that a good part of the job was supervising the children as opposed to actively participating in all of the recreational activities. D.C. said that he typically crossed paths with the plaintiff once a day at Camp Howdy for a few minutes at a time. In that narrow window, he did not notice that the plaintiff had any physical limitations at work, nor did she complain to him of pain while carrying out her duties as a counsellor.

**99**  In September 2007, the plaintiff enrolled in three courses, worth eleven credits, at SFU. Unlike the preceding semesters, this time she took university level math and chemistry. She was also employed as a part-time nanny, approximately three hours each school day afternoon, until December 2007. The plaintiff testified that she occasionally had difficulty with symptom aggravation when picking up one of the children.

***Referral to Dr. Janine O'Kane***

**100**  It would appear that the plaintiff continued to take her anti-anxiety medication throughout this time or for most of it. She did not meet with the psychiatrist, Dr. Janine O'Kane, to whom she had been referred by Dr. Patel, until November 1, 2007.

**101**  In their initial session, the plaintiff's presenting complaint was anxiety. She told Dr. O'Kane that she had always been an anxious person but that it had worsened after the liquor store incident and had become even more heightened over the preceding few months. In describing her anxiety symptoms, the plaintiff said that she felt very ill at ease and had difficulty getting to sleep and spent time lying awake at night worrying about her school work and about possible contamination from the liquor store incident. At trial, the plaintiff testified that her school work and the liquor store incident were not her only sources of anxiety at that time.

**102**  The plaintiff also told Dr. O'Kane that she had been experiencing panic attacks approximately every week. She said they were characterized by feeling overwhelmed with anxiety and dread. Dr. O'Kane noted that the plaintiff's coping techniques, such as taking baths, reading, and watching television were far from completely effective.

**103**  The plaintiff confided in Dr. O'Kane that she felt very emotional and at times tearful. She complained that her energy was down, that she had difficulty concentrating and that her school grades were not "going well". It was obvious to Dr. O'Kane that the plaintiff needed treatment for her anxiety and depression. She suggested a low dose of Effexor to start. The plaintiff's prediction of poor school performance that semester was accurate, as she ended up achieving low marks in math and chemistry.

**104**  The plaintiff also spoke to Dr. O'Kane about the accident. She reported that her back pain prevented her from sitting in lectures and standing in labs for prolonged periods of time and in that way interfered with her school work. She also said that she found the process of dealing with the legal system and ICBC to be stressful. She did not mention anxiety around driving, nightmares or ruminating about the accident, or other psychological sequelae related to the accident. At trial, the plaintiff did not give a credible explanation for that omission.

**105**  Dr. O'Kane noted that the plaintiff was very reluctant to open up about her eating disorder, about which she felt deeply ashamed, because she was in the process of dealing with her claim with ICBC and was concerned about confidentiality. However, as the interview progressed, she became more forthcoming and it became apparent to Dr. O'Kane that her disorder was active. Because of the potentially serious medical implications of her eating disorder, the balance of the interview revolved around that topic and not her anxiety or accident-induced symptoms.

**106**  Dr. O'Kane recorded that the plaintiff told her that she had hoped to become a psychologist. The plaintiff denied that at trial. She testified that she has never wanted to be a psychologist and that what she told Dr. O'Kane was that she had hoped to become a psychiatrist. At that stage, the plaintiff had taken only one psychology course at SFU; however, she took three classes in that subject the following term and ultimately declared psychology to be her minor and then major of her Bachelor of Arts degree. She had also taken an advanced placement psychology class in high school. Her friend, D.C., had understood in high school that the plaintiff was interested in becoming a psychologist or a physician. I find Dr. O'Kane's note to be accurate.

**107**  The plaintiff testified that she had an opportunity to take on casual work at the liquor store after December 2006, but declined primarily because the job aggravated her back and, to a lesser extent, because of the contamination incident. My assessment of the evidence is that the contamination incident was the sole source of her decision not to return.

***2008***

**108**  The plaintiff increased her course load to four classes (twelve credits) in the 2008 Spring semester. They were all arts courses. She did very well that term, achieving marks ranging from A to B-. She was also able to work on a part-time basis. From early January 2008 until March 2008, she worked one or two days per week at Modern Drywall where her father was the foreman. Her duties consisted mostly of collecting and disposing of small pieces of drywall debris, removing the polyurethane tarping over the windows and vacuuming the window sills. She testified that her father was well aware of her physical limitations and did not expect her to do any heavy labour work. She says that he accommodated her limitation by assigning her light duties and relieving her of physically aggravating tasks.

**109**  The plaintiff said that she returned to work for Modern Drywall in September 2008. She testified that, because her father was no longer the foreman, she was not given the same kind of job accommodations. She says she found the work to be too aggravating to her back and was only able to last the one day. Her evidence on this point is not consistent with the Modern Drywall payroll records which show that the plaintiff did not collect any pay after March 4, 2008. The plaintiff's father did not testify.

**110**  In the meantime, pursuant to Dr. O'Kane's recommendation, Dr. Patel switched the plaintiff's medication to Effexor.

**111**  The plaintiff travelled to the United Kingdom and Ireland on her own in May and June, 2008. She took her backpack and stayed in hostels. Beyond that, there was very little evidence about her activities during that holiday or whether her symptoms bothered her. When the plaintiff arrived home around June 21, 2008, she returned to work at Camp Howdy for the summer and so did her friend, D.C.

**112**  On July 25, 2008, the plaintiff told Dr. Patel that she was not doing well on Effexor. Dr. Patel changed her medication to Paxil and she fared much better.

**113**  In the Fall of 2008 the plaintiff again took four undergraduate courses (thirteen credits) at SFU. She scored high marks just as she had done the preceding semester. Also in or around this time frame, the plaintiff came to realize that she had been putting on weight as a result of taking Paxil. She testified that gaining weight was severely straining on her mood and her doctor prescribed an alternate medication. There can be no doubt that the plaintiff continues to struggle with her eating disorder.

**114**  On December 10, 2008, Dr. Patel performed a physical examination of the plaintiff. It was done at the request of her counsel for the purposes of providing an opinion in this litigation about the nature of the plaintiff's soft tissue injuries, and whether they were caused by the accident.

***2009***

**115**  In January 2009, the plaintiff scaled back her course load to three classes from four. She says that she had found taking four courses in a single semester to be overwhelming, and described the exam period as being nearly incapacitating. She also pointed to the fact that the increased studying and sitting in class had aggravated her back. The plaintiff candidly acknowledged that she had also found her school work and impending provincial examinations extremely stressful when she was attending the program at Children's. However, she said that the nature and intensity of the stress connected to her SFU workload with four classes was decidedly different. She did not elaborate much on what those differences consist of. I conclude that an aspect of her difficulty coping with the increased course load in the Fall 2008 semester was the fact that her medication was causing her to gain weight. I do not consider the impact of that unwanted outcome to have been insignificant.

**116**  In mid-February, the plaintiff formally withdrew from all of her classes. The primary reason she gave for doing so at trial was her chronic back pain which made it difficult for her to sit or stand for prolonged periods. She gave as a secondary reason the stress brought on in confronting the bleak prognoses and ability to succeed at medical school expressed in the reports of her medical experts over the preceding months.

**117**  At the plaintiff's request, Dr. Patel completed SFU's requisite form in support of her withdrawal that semester. Dr. Patel identified the plaintiff's anxiety and depression, and her resulting lack of focus and concentration, as the conditions that prevented her from attending class. Dr. Patel also wrote on the form that she expected it likely that the plaintiff would be able to resume fulltime studies in September 2009, and that she had recommended that the plaintiff attend counselling and see her psychiatrist again.

**118**  It is noteworthy that Dr. Patel does not implicate the plaintiff's physical injuries from the accident as a reason for her withdrawal even though she had conducted her independent assessment of the plaintiff just two months earlier.

***Collateral Witnesses***

**119**  The plaintiff's girlfriend, H.R., had also been in the accident. She testified that all four of the girls had sustained whiplash-like symptoms and that she continues to have lingering headaches and back pain to this day.

**120**  Following the accident, H.R. and the plaintiff continued to see one another on weekends when they would enjoy a "girl's night" with other friends. They typically saw one another as part of a larger group which often included the defendant, A.S. It had only been within the last few months that H.R. and the plaintiff had spent time together alone.

**121**  H.R. does not attend SFU. She has never worked out or played any sports with the plaintiff. She was not even aware that the plaintiff had quit field hockey after the accident. Nor was she aware of the plaintiff's pre-accident physical difficulties. She did know, however, that the plaintiff was grappling with an eating disorder and depression and anxiety. They were never confidants.

**122**  Each of H.R. and D.C. confirmed that after the plaintiff's discharge from Children's, she seemed to be eating more healthily, her outlook on life had improved, and her anxiety appeared to have stabilized.

**123**  H.R. testified that she did not notice any change in the plaintiff's social life until after she returned from Australia. At that point, the plaintiff appeared to be dealing with emotional issues such as depression and anxiety which curtailed her social life. H.R. recalled witnessing the plaintiff having a panic attack on one occasion after the accident. They had been to dinner at a restaurant and the plaintiff had eaten a lot of food. The plaintiff could not breathe and had to be taken outside for fresh air. From H.R.'s perspective, this panic attack was wholly related to the plaintiff's eating disorder and her issues around food.

**124**  H.R. noticed the plaintiff behaving somewhat abnormally as a passenger in a car after the accident. She described the plaintiff as being extremely observant of the goings-on outside and inside the car. She would hear her quietly caution the driver "you're going too fast", "someone is crossing the street" or "look out". She stated that the plaintiff tended not to comment on A.S.'s driving because A.S. would simply tell her to be quiet. H.R. largely supported the plaintiff's evidence concerning an incident in 2008 where the plaintiff had switched from a car driven by an erratic driver, to the vehicle drive by A.S., on the way to Powell River. D.C., on the other hand, had not witnessed the plaintiff being hyper-vigilant or exhibiting any unusual behaviour as a passenger in his car. She did not strike him as being withdrawn from graduation activities in grade 12, nor had he observed any change in her social activities since the accident.

**125**  Both H.R. and D.C. described the plaintiff as a stoic and private person who tended not to complain about her aches and pains. H.R. testified that although the plaintiff did not complain to her of any pain after the accident, she noticed the plaintiff placing her hands on her low back while standing around during their social interactions.

**126**  I found both D.C. and H.R. to be credible witnesses. It is my impression that of the two of them, H.R. had more regular contact with the plaintiff during and after high school and therefore has a greater awareness about her. I accept H.R.'s evidence about her observations of the plaintiff before and after the accident.

**127**  The defendant, A.S., also gave evidence. She and the plaintiff had been good friends since grade 8. They continued to maintain a friendship after grade 12 even though they did not attend the same post-secondary institutions. They socialized together, attended yoga on occasions and saw one another most weekends. A.S. recollected that the plaintiff complained of a sore back once in a while when they were still in grade 12 and throughout the following summer. After the plaintiff returned from Australia, they spent time studying together. A.S. testified that the plaintiff would complain about her back when studying, although she did not say much. She also recalls that before the "lawyers got involved", she heard the plaintiff complain of having a headache about once a month. Not surprisingly, their relationship declined steadily after the plaintiff launched this lawsuit in 2007.

**128**  A.S. testified that she had suffered a whiplash-type injury and hurt her back as a result of the accident and received chiropractic treatment for her accident-related back injury. She admitted that she continues to see a chiropractor every now and again to relief back symptoms which she says are brought on by her clumsiness and are not connected to the accident.

**129**  A.S. claimed not to notice anything unusual about the plaintiff's demeanour while riding in a car after the accident. At the same time however, she corroborated the plaintiff's evidence about switching vehicles during the Powell River trip. She did not believe that any of their other friends had switched vehicles. She confirmed that among their mutual friends, she was considered to be a safe driver.

**130**  A.S. admitted to being very unhappy about being involved in this lawsuit and testified that she made her feelings clearly known to the plaintiff. Understandably, their contact in the months leading up to this trial has been infrequent and unfriendly. There are clearly hard feelings on A.S.'s part. That was evident in her apparent eagerness to discuss aspects of the plaintiff's life that were personally embarrassing and painful and not crucial to the issues at hand. I contrast A.S.'s courtroom composure with that of H.R. who appeared extremely uncomfortable and emotional about answering similar questions. While I found A.S. to be generally credible, I have reflected that bias in the weight given to her evidence.

**131**  When testifying at trial, the plaintiff often sat in a partial lotus-like position with one leg over her front and the other leg bent upward, with her arms grasping around the knee. The plaintiff testified that she had adopted this unique sitting posture after the accident because it relieved her low back symptoms. She said that before the accident, she sometimes adjusted her sitting posture to accommodate discomfort with her knees or from the pinching at the front of her hip flexors. She contends that it was very different from the posture she has adopted as a means of relieving the pain and discomfort from the accident-induced injuries.

**132**  Defence counsel questioned the plaintiff's three friends about her peculiar sitting position. D.C. did not recall anything remarkable about the way the plaintiff sat either before or after the accident. H.R. had a clear recollection. She testified that before the accident the plaintiff sat cross-legged with both feet up off the floor. She testified that after the accident, she noticed the plaintiff sitting cross-legged when seated on the couch, but did not elaborate further.

**133**  A.S. also testified about the plaintiff's sitting posture. She said that, the plaintiff often sat cross-legged or with one leg under her "butt" before the accident. It was not clear to me whether her description was meant to refer to the way the plaintiff sat during trial or some other sitting position. Counsel for the defence contend that the plaintiff's evidence on this matter directly contradicts the evidence of H.R. and A.S. and further impugns her credibility. I do not agree. The testimony of A.S. and H.R. on the point was not precise. I do not consider H.R.'s evidence to contradict the plaintiff's and do not regard the evidence of A.S. to be necessarily contradictory either. While it is clear that before the accident the plaintiff often sat in a unique position and may have sat that way on occasion after the accident, the evidence does not go so far as to establish that she ever sat in her partial lotus style before the accident. I am satisfied that such a posture was assumed by the plaintiff after the accident to help relieve her symptoms.

***Plaintiff's Medical, Functional Capacity and Vocational Experts***

***Dr. Surekha Patel, General Practitioner***

***Assessment Date: December 10, 2008***

**134**  The plaintiff was examined by Dr. Patel specifically in relation to her accident-induced injuries on December 10, 2008.

**135**  On examination, Dr. Patel found tenderness and spasm in the plaintiff's neck, the left side of her upper back and her left paramedian muscle region. Dr. Patel was aware from reading the other medical reports that the plaintiff's lower back was her primary area of pain and dysfunction. However, she made no findings of tenderness or spasm in that area on the date of her examination, and therefore did not offer an opinion about the nature of the plaintiff's low back complaint or the cause of it. In cross-examination, Dr. Patel went on to say that the plaintiff had not mentioned back pain at that time, and that she did not find any back pain problems at that time. She clarified that she was speaking about the plaintiff's lower back.

**136**  As I understand the submissions of defence counsel, they interpret Dr. Patel's testimony to the effect that the plaintiff did not mention to her that she had ever suffered from low back pain, at any time. The defence asserts that Dr. Patel's testimony directly contradicts the plaintiff's evidence where she stated that she "definitely told" Dr. Patel that she had experienced low back pain from the accident. In this context, the plaintiff elaborated that she told Dr. Patel that her low back symptoms were the primary source of her pain, but that Dr. Patel could not find any low back pain symptoms on her examination that particular day.

**137**  Although I found Dr. Patel's testimony on the point somewhat muddled, I do not interpret it as incompatible with the plaintiff's on this point. In giving her testimony, Dr. Patel was clearly focussed on the fact that the plaintiff had not complained to her of any low back pain at the precise time of the examination. Moreover, in cross-examination, she was taken to the aspect of Dr. Hershler's report where he states that he found pain in the plaintiff's lumbar spine. She answered that she did not similarly find such pain on her examination, and stated that the absence of pain on that particular day did not mean that such pain does not exist. Dr. Patel's answer reinforces my assessment of her evidence, namely that when she spoke of there being no complaint by the plaintiff of lumbar spine pain when examining her, she was referring to the experience of pain on that specific day and not more broadly.

**138**  Dr. Patel was cross-examined about a number of the plaintiff's post-accident physical activities with the suggestion that partaking in them was inconsistent with a claim of neck and back injury or with severe injury to those areas. She was not aware that the plaintiff had gone bungee jumping while in Australia. She agreed in general terms with the contents put to her of an article titled "Injuries and Bungee Jumping" published in the 1995 edition of the *Sports Medicine* Journal, to the effect that there can be significant forces exerted on the spine when bungee jumping, and that, although limited in number, spinal trauma from that extreme sport has serious consequences. She emphasized that not all participants sustain spinal injuries in that sport. She would not agree that participation in that activity would necessarily indicate that the plaintiffs back injury was not severe. However, she did agree that the ability to sky dive could indicate that the plaintiff's back injury may not be severe.

**139**  Dr. Patel did not become the plaintiff's doctor for more than two years after the accident, and would not treat her for any injuries stemming from it. It is, therefore, not surprising that she did not know that the plaintiff had returned to soccer shortly after the accident. In any event, Dr. Patel would not agree that resumption of that activity necessarily meant that the plaintiff's injuries were not "so bad", testifying that many patients play sports after an accident before they notice the severity of their pain. She did agree, however, that continuing to play soccer for two years after the accident could indicate that the player's back injury is "not that severe". I accept Dr. Patel's general statement as a common-sense proposition as far as it goes. However, the application of it must be evaluated in the circumstances of an individual plaintiff. I have more to say about this issue under the heading of damages.

**140**  Based on her clinical examination, Dr. Patel diagnosed soft tissue injuries to the plaintiff's neck and upper back, and cervicogenic headaches secondary to the soft tissue injury to her neck. In Dr. Patel's opinion, those soft tissue injuries resulted directly from the accident. It is also her view that the plaintiff is at higher risk of injury to her neck and upper back because of the accident.

**141**  Dr. Patel offers a guarded prognosis. In light of the chronicity of the plaintiff's neck and upper back symptoms, she considers the likelihood of complete resolution to be slim.

***Dr. Cecil Hershler, Physiatrist***

***Assessment Date: March 18, 2008***

**142**  Dr. Hershler was qualified to give expert opinion evidence with respect to the diagnosis, management and treatment of musculoskeletal, musculoligamentous and soft tissue injuries, including chronic pain.

**143**  Among other things, Dr. Hershler found the movements of the plaintiff's head, neck and lumbar spine to be fluid. He likewise detected no restriction in the range of motion of her lumbar spine. Dr. Hershler found muscle tenderness points in her upper trapezius muscles, more notably on the left side than the right. The plaintiff complained to him of pain consistently on extension of her lumbar spine and he was able to consistently trigger a pain response with specific loading of the plaintiff's facet joints.

**144**  Dr. Hershler concluded that the plaintiff's medical history and his physical findings were consistent with two musculoskeletal injuries:

*1. Muscle injury to her neck and shoulders*

He concluded that the plaintiff's upper trapezius muscle was mainly affected, and that it explained her headaches and left shoulder pains.

*2. Mechanical injury to her lumbar spine*

In Dr. Hershler's view, this injury is predominantly in the plaintiff's ligaments and probably the facet joints of the spine, which would explain why she experiences pain with extension.

**145**  In Dr. Hershler's opinion, both of these spinal injuries were caused by the accident.

**146**  Dr. Hershler could not implicate the slight scoliosis in the plaintiff's back to her post-accident pain or symptoms. He would not agree that her scoliosis would become symptomatic in adult life absent the accident, explaining that it is typically a benign and asymptomatic condition.

**147**  In cross-examination, Dr. Hershler would not agree that the mere fact of the plaintiff wearing a backpack during her holidays could cause her back pain. He testified that if she wore it in a manner where she does not arch her back, then it ought not to be a problem.

**148**  Nor would Dr. Hershler agree that the fact that the plaintiff took part in bungee jumping meant that her back is "not that bad". He stated that one would have to take into account the fact that the plaintiff is a very athletic woman, and would depend as well upon the nature of the load on her facet joints from that activity. According to Dr. Hershler, bungee jumping could actually create a traction or distraction force of the spine that would not be unhelpful to the plaintiff.

**149**  A similar proposition was put to him in relation to skydiving. Dr. Hershler answered that skydiving itself does not place enormous forces on the spine. He testified that if the plaintiff had landed awkwardly or with force on her spine, then such an activity could pose a problem.

**150**  It was suggested to Dr. Hershler several times throughout cross-examination that the plaintiff's pre-accident areas of pain in her hip flexors and "upper butt" were virtually in the same area as the low back pain she claims to have suffered from the accident. Dr. Hershler persuasively testified that the sacroiliac joint is a completely discrete anatomical region from the lumbar spine and even has a different pain referral pattern when it is injured. Using a model, he demonstrated the obvious difference. Dr. Hershler did not see any connection between the injuries recorded by the plaintiff's pre-accident physiotherapy records and the injuries she claims to have sustained in the accident. He regarded these pre-accident physiotherapy records as fitting with the plaintiff's own admission to him of injury and pain in unrelated areas prior to the accident.

**151**  Due to the chronicity of the plaintiff's many years after the accident, Dr. Hershler gave a guarded prognosis for her full recovery. He stated that he was not yet comfortable to know when in the future she might be recovered.

***Dr. Stanley Jung, Chiropractic Rehabilitation Specialist***

***Assessment Date: March 4, 2008***

**152**  Dr. Jung was qualified as a chiropractic specialist, special consultant in injury rehabilitation, and a specialist in the treatment and management of chronic pain. His practice is restricted to referrals from chiropractors and physicians who seek a second opinion in respect of patients whose recovery has plateaued. Dr. Jung assesses several hundred patients each year, the vast majority of whom have chronic pain arising from soft tissue injuries. Approximately 80% of his practice involves facet joint injuries.

**153**  As part of his evaluation, Dr. Jung tested the plaintiff's range of motion with a device called a dual inclinometer. He described it as the "gold standard" method, explaining that it allows for significantly more precise, and hence reliable, measurement of range of motion than the traditional mode of "eyeballing" method. Testing is conducted three times using that device, and the patient is blinded as to which part of the body is being tested. Dr. Jung confirmed that the plaintiff was consistent across each trial.

**154**  In addition to finding consistently restricted range of motion in her mid and low back, Dr. Jung also jammed the plaintiff's facet joints at the same segments of her spine using various hyper-extension movements and found that she reported pain consistent with facet joint injury. He also elicited what he considered to be reliable pain symptoms when he purposefully jammed her costovertebral joint. He concluded that this finding was consistent with the plaintiff's reporting of pain on full aspiration. Dr. Jung considered his findings to be clinically significant and supportive of a likely injury to her facet joints at her low back.

**155**  Dr. Jung identified additional functional deficits on the part of the plaintiff that he attributed to the effects of the accident. Included among them were poor back strength, difficulty lunging forward, difficulty standing on one leg, impaired motion of certain of her spinal segments at the lumbar level, and tenderness of the interspinous ligaments from L2 to L5, and her sacrotuberous ligament.

**156**  Dr. Jung confirmed that the plaintiff showed signs of maximum effort throughout her testing, and he did not observe any non-organic signs of abnormal illness behaviour. On the day of his assessment, the plaintiff did not complain of neck pain, and therefore Dr. Jung did not examine her neck and offered no opinion in respect of it.

**157**  In Dr. Jung's opinion, the accident caused the following injuries to the plaintiff:

1. soft tissue/musculoligamentous injuries to her mid back and low back;
2. facet joint injuries to her mid back and low back;
3. costovertebral joint injury at the T6 level of her spine on the left side; and
4. headaches.

Additionally, he concluded that the accident exacerbated her sacroiliac joint pain. Dr. Jung was the only expert to conclude that the plaintiff had a costovertebral joint injury.

**158**  Given the persistence of the plaintiff's symptoms, Dr. Jung did not expect the plaintiff to improve significantly. It is his belief that further therapies, such as physiotherapy and spinal manipulation may help the plaintiff at least minimally. However, he considered it unlikely that they would yield more than a 10% additional improvement overall.

**159**  In his report, Dr. Jung described the plaintiff as permanently partially disabled. When taken to that aspect of Dr. Jung's report, Dr. Hershler testified that he agreed that the plaintiff has endured persistent symptoms that affect her ability to do things, and could be said to be disabled in that broad sense.

**160**  Dr. Jung believes it likely that the plaintiff will continue to experience some degree of pain on a permanent and ongoing basis. At trial, he clarified that he expected that she would have a normally functioning life for the most part, but would require modifications and encounter inconvenience. In his experience, because of the accident, she may also be more susceptible to having a significantly adverse reaction to a minor insult her to mid or low back.

**161**  As did Dr. Hershler, Dr. Jung testified that the low lumbar spine and sacroiliac joint areas are distinct physiological regions. He testified that they are separated by a space of roughly two inches. Anatomically speaking, that is a significant distance. While I can conceive of lay persons conflating those parts of the anatomy, I would not expect physicians, physiotherapists, chiropractors and other trained medical professionals to regard those obviously distinct areas as a blended or overlapping anatomical region.

***Ms. Marilee Cross, Physiotherapist***

***Assessment Date: April 18, 2008***

**162**  Ms. Cross provided opinion evidence with respect to the diagnosis, treatment and management of musculoskeletal and musculoligamentous injuries. Her practice is almost entirely comprised of musculoskeletal injuries, the majority of which are soft tissue injuries. Most of her patients present with spinal injuries involving the facet joints.

**163**  The plaintiff's primary complaint on examination by Ms. Cross was of a episodic low back pain, exacerbated by sitting, standing, walking and running. She told Ms. Cross that she could manage three hour lectures so long as she had breaks. Like Dr. Hershler and Dr. Jung, Ms. Cross observed what she considered to be objective indicia of injury throughout her testing of the plaintiff. For example, she observed increased muscle tension at rest in the plaintiff's left suboccipital muscles and in the erector spinae muscles of the plaintiff's neck, thoracic spine and lumbar spine.

**164**  Ms. Cross detected a restriction of the plaintiff's left facet joint motion at her cervical, thoracic and lumbar spine. She also found irritation of the L3/4 and L4/5 joints.

**165**  Ms. Cross had reviewed the records of the plaintiff's physiotherapy treatments prior to the accident. She shared the views of Drs. Jung and Hershler that the plaintiff's lumbar spine had not been treated prior to the accident.

**166**  Ms. Cross opined that the accident likely caused the plaintiff to suffer from mechanical neck pain and mechanical thoracic and low back pain, as well as headaches. Ms. Cross noted that headaches can commonly occur as a result of tightness of trapezius muscle or cervical facet joint dysfunction.

**167**  Ms. Cross also found altered motion at the plaintiff's left sacroiliac joint. She attributed the plaintiff's left-sided sacroiliac joint injury to the accident, noting that the pre-accident treatment of her sacroiliac joint was largely directed to her right side. In her view, the plaintiff's left-sided sacroiliac joint dysfunction likely caused a flareup of symptoms associated with the right side of that joint. Ms. Cross was asked to interpret certain of the pre-accident physiotherapy records as best she could. She testified that her reading of the records of the March 20, 2004 session indicated that the treating physiotherapist noted a positive kinetic test on the right, indicative of restricted active motion of the right sacroiliac joint. She also noted hypermobility of the left sacroiliac joint. In cross-examination, Ms. Cross agreed that it was at least possible that they could be responsible for the plaintiff's current sacroiliac dysfunction

**168**  At trial, Ms. Cross confirmed that she expects recovery with respect to the plaintiff's left scapular and thoracic pain, but that the prognosis for her low back injuries remains poor given the passage of time since the accident and the relatively poor progress the plaintiff has enjoyed to date. Ms. Cross shares Dr. Jung's concern that the plaintiff will likely be more susceptible to future problems with her low back, even with minor trauma.

**169**  As had Dr. Hershler, Ms. Cross regarded the plaintiff's scoliosis as very mild, and not the cause of her low back symptoms.

***Dr. Stephen A. Kline, Psychiatrist***

***Assessment Date: November 4, 2008***

**170**  Dr. Kline assessed the plaintiff on November 4, 2008. This marked the first time that she reported experiencing nightmares and ruminating about the accident, and hypervigilance on the road to a doctor.

**171**  Dr. Kline diagnosed mild symptoms of post-traumatic stress, although not the disorder itself, caused by the accident. He also diagnosed mild, but improving, panic attacks. Like Dr. O'Kane, Dr. Kline believes that the plaintiff's panic attack symptoms arise out of the symptoms of post-traumatic stress and, in that way, are indirectly caused by the accident. However, he also stated that her panic attacks are likely connected to her anxiety. He did not clarify whether he meant her inherent baseline anxiety or a manifestation of anxiety claimed to be caused by the accident.

**172**  In Dr. Kline's view, the plaintiff's psychiatric prognosis is fair with appropriate treatment. He shares Dr. O'Kane's opinion that the plaintiff is somewhat more vulnerable to symptoms of post-traumatic stress and to panic attacks in the event that she experiences another traumatic event. In Dr. Kline's opinion, the plaintiff is also at increased risk of a recurrence of her eating disorder symptoms, but does not view that as related to the accident.

***Dr. Janine O'Kane, Treating Psychiatrist***

***Assessment Dates: November 1, 2007 and December 4, 2008***

**173**  When Dr. O'Kane met with the plaintiff a second time on December 4, 2008, she found her presentation to be very different and generally improved from when she carried out her consultation for Dr. Patel some 13 months earlier. During the December assessment, the plaintiff told Dr. O'Kane that her eating disorder had steadily improved. She said that she continued to be anxious generally. The plaintiff also confessed that she ruminated about the accident and was plagued by nightmares and anxiety around driving. She reported that the frequency of her panic attacks had lessened to once every month or two upon taking Paxil. Dr. O'Kane thought it likely that the plaintiff's overall psychological improvement was attributable to her use of Paxil.

**174**  In Dr. O'Kane's opinion, the plaintiff's mood and anxiety were impacted by the accident. She believes that, the plaintiff's depression, eating disorder and related pre-accident psychological difficulties rendered her more susceptible than the average person to suffer from post-traumatic stress disorder, panic attacks and driving fears. It is her view that the plaintiff suffers from mild post-traumatic stress disorder as a direct result of the accident. She thinks that the plaintiff's panic attacks are likely an off-shoot of her post-traumatic stress disorder and, in that sense, are indirectly caused by the accident.

**175**  In Dr. O'Kane's opinion, with continued use of medication and a course of cognitive behavioural therapy, the plaintiff's long-term prognosis from a psychiatric standpoint is fair. She explained that meant the plaintiff will be able to function with minimal symptoms. Even so, Dr. O'Kane considers the plaintiff's post-traumatic stress disorder to be chronic and believes that in the years to come she will continue to be more anxious generally, to ruminate about the accident, be apprehensive about returning to the scene of the accident, have occasional nightmares about the accident, and be hypervigilant on the road. She also considers the plaintiff is more susceptible to suffering from more severe post-traumatic stress disorder or panic attacks or other psychological difficulties if she is involved in another traumatic event in the future, than she would have been if she had not been involved in the accident.

***Gerard Kerr, Occupational Therapist***

***Assessment Date: October 9, 2007***

**176**  Mr. Kerr administered a number of tests with the objective of assessing the plaintiff's work capacity. The results of his testing demonstrated that she had functional limitations related primarily to her low back and left knee. He found that the plaintiff's self-reports of function were consistent with his clinical measures of her ability and limitations. Mr. Kerr believes that the plaintiff participated in the testing with high levels of effort, an element of his testing which he characterized as crucial for obvious reasons.

**177**  In Mr. Kerr's view, the plaintiff showed a mild tendency to overrate her abilities and/or otherwise diminish her symptoms. He explained, for example, that even though she appeared to have low back discomfort in performing certain assigned tasks, she would nonetheless forge ahead until he had to instruct her to go no further.

**178**  It became evident through the course of Mr. Kerr's testimony that the plaintiff's left knee pain, and not her physical injuries from the accident, was the reason for many of the physical limitations that he observed and for the severity of certain limitations. Mr. Kerr clarified that with respect to some movements (e.g. kneeling, crouching and crawling), the plaintiff's knee pain was the exclusive cause of her limitation. In regard to others, he identified her knee pain as contributing to her limitation, along with her low back symptoms. Those movements included moderate to extreme strength lifting from the floor, moderate to extreme stooping (as distinct from mild to moderate stooping), and climbing stairs and ladders. It is obviously essential that the role played by the plaintiff's knee dysfunction in the limitations and restrictions found by Mr. Kerr be taken into account in weighing his opinion and evaluating the plaintiff's overall function limitation caused by the accident.

**179**  During Mr. Kerr's assessment, the plaintiff reported low back pain with static moderate stooping and standing postures, as well as with prolonged sitting. He noticed her using strategies like leaning against the work surface or on her elbows to compensate for low back discomfort. Mr. Kerr concluded that the plaintiff is not suited to full-time static standing demands and said that remaining in a static position poses a real challenge for her. Those limitations were not connected to her left knee impairment.

**180**  In terms of overall work endurance, Mr. Kerr opined that the plaintiff is capable of fulltime work where the physical demands are in keeping with the limitations he observed.

**181**  At the time the plaintiff met with Mr. Kerr, she was in her second year of study at SFU. She told Mr. Kerr that she was enrolled in the Bachelor of Science program. While she was taking classes in math and chemistry, it is clear from her official SFU transcript that she was enrolled in a Bachelor of Arts program. She also told Mr. Kerr that she intended to apply to medical school and then qualify as a physician, and possibly a specialist, such as a psychiatrist or cosmetic surgeon.

**182**  Mr. Kerr found that the plaintiff generally meets the physical demands required of a medical doctor; however, he noted that she is compromised for demands that involve prolonged sitting in particular. For that reason, he opined that she would likely be best suited to a general practice in medicine rather than psychiatry which would require her to be seated for extended periods.

**183**  Mr. Kerr went on to say that the plaintiff would be unlikely to tolerate other medical specialty areas such as surgery and emergency room medicine, mainly because they require prolonged static standing and sustained moderate to extreme stooping in combination with heavier lifting demands. It is to be remembered that an important aspect of the plaintiff's physical intolerance in respect of certain types of stooping and heavy lifting stems from her left knee deficit, and not solely from her accident-induced back injury.

**184**  At trial, the plaintiff testified that she has considered a career in law as an alternative to medicine. In Mr. Kerr's view, she is fully capable of practicing law so long as she is not required to sit for excessive periods without flexibility to reposition herself or move around as comfort demands.

**185**  The defence contends that because Mr. Kerr's data and his findings based on such data were more than seventeen months old at the date of trial, his opinions about the plaintiff's functional capacity must be approached with considerable caution. Mr. Kerr agreed that his testing comprises a key component of his opinion. He also agreed that due to the passage of time, his data may not reflect the plaintiff's current capacity. However, he would not go so far as to agree with the suggestion that his findings were obsolete. At the same time, however, Mr. Kerr stated that assuming the medical reports concerning the plaintiff's low back difficulty remained accurate, he would not expect his results to change greatly, except to reflect improvement in relation to the plaintiff's knee. When he conducted his assessment, Mr. Kerr found that the plaintiff had a sitting tolerance of between one and two hours, provided she was able to reposition herself for comfort. Ms. Cross and the plaintiff herself stated that she could endure sitting in three hour lectures with repositioning. In my view, Mr. Kerr's finding of a shorter sitting tolerance reflected the plaintiff's more pronounced left knee difficulty at that time, and does not take into account the fact that her low back symptoms continued to improve after that time.

***Derek Nordin, Vocational Rehabilitation Consultant***

***Assessment Date: November 12, 2008***

**186**  Derek Nordin carried out a vocational assessment of the plaintiff on November 12, 2008. The plaintiff told him that she hoped to complete her Bachelor of Arts degree in psychology by 2011. She also stated that she would then like to travel and had given consideration after travelling to continuing her education. She expressed an interest in careers in law, medicine and psychology.

**187**  Based on the tests he administered, Mr. Nordin found that the plaintiff's highest vocational interest area fell into the category of investigative theme. That theme area involved science, medicine, mathematics and research. More specifically, her top five interest areas were law, medical science, counselling and helping, social sciences and finance and investing. The plaintiff's IQ score and her demonstrated academic abilities at SFU suggest to Mr. Nordin that she is capable of successfully completing graduate school course work. Her verbal IQ, in particular, scored very high.

**188**  In his report, Mr. Nordin gave average full-time earnings for female physicians, dentists, lawyers, psychologists and the like, expressed in 2007 dollars. He echoed Mr. Kerr's concern about whether the plaintiff would meet the physical requirements of the work of a doctor. He believes that she may be able to do the work of a psychologist. As well, he opines that from an intellectual point of view, a career in law remained an option for the plaintiff, although she may have difficulty if her legal work required her to sit for extensive periods.

**189**  Mr. Nordin also opined that the plaintiff would likely struggle to find a summer job or part-time job while she is in school that meets her qualifications and physical requirements. In his experience, students often work in the service sector, and most, if not all, jobs in that industry require prolonged standing. The plaintiff asserts that to a certain extent, this category of loss has already been realized as evidenced by her struggles with the physical requirements of her work at Modern Drywall and the liquor store.

***Defence Medical Expert***

**190**  The defence called only one medical expert, Dr. Hepburn, a retired orthopaedic surgeon. Dr. Hepburn was qualified to give expert opinion evidence in the field of orthopaedics and musculoskeletal and soft tissue injuries.

**191**  Since his retirement in 2007, Dr. Hepburn's medical practice has been solely devoted to conducting independent medical examinations. Virtually every referral examination he receives comes from defence counsel and ICBC.

**192**  By his own admission, a mere 10%-15% of Dr. Hepburn's practice prior to his retirement involved soft tissue injuries, and even then he was not involved in their ongoing management and treatment. Dr. Hepburn testified that, while in practice, he did not treat patients with back injuries who had not suffered a fracture, slipped disc, disc prolapse or other type of injury requiring surgical intervention. Generally, he would not even see such patients and would typically refer them to a specialist better trained to treat ongoing non-orthopaedic soft tissue injuries, such as a physiotherapist and physiatrist.

**193**  Dr. Hepburn could not recollect treating any costovertebral joint injuries, and testified that he only treated orthopaedic facet joint injuries (dislocations and fractures) for which surgery can produce some benefit.

**194**  As Dr. Hepburn testified, it became apparent that, although he was qualified as an expert in the diagnosis and prognosis of soft tissue injuries, his expertise lies almost exclusively in the field of orthopaedics. This, however, is not an orthopaedic case. It is a claim involving chronic soft tissue injuries which cannot be repaired through surgical intervention.

**195**  The plaintiff told Dr. Hepburn that her major problem related to her low back. She also complained of pain in her left shoulder, a stiff neck, and headaches. Dr. Hepburn agreed that the plaintiff likely suffered some soft tissue injury to her neck and knee from the accident. However, he found it unclear as to whether her lower back pain was connected to the accident. In this regard, he seemed to place some reliance on his understanding that there had been no complaint of back pain noted in the plaintiff's medical records in the months following the accident. That is a misconception. The physiotherapy records are replete with the plaintiff's complaints of low back pain in the months immediately after the accident. The treating physiotherapist's discharge note, which formed part of Dr. Smith's file, leaves no doubt that the plaintiff's lumbar spine was the chief area of treatment throughout the many sessions. I can only conclude that Dr. Hepburn's review of those records was superficial.

**196**  As an aside I would also note that the plaintiff's controversial ICBC statement tendered into evidence by the defence itself refers to complaints of low back pain within the first two weeks following the accident.

**197**  In addressing the plaintiff's pre-accident physical difficulties, Dr. Hepburn seemed to suggest that it would be legitimate to interpret her physiotherapist's notations of sacroiliac joint pain as being medically equivalent to a notation of unspecified low back pain. The implicit suggestion was that the plaintiff's post-accident low back pain is the same as her sacroiliac joint complaints before the accident and, accordingly, was not caused by the accident. He went so far to say that, in all likelihood, the plaintiff actually had low back pain and not sacroiliac joint dysfunction when she saw her physiotherapist before the accident. I have previously made clear that I reject the free-floating notion that a physiotherapist would confuse those distinct anatomical areas. His evidence on this point distinguished Dr. Hepburn from the other medical experts who gave evidence on the point. It caused me considerable concern.

**198**  I also found it strange that in his report, Dr. Hepburn described the plaintiff's headache complaints as falling beyond his area of expertise. The preponderance of all of the other medical opinion evidence, which I find credible, is that the plaintiff's post-accident headaches probably stem from her injured neck. In his report, Dr. Hepburn did not allow for the prospect that the plaintiff's headaches could be cervicogenic in origin, and represented referred pain from her injured neck. He was only prepared to admit that potential in cross-examination. Instead, in his report he had implied that the plaintiff's headaches had a psychological source by suggesting that they could be addressed by medication for anxiety. In my view, Dr. Hepburn's assessment of the plaintiff's ongoing headaches was not evenly balanced. That too was of concern.

**199**  Dr. Hepburn did not find a restricted range of movement in the plaintiff's spine. He explained that the dual inclinometer applied by Dr. Jung is not used by him or any orthopaedic surgeon to his knowledge. That does not mean that measurement with that device is not the gold standard. I was most impressed with Dr. Jung's explanation of the frailties of the so-called "eyeballing" assessment of range of motion and the superior measurement capability of the device he used.

**200**  Dr. Hepburn was adamant that the manner in which Dr. Jung and Dr. Hershler purported to diagnose a potential facet joint injury was not adequate. He testified that a definitive diagnosis cannot be made without proper imaging studies such as a bone scan, CT scan or MRI. He stood by his opinion that there was no facet joint injury that he could detect on his examination of the plaintiff. Dr. Hepburn's comments regarding the diagnosis of facet joint injury illustrates the difference between the medical approach to diagnosis for the purposes of determining causation, and the legal approach to the question of causation. As noted by the Supreme Court of Canada in *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), [*Snell*] at para. 34: "Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law."

**201**  With respect to Dr. Jung's diagnosis of costovertebral injury, Dr. Hepburn opined that such an injury is quite rare and would normally be associated with severe trauma such as in an individual with broken ribs. He suggested that it would take a "divine talent" to diagnose this type of injury based on physical/clinical presentation alone.

**202**  Relying on Dr. Hepburn's opinion, the defence argues that the plaintiff's subjective pain complaints which have continued for more than four years after the accident are inconsistent with the fact that her spine has suffered no structural damage or other ominous pathology. The underlying logic appears to be that pain and chronic injury do not occur in the absence of orthopaedic or other structural injury. That notion offends common sense and is blind to the credible explanations given by Drs. Jung and Hershler and Ms. Cross as to the nature of soft tissue injury.

**203**  In the end, I consider it unsafe to give any weight to the opinions expressed by Dr. Hepburn.

**CAUSATION**

***General***

**204**  It is trite to observe that for a plaintiff to recover damages in tort there must be a causal link between the wrongful act and the damage inflicted. This notion of cause-in-fact is concerned with the basis of liability, as distinct from the extent of the liability once it has been established.

**205**  In addressing a perceived rigidity in the judicial approach to causation, Mr. Justice Sopinka memorably observed that it is not necessary to establish the causal connection with "scientific precision": *Snell*.

**206**  Causation in tort is established where the plaintiff proves on a balance of probabilities that the defendant caused or materially contributed to the harm. A contributing factor will be considered to be material if it falls outside the *de minimis* range: *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* cited to the S.C.R.].

**207**  The primary test used in determining causation is commonly articulated as the *but for* test. Applying it here requires the plaintiff to prove that she would not have experienced her post-accident physical symptoms, *but for* the accident, and would not have developed symptoms of post-traumatic stress, including heightened anxiety, fear around driving and panic attacks, or a reactivation of her eating disorder at all or with the same frequency, duration and intensity *but for* the occurrence of the accident: *Athey*; *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=), [*Blackwater*]; *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=), [*Resurfice*].

**208**  In *Resurfice*, the Supreme Court of Canada commented on the causation test at para. 23:

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

**209**  A negligent defendant will not be excused from liability merely because other causal factors were at play in producing the harm. So long as it is part of the cause of her injuries, the defendant will be fully liable to the plaintiff even if the ***negligence*** alone was not enough to create her injuries: *Athey*.

***Causation of Physical Injuries***

**210**  According to the plaintiff, since the accident she has felt an ache along with tightness and sore muscles in her low back. She says that every few weeks the pain is so intense that she keels over. She testified that in the first six months or so following the accident, her neck and muscles were stiff and knotted, particularly when her head was bent. Her headaches would follow at least once per week, building up slowly from the back of her neck. At times they lasted an entire day. Unlike the headaches that she experienced prior to the accident, eating did not alleviate the pain in her head. Also within the initial six months time frame, the plaintiff said she would feel a sharp pinching sensation in her upper back/trapezius area a few times each month that seemed to come out of nowhere. She testified that at her last appointment with Dr. Smith roughly 22 months post-accident, her neck was still stiff and she was still experiencing intermittent sharp pinching pain in her shoulder blade/trapezius area. Her low back continued to produce a dull ache most of the time that fluctuated considerably in intensity depending on her activity.

**211**  The plaintiff says that she has not had a pain-free day since the accident. In terms of her current symptoms, the plaintiff claims that her low back pain, of variable intensity, persists and is her dominant problem. Physical activities such as soccer, jogging and extensive walking, climbing up or descending stairs can cause a flare-up of pain. However, the postures that are most aggravating are those which appear to be innocuous, such as sitting and static standing for prolonged periods.

**212**  The plaintiff also continues to experience episodic pain in her neck and upper trapezius area. She claims that the jabs of pain in her shoulder blade area have become infrequent, flaring up roughly once per month. Although she still suffers headaches, especially when she sits down for long periods to study, they have substantially diminished in their frequency. Her hips and "upper butt" area have not caused her difficulty for a very long time.

**213**  The defence concedes that the plaintiff sustained mild to moderate soft tissue injuries to her neck and back. As to her low back injury, the defendants assert that, at most, the accident caused a temporary aggravation of an "ongoing injury process" due to her pre-existing injuries and core weakness. It should be evident from my discussion of the expert medical evidence and, specifically, my disapproval of Dr. Hepburn's opinion, that I find the evidence does not support the defendants' position that the plaintiff's current low back pain is basically the same as the dysfunction in her upper "butt" sacroiliac joint or hip regions experienced before the accident.

**214**  The evidence amply establishes that the accident caused musculoskeletal injuries to the plaintiff's neck, upper trapezius (left shoulder area) and her lumbar spine. Relying on Dr. Hershler, Dr. Jung and Ms. Cross, I also find that it is more probable than not that the accident injured the facet joints of the plaintiff's lumbar spine. I find, as well, that it caused her headaches secondary to her neck pain, injured her left sacroiliac joint and aggravated her pre-accident difficulty with the right side of that joint. On balance, I am not persuaded that she suffered a costovertebral injury as opined by Dr. Jung.

**215**  I reject the defence assertion that the assault on the plaintiff in January 2005 or her participation in bungee jumping constitute an intervening event.

**216**  The principal controversy over the plaintiff's physical injuries centers on their intensity, duration and frequency, and their impact on her enjoyment of life and future vocation and functioning. I will address those key issues in greater detail under the heading of damages.

***Causation of Psychological Injuries***

**217**  Causation is very much in issue with regard to the plaintiff's alleged psychological injuries.

**218**  The essence of the plaintiff's assertion is that as a result of the accident she has been hampered by increased anxiety, the onset of panic attacks and other post-traumatic stress symptoms including nightmares of and ruminating about the accident and a fear of driving. She also claims that her eating disorder was worsened by the accident. The defendants dispute that some of the claimed psychological impairments are even real, and assert that, to the extent they are, such impairments are not accident-related.

**219**  In support of their position, the defendants argue that simple common sense dictates that if the plaintiff had genuinely suffered from panic attacks and other symptoms of post-traumatic stress, she would have reported them to Dr. Smith or some other caregiver much sooner than she did. The defence line of argument emphasizes that the protracted lag of time between the accident and the plaintiff first reporting panic attacks (to Dr. Smith approximately 22 months after the accident) and first reporting other symptoms associated with post-traumatic stress (to Dr. Kline 46 months later), significantly undermine her claim and, indeed, bolster their assertion that the accident did not cause her those injuries.

**220**  Care must be taken not to overly rely on the temporal relationship between the accident and the time that the plaintiff first reported psychological symptoms to her physician. The onset of psychological injury is often not as obvious as a physical injury; it can be subtle and may be undetectable in its early manifestation. In instances where a temporal connection between the wrongful act and the harm appears tenuous, causation may nevertheless be established where other factors link those essential elements in a causative way. Having said that, however, the massive time gap in the plaintiff reporting her psychological symptoms is problematic.

**221**  The thrust of the plaintiff's justification for not telling a doctor about her psychological difficulties sooner has two main components: (1) she is a stoic person who is not apt to complain; and (2) she did not want to bother Dr. Smith. The plaintiff described herself as naïve in relation to litigation and repeatedly testified along the lines that, in hindsight, she ought to have reported her symptoms considerably earlier and more fully. I accept that despite her relatively young years, the plaintiff is a stoic person, who is not prone to rush to her doctor over every bothersome symptom. The evidence also indicates that she did not readily embrace psychological counselling and was reluctant to accept a referral to a psychiatrist. By the same token, however, she was not adverse to consulting her doctor about relatively run-of-the-mill concerns, such as a sty on her eye and skin problems, and following through on referrals to various specialists. Nor did she avoid the referral to Dr. O'Kane to address the unrelenting negative effects of the liquor store incident.

**222**  During the plaintiff's examination for discovery conducted in April 2008, she was asked what symptoms remained from the accident. She referred to her physical injuries and fear of driving, but made no mention of panic attacks or other post-traumatic stress symptoms. When confronted at trial with this inconsistency, the plaintiff's explanation was not adequate.

**223**  There is evidence that any panic attacks experienced by the plaintiff after the accident were linked to the liquor store incident and/or her eating disorder.

**224**  The ill-effects persisting from the event of the liquor store formed the basis of Dr. Patel's referral to Dr. O'Kane. There is no mention in Dr. Patel's referral of any accident related psychological symptoms and her notation of a history of panic attacks, was made under the larger heading of the liquor store incident. I find that the panic attacks that the plaintiff complained of to Dr. Patel in the spring of 2007 were connected to that incident and prompted the referral to Dr. O'Kane. I also note that the discussion of the plaintiff's anxiety and panic attacks in Dr. O'Kane's November 2007 report occurred in the context of the liquor store event and the plaintiff's school work.

**225**  The plaintiff says that her frequent panic attacks would have been apparent to the eye of an observer. However, the only credible independent evidence of a witness having seen the plaintiff experience a panic attack came from H.R. That attack was connected to the plaintiff's illness around food and eating, which is not related to the accident.

**226**  In my view, the onset of the plaintiff's knee dysfunction in February 2007 was a major event that provoked a cascading effect on many fronts of the plaintiff's life. Prior to her knee dysfunction, she had been able to continue with all sorts of activities, albeit some of them in a modified way and with pain and discomfort, including playing soccer and jogging. Her knee injury disabled her from playing soccer, jogging and other types of cardiovascular exercise. In doing so, it effectively prevented the plaintiff from controlling her weight through such healthy outlets. I find that after her knee gave out, she began to revert to weight control through purging and restricting food. By the time that Dr. O'Kane saw her about eight months later, her eating disorder was fully active. Impairments in concentration and sleep, enhanced anxiety, anxiety attacks and distractibility were all incidental to the plaintiff's eating disorder before the accident. I find that those symptoms were brought to the fore once again by the Fall of 2007 as her eating disorder intensified.

**227**  The heightening of the plaintiff's eating disorder and the adverse psychological symptoms it entails are not connected to the accident, directly or indirectly. They overlap the plaintiff's elevated anxiety and her other unresolved psychological maladies she had been experiencing in relation to the liquor store incident.

**228**  Dr. O'Kane did not include a diagnosis of mild post-traumatic stress disorder as part of her consult note to Dr. Patel. In cross-examination, she agreed that the plaintiff had not reported symptoms consistent with post-traumatic stress disorder in relation to the accident in their initial meeting. She also agreed that she did not elicit any history from the plaintiff regarding fear of driving during that session. Dr. O'Kane further agreed that there was nothing in any of Dr. Smith's records that suggested post-traumatic stress disorder symptoms, and confirmed that the plaintiff did not report any such symptoms to Dr. Patel either.

**229**  Dr. O'Kane explained that she did not make a diagnosis of post-traumatic stress disorder in November 2007 because she was concentrating on the plaintiff's eating disorder which presented immediate medical concerns. But it is by no means a given that based on the information she had before her at that particular time, Dr. O'Kane would have made such a diagnosis in any event. Moreover, what troubles me is that the plaintiff did not divulge any of those symptoms to Dr. O'Kane at that time. Given that the symptoms flowing from the event at the liquor store had continued to be sufficiently bothersome to the plaintiff to seek a referral for psychiatric help, I would have expected her to likewise seek some degree of medical assistance for her alleged post-traumatic stress symptoms had they also been pronounced and persistent concerns. It was revealed that the plaintiff had not told Dr. O'Kane about her pre-accident bouts of anxiety or anxiety attacks. At trial, the reason she gave was that Dr. O'Kane "didn't ask". I did not find that satisfactory.

**230**  There is some indication in the records of Children's and in Dr. Freedman's consult report that the plaintiff may have suffered panic attacks even before the accident. In this regard, Dr. O'Kane was questioned about the DSM-IV definition of panic attack. She accepted it as authoritative. In cross-examination Dr. O'Kane agreed that the pre-accident bouts of intense anxiety described by Dr. Freedman contained three of the four requisite symptoms of the DSM-IV criteria for panic attack prior to the accident. During her November 2007 interview after the accident, she had only elicited two of the requisite symptoms.

**231**  Drs. O'Kane and Kline each rely to some degree on basic temporal reasoning in concluding that the accident played a causative role in the plaintiff's panic attacks and other symptoms of post-traumatic stress. There are obvious dangers inherent in applying that reasoning. The utility of using a straight temporal analysis in the assessment of causation becomes more doubtful where, as here, there is an extensive pre-accident history of similar and overlapping psychological symptoms and the post-accident reporting of those symptoms is made long after the occurrence of the accident, without sufficient explanation.

**232**  The human psyche is a complex and mysterious entity. To pinpoint with any degree of precision the impact of some factors over others in relation to the development or aggravation of psychiatric maladies is an elusive undertaking, even for the experts. The plaintiff's psychiatric condition is by no means straightforward. She has an extensive and significant pre-accident psychiatric history. At least two of her psychological conditions, being generalized anxiety and an eating disorder, were plainly active at the time of the accident. This has made the determination of causation of the plaintiff's post-accident psychological symptoms most challenging.

**233**  The burden is on the plaintiff to prove, on a balance of probabilities, that the accident caused or materially contributed to her panic attacks and the other symptoms of post-traumatic stress that she claims to have endured since the accident. While I acknowledge there is expert opinion evidence to the effect that the plaintiff's psychological status at the time of the accident may have predisposed her to the development of post-traumatic stress symptoms, I conclude on the preponderance of the evidence that, with one exception, the plaintiff has not discharged her burden. The single exception I refer to pertains to her low-grade apprehension around driving. In this regard I found H.R.'s evidence persuasively corroborative of the plaintiff's claim. I conclude that the plaintiff did not discuss her symptoms of driving anxiety with Dr. Smith or raise them until much later because they manifested infrequently, were extremely mild and fleeting in nature and were so inconsequential in comparison to her other psychological difficulties unrelated to the accident, that she felt no need to have it addressed. I do not find that the accident exacerbated or compounded the plaintiff's eating disorder. Nor do I find that it intensified her established difficulties with anxiety, other than her slight driving apprehension.

**DAMAGES**

**234**  The purpose of damages is to theoretically restore an injured plaintiff to her original position to the extent that monetary damages can do so. A fundamental principle in the assessment of damages is that the defendant must take the plaintiff as he finds her and must compensate for all accident-induced injuries and loss as they are experienced by that individual plaintiff. This is so even where owing to some unique feature of the plaintiff, the injury was greater or of a different type than one would expect an average person to sustain, and where the extent of the damage could not reasonably be foreseen by the tortfeasor: *Cotic v. Gray* [*(1981), 124 D.L.R. (3d) 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M4YV-00000-00&context=) (Ont. C.A.); *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=) (C.A.).

**235**  However, a defendant is not required to compensate a plaintiff for any debilitating effects of a pre-existing condition that she would have experienced anyway; that is, even if the accident had not occurred. A plaintiff is not entitled to be placed in a better position than she was the moment before the accident happened. It is the difference between the plaintiff's "original" position (just before the accident) and her "injured" position (after and as a result of the accident) that is her loss. Accordingly, the issue of whether a plaintiff has a pre-existing condition, be it latent or active, that was rendered symptomatic or otherwise aggravated by the accident is relevant to the measure of damages. (See generally: *Athey*; *Blackwater*; *A. (T.W.N.) v. Clarke*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=)). Damages may be reduced to reflect the measurable risk that a plaintiff's pre-existing condition would have become symptomatic or worsened even had the plaintiff not been injured.

***1. Non-Pecuniary Damages***

**236**  The objective of non-pecuniary damages is to compensate a plaintiff's pain, suffering, and loss of enjoyment of life. The essential principle, expressed in a variety of ways, is that fairness and reasonableness of the amount of an award is measured by the adverse impact of the particular injuries on the particular individual plaintiff. Consequently, while fairness is assessed by reference to awards made in comparable cases, it is "impossible to develop a tariff": *Lindal v. Lindal*, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 637, [*129 D.L.R. (3d) 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=). Each case is decided on its own unique facts: *Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) [*Kuskis*]; *Noriega v. Lewars*, [*2008 BCSC 1405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3SN-00000-00&context=). Because it is not entirely possible to restore a plaintiff to her original position by an award of money, the process is one of assessment and not of mathematical precision.

**237**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46, [*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=), Kirkpatrick J.A. enumerated a non-exhaustive list of factors to be considered in awarding non-pecuniary damages. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; and loss of lifestyle.

**238**  The defendants dispute that the plaintiff has continued to suffer from any accident-induced physical injuries. In the alternative, they contend that if she has, her symptoms are extremely mild and in no measure disabling. In support of their assertion, the defendants point to the plaintiff's active lifestyle after the accident which saw her continuing to play sports and partake in a range of physical activities, including competitive level soccer and trying extreme sports, and travelling extensively with a backpack. They also emphasize the fact that after January 21, 2005, she made no complaint of back pain to a doctor for an extended period.

**239**  Although the defendants went to great lengths to establish that the plaintiff was physically able to travel and carry an ergonomic backpack after the accident, I am satisfied that her trips were not typical backpacking holidays and that she took care to ensure that she did not wear a heavy backpack for more than an hour at a time. I accept the evidence of the plaintiff and her mother that she often paid the price in terms of physical discomfort and pain with extensive walking and sightseeing during her travels to Australia and Spain. As mentioned however, I find that some degree of the physical difficulties the plaintiff encountered in Spain stemmed from her still symptomatic left knee.

**240**  Different people have different thresholds for pain, physical tolerances for activity, and different levels of pre-accident fitness. I think it reasonable to infer that an individual with a lifelong commitment to athletics, like the plaintiff, is more apt to engage in sports and recreational pursuits even when injured, than is a person who has enjoyed a more sedentary lifestyle. When an unresolved eating disorder, which drives an individual to use excessive exercising and physical activity as a means of controlling her weight, is superimposed on the situation, it is to be expected that such an individual would be more motivated to maintain a demanding regimen of physical exercise, even if it caused her considerable pain. In such cases, the bald assertion that taking part in strenuous or regular physical activity after an accident means that the pain must be non-existent or minimal and hence the injuries mild, puts too simplistic a gloss on the complexities at play. A more fulsome analysis must be undertaken in order to evaluate in a meaningful way whether active participation in sports and other recreational pursuits following an accident reflects the absence of injury or a lack of severity of injury.

**241**  The plaintiff is an extremely athletic and fit young woman who is plagued with an eating disorder. As part of that illness, she engaged in excessive exercising as a mechanism to control her weight. I find that she was highly motivated to remain extremely physically active after the accident, including playing soccer at a high level and jogging, even though doing so was painful for her.

**242**  Given the complexity of the non-bony human structure and having no cogent medical evidence to the contrary, I do not regard it as implausible or defying common sense that the plaintiff was able to resume soccer and other sports, including jogging, with pain and yet, at the same time, find that far less physically intensive movement such as prolonged sitting and standing, aggravated her neck and back injuries.

**243**  I do not interpret the interval between appointments with Dr. Smith dealing with the plaintiff's physical injuries as indicating that her injuries had completely or substantially resolved in the meantime. For a number of months during that time frame the plaintiff attended physiotherapy where she consistently complained of her neck and back injuries. She also carried out stretching and the other exercises that had been recommended to alleviate her symptoms. I accept that she ceased physiotherapy in March 2005 not because her symptoms had resolved but because she believed the sessions were no longer beneficial and would not help her improve further.

**244**  Nor do I conclude that by trying bungee jumping and skydiving it necessarily follows that the plaintiff's physical injuries had essentially resolved or were extremely mild by then. Having said that, however, I do not consider that conduct to be entirely neutral. What I take from her preparedness to try these extreme activities is that during her trip to Australia, the intensity and frequency of her physical symptoms were diminishing.

**245**  One of the reasons given by the plaintiff for not seeing Dr. Smith regularly about her injuries, is that she believed that they would eventually resolve. As time passed after the accident it was increasingly apparent to her that they were not resolving and, based on her evidence, continued to interfere with her life including post-secondary education. With the realization that her symptoms were not resolving, she still did not seek out medical treatment or take any steps to locate a new family doctor willing to treat her accident-related symptoms and advise about possible therapeutic and pain management modalities in place of Dr. Patel. To my mind that reveals a level of complacency that is somewhat inconsistent with the plaintiff's claim about the persistence and severity of her back pain and suggests that her symptoms had been subsiding over time.

**246**  The defence also produced vast amounts of photographic evidence showing the plaintiff juggling a soccer ball, holding a bowling ball, sitting on a swing or teeter-totter at various points in time. The plaintiff does not claim that she is disabled from doing those things. Over time, however, those flare-ups significantly decreased both in frequency and intensity. In any event, I did not find the photographic evidence or the evidence of certain entries in her Facebook page of much probative value one way or the other. The focus in quantifying non-pecuniary damages is not so much to assess what enjoyment and activities are left in a plaintiff's life after certain amenities are taken away, as it is to assess which activities of enjoyment and amenities of life have been lost or compromised as a result of the accident. The key issue is whether the injuries from the accident cause the plaintiff discomfort or pain while participating in such conduct or afterward, or otherwise compromises her ability to do so. The plaintiff's very nature is to challenge her limitations at the extremes of her reduced post-accident abilities. I accept that although she was physically able to engage in a wide variety of physical activities, even demanding ones, after the accident, she was largely motivated to do so as a feature of her eating disorder and frequently paid the price by aggravating her symptoms and enduring pain. I conclude that this was especially the case within the first 24 months after the accident.

**247**  In my view, the plaintiff's decision to take a reduced course load in her first full year at SFU was due to her ongoing back symptoms, but only in part. Other considerations also came into play, including her long-standing stress and anxiety around school. Additional stressors emerged and influenced the plaintiff's course load in the 2007 Fall semester. Her eating disorder with its attendant impairments had intensified for reasons not connected to the accident. To compound matters, she had enrolled in math and chemistry courses which she understood would be extra challenging. She was also still struggling mightily with her anxiety over the blood contamination event. In those circumstances, it was sensible for the plaintiff to elect to take only three classes that term. By that stage her low back and neck symptoms continued to cause her discomfort and pain though on a more episodic basis, and generally speaking, with considerably less intensity. I conclude that they played a relatively minor role in her decision to take only three courses that term.

**248**  The plaintiff increased her course load to four classes in January 2008 semester. I conclude that one of the reasons she chose to do so was because her neck and low back symptoms had vastly improved and no longer hindered her physical ability to assume a full university course load. Specifically, I conclude that her decision to enrol in four rather than five courses that term had no link to her physical injuries from the accident. At the same time, I accept that her neck and low back injuries had not resolved entirely.

**249**  The plaintiff continues to have lingering difficulties from time to time with her neck and headaches and experiences intermittent low back pain episodically, most commonly with prolonged static standing and sitting. I find it is more likely that not that she will continue to improve with time and physiotherapy and massage treatment. However, I accept that her prognosis for a complete recovery is somewhat poor and that due to the accident she is slightly more susceptible to having an adverse reaction with a relatively minor insult to her low back. Because of the accident, the plaintiff is not the same healthy person she was a moment before the accident occurred.

**250**  As mentioned, despite her very late disclosure I accept that the plaintiff developed a slight driving apprehension from the accident. It is extremely mild in nature. It contributed in only a minor way to the plaintiff not pursuing renewal of her learner's driver licence and, beyond that, cannot be said to have interfered in any real way with the quality or enjoyment of her life.

**251**  Having reviewed the authorities provided by the parties, and considered the totality of the evidence pertaining to the plaintiff's specific circumstances; I conclude that a fair and reasonable award for non-pecuniary damages is $70,000.

***2. Loss of Future Earning Capacity/Delay***

**252**  The plaintiff seeks damages for her diminished earning capacity in the future, attributable to the disabling effects of the injuries that she says she will likely continue to suffer.

**253**  The issue here is whether the plaintiff's future earning capacity has been impaired or diminished by the injuries caused by the accident. If it has, then the Court must look at the companion issue of what amount, in light of all the evidence, should she be awarded as compensation for that impairment.

**254**  The law has long recognized that unknown contingencies and uncertain factors make it impossible to calculate lost future earning capacity with any precision. It is because the occurrence of future events is unknown, that allowances must be made for the contingency that the assumptions underlying a proposed award may prove to be wrong. Because this is a future loss, the plaintiff need only prove the realistic or substantial possibility, as distinct from a probability, that because of her accident-induced injuries, her earning capacity has been impaired. If the Court is satisfied that there is a substantial possibility of the happening of a hypothetical event leading to an income loss, it will award compensation based on an estimation of the chance that event will occur: *Parypa v. Wickware*, [*169 D.L.R. (4th) 661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=), [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=); *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=) [*Steward*].

**255**  In *Palmer v. Goodall* [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) at 59 (C.A.), Southin J.A. made the following clarifying remarks in relation to the concept of future impairment:

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.

**256**  There is no single way to value the loss of future earning capacity. The process of quantification in respect of any impairment is one of assessment based on the evidence, taking into account all relevant positive and negative contingencies: *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=); *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.); *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) [*Rosvold*]; *Reilly v. Lynn* [*(2003), 10 B.C.L.R. (4th) 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) (C.A.); *Durand v. Bolt*, [*2007 BCSC 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-242B-00000-00&context=), [*71 B.C.L.R. (4th) 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-242B-00000-00&context=).

**257**  In determining whether the plaintiff's earning capacity has been impaired, the Court will consider factors such as whether she has been rendered less capable overall of earning income from all types of employment; is less marketable or attractive as a potential employee; has lost the ability to take advantage of all job opportunities that might otherwise have been open; and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.); *Kuskis*. In *Steward*, the Court of Appeal reminded that the consideration of those factors is subject to the plaintiff's overriding burden to show that future income loss or impairment is a substantial possibility.

**258**  In my view, the symptoms of driving apprehension have no bearing on the plaintiff's capacity to earn income in the future.

**259**  The plaintiff is an intelligent and articulate young woman. As a young teen, she aspired to be a writer and work in the fashion design industry. In grade 11 or 12 she had an opportunity to accompany a doctor on his hospital rounds. She says that was a pivotal experience which formulated her desire to pursue medicine. Both H.R. and A.S. were aware that in high school the plaintiff aspired to be a doctor. As already mentioned, D.C. understood that she was interested in pursuing a career in psychology or medicine. At the time that she first met with Dr. Freedman in January 2004, she told him that her future plans were to work in the fashion, sales or design industry.

**260**  The plaintiff claims that the injuries from the accident have compromised her ability to achieve her ambition to become a doctor. As a backup plan, she is considering pursuing a career in law or as a psychologist. She testified that from a young age she intended to pursue post-secondary education at least to the level of attaining a bachelor degree, and likely beyond. The plaintiff asserts that due to her accident-induced injuries, certain professions are now closed to her. Her companion assertion is that her physical injuries from the accident have prevented her from taking a full course load at SFU. Based on that premise, she claims that it will take her longer to finish her undergraduate degree and any graduate or subsequent professional degree, and will concomitantly delay her entry into the work force. That delay will, in turn, negatively impact her earnings.

**261**  The defence contends that the evidence does not support the existence of a realistic possibility that the plaintiff would have become a medical doctor absent the accident. Alternatively, they assert that her prospects of such a career are no different now than they would have been had the accident not occurred. They also submit that there is no cogent evidence of physical impairment that would in any way preclude the plaintiff from pursuing whatever profession she was capable of striving for before the accident.

**262**  The plaintiff's decision to take a year out from school after completion of high school and travel to Australia was completely unrelated to her injuries from the accident. However, her decision to enrol in less than a full course load for the first three full semesters at SFU was, in part, dictated by the difficulty she was experiencing from her physical injuries caused by the accident. Accordingly, the accident has contributed to a delay in the completion of her Bachelor of Arts undergraduate degree. I have every confidence that the plaintiff will complete that degree and that her timing in doing so will not be further impacted by any ill-effects of the accident. Implicating the accident in the plaintiff's decision to withdraw from the Spring 2009 term because she became increasingly anxious about the negative contents of the reports of her medical experts, raises an interesting issue about remoteness of damages. However, that matter was not adequately developed in the evidence or in submissions.

**263**  There was evidence of the plaintiff's academic performance reaching back to grade 4. It is clear that from grade 8 onward she did not excel in math. She failed that subject in grades 8 and 10 and attended summer school. She obtained a C grade in Math 11 which she took in grade 12. She did not take Math 12 or any classes in calculus, chemistry or physics. The only science course that the plaintiff took in senior high was Biology 12 in which she obtained a B grade.

**264**  I acknowledge that during grades 10-12 the plaintiff was struggling with serious issues outside of school, such as her substance abuse and eating disorder. However, I do not find that this adequately explains her poor academic performance in math, as she was able to achieve significantly better marks in every other subject within the same time period. Nor does it explain her electing not to take a wider range of science courses or calculus. I note further that her C grade in Math 11 was obtained after she completed the program at Children's and her eating disorder, with attendant difficulties of concentration and anxiety, had improved.

**265**  At SFU the plaintiff took only three science/math classes, as well and a Math 12 equivalent out of a total 17 courses over six semesters. She achieved average or below average marks in the majority of the university level courses. She took those particular classes in the first three semesters at SFU. Thereafter, her transcript shows that she abandoned math and science courses and enrolled exclusively in art undergraduate classes. Her overall academic performance vastly improved.

**266**  The plaintiff was enrolled in the Bachelor of Arts program, and not the Bachelor of Science program, at SFU from the outset. She gave non-specific anecdotal evidence about the possibility of being accepted into medical school on the strength of a Bachelor of Arts degree. She led no evidence identifying such medical schools or their criteria for admission.

**267**  Mr. Nordin testified that medical faculties have a number of science prerequisites, such as organic chemistry and biochemistry. He agreed that, in terms of the courses taken to date, the plaintiff was not currently on track for admission into medical school. He similarly agreed that it was essential to have a basic grounding in science and mathematics for admission. Mr. Nordin agreed that the plaintiff has a glaring weakness in math and science.

**268**  The plaintiff has not taken any upper level courses at SFU in science or mathematics. She has not written the MCAT, which she understands requires a substantive knowledge of sciences, and is mandatory for admission into medical school. The plaintiff gave evidence that she struggled more in the science-based courses from a physical perspective because of the prolonged standing and bending involved in the lab components of them. In closing argument, counsel for the plaintiff asserted that it "could be" that the injuries which the plaintiff suffered in the accident are in and of themselves significantly contributing to her struggles in pursuing her goal of becoming a medical doctor. The preponderance of the evidence does not support this cause and effect relationship.

**269**  The plaintiff is in her early 20's, and has yet to embark on a clear career path. She has a number of areas of interest and considerable capacity outside the academic arenas that emphasize science and math. I conclude that there is no realistic possibility that absent the accident, the plaintiff would have been admitted to medical school, completed it successfully, and ultimately become a medical doctor. As mentioned, I am confident that she will successfully complete her Bachelor of Arts degree. I consider it a realistic possibility that she will eventually pursue graduate studies or obtain a law degree and find that her injuries will not interfere with the timing of the completion of those achievements. While I have not been persuaded that the accident has closed off any genuine career options for the plaintiff, the preponderance of the evidence does establish a relatively modest chance of a realistic possibility that she will encounter occasional pain and mild limitations in performing her duties in her chosen occupation or profession due principally to her episodic low back pain with prolonged sitting and static standing, that will translate into a loss in the future. My assessment is that the extent of her impairment is mild and will not manifest throughout the plaintiff's working life.

**270**  Having found that the plaintiff's future earning capacity will be mildly diminished due to the accident, I must decide what amount, in light of all of the evidence, should be awarded for that impairment.

**271**  The plaintiff called Darren Benning, an economist, to provide expert evidence to assist the Court in quantifying the plaintiff's future loss.

**272**  Relying on Mr. Nordin's conclusions about the plaintiff's demonstrated areas of career interest and her capacity for employment in certain specific fields, Mr. Benning's general approach was to assume that *but for* the accident, the plaintiff would have pursued one of among ten specific professions: family doctor, dentist, registered nurse, physiotherapist, occupational therapist, lawyer, marriage counselling, dietician, social worker, or psychologist. Many of those occupations are more lucrative than the average earnings of the significantly wider spectrum of occupations flowing from the attainment of undergraduate and postgraduate degrees. Relying further on Mr. Nordin's opinion, Mr. Benning assumed that because of the accident, the first six occupations listed above had become closed to the plaintiff.

**273**  Mr. Benning also assumed that, although the plaintiff may be capable of working in the remaining four occupations, her earnings would be permanently delayed because of the accident. In this regard, he assumed a one-year accident related delay to occupations requiring a bachelor degree (i.e. social worker) and a two-year accident-related delay to occupations requiring a masters degree (dietician and marriage counsellor) or doctorate degree (psychologist). He then provided tables showing the without-accident earnings of the ten occupations of an average B.C. female to ages 65 and 70, and the with-accident earnings of the four occupations that the plaintiff is assumed capable of undertaking (marriage counsellor, dietician, social worker and psychologist). By way of example, Mr. Benning noted that the past and future income of a female psychologist without the accident, working to age 65 would be $1,198,867, and with the accident would be $1,020,886. A more extreme illustration is found by comparing projected earnings of a female family doctor, a profession he assumed was closed to the plaintiff because of the accident, and of a marriage counsellor, assumed to remain open. In that instance, the difference in earnings is significant.

**274**  Mr. Mark Szekely, a consulting economist, was called by defence in rebuttal. He noted that in projecting earnings for a young person who was still attending school, the standard practice among economists is to apply average labour force participation rates commensurate with the anticipated level of education, as opposed to select occupations. That approach captures a wide number of occupations with diverse earnings.

**275**  Mr. Szekely was critical of a number of features of Mr. Benning's approach. In his view, the non-participation contingency factor used by Mr. Benning which was confined to the single assumption that the plaintiff would withdraw from the labour force for reasons of disability only was too restrictive. Mr. Benning had disregarded the possibility that the plaintiff might have chosen to spend time out of the workforce for other reasons such as raising children, leisure, travel or voluntary retirement. Mr. Szekely urged considerably higher deductions than the 2-3% applied by Mr. Benning to account for non-participation in the labour force. I prefer Mr. Szekely's approach. Having said that, however, I would not fully endorse the percentage deductions based on the 2006 census data urged by Mr. Szekely because that data draws, in part, on statistical information derived from women who achieved their university degrees at least one full generation ago and faced vastly different societal and workplace realities than do young women like the plaintiff. I note as well that his higher non-participation data did not capture non-participation for female lawyers.

**276**  Mr. Szekely provided earnings projections for a B.C. female with the educational attainment of a bachelor degree and of a master's degree, both including and excluding a one-year permanent earnings delay and labour market entry. The educational groups he used do not include law studies. Therefore, female lawyers' earnings, which Mr. Szekely acknowledged were higher on average than women with a graduate degree, were not taken into account.

**277**  Both the experts used identical methodology in quantifying a one-year delay into the workforce. Their calculations accounted for one missed year of earnings and the persistent effect of earnings being lagged by one year over the plaintiff's working life. On the footing that the plaintiff's future loss would be confined solely to a delay of earnings for one year, and using full year earnings from the 2006 census adjusted to 2009 dollars, and adjusting for average labour market contingencies (both voluntary and non-voluntary withdrawals), Mr. Szekely quantified the following losses:

$35,926 - one year delay into labour market with a bachelor degree;

$36,730 - one year delay into labour market with a masters degree.

**278**  Included among the specific occupations canvassed by Mr. Benning was a family doctor, which there is no realistic possibility of the plaintiff becoming, and other occupations for which there is no genuine indication the plaintiff would ever choose to pursue, such as becoming a dentist, physiotherapist or occupational therapist. I also think that he considers too narrow a segment of potential labour market outcomes that could reasonably apply to the plaintiff. There is some merit to the defence contention that Mr. Benning's approach constructs a future loss scenario on the basis of cherry-picking a number of high-paying occupations.

**279**  This is not a proper case for the Court to engage in a comparison of with-accident and without-accident earning trajectories of certain professions or engage in a dominantly mathematical calculation of loss. The preferable approach here is to assess the plaintiff's loss with an eye on the average earnings at anticipated education levels offered by Mr. Szekely ,taking into account that those amounts would be somewhat higher had the attainment of a law degree been included and bearing in mind that the non-participation percentages he used are, in my view, slightly overstated.

**280**  In applying the relevant legal principles, taking into account the case authorities relied upon by each side and using my judgment as best I can on the totality of the evidence, I conclude that, in all the circumstances, the sum of $75,000 is a fair and reasonable measure of the present value of the plaintiff's loss of future earning capacity, inclusive of the delay in her post-secondary schooling and launching into a career, caused by the accident.

***3. Past Wage Loss***

**281**  The main component of the plaintiff's claim for past wage loss is built on the premise that, absent the accident, there is a substantial possibility she would have applied for and obtained additional part-time work at the liquor store and earned more than minimum wage. As stated earlier in my reasons, I have found that the plaintiff's physical symptoms from the accident had no influence on her decision not to pursue further work with the liquor store; it had everything to do with the festering aftermath of the liquor store incident.

**282**  Another feature of the plaintiff's claim for damages under this head is that *but for* the accident, the plaintiff would have continued to work at Modern Drywall throughout the Spring of 2008 until she rejoined Camp Howdy that summer. The plaintiff also asserts that from September 2008 onward she would have worked about two days a week at Modern Drywall and earned a higher hourly wage than if she worked in a retail store. She asserts that she had tried to find suitable work during the school year but those opportunities are too physically demanding for her back or require her to drive which she is unable to do because of her driving anxiety.

**283**  In my view, the evidence shows that after the accident, the plaintiff pursued as much part-time work as she wished, unfettered by her injuries. The evidence falls short of demonstrating that she was unable to work at times or unable to pursue more remunerative types of part-time work because of her injuries from the accident. The plaintiff has not made work choices with the goal of earning the highest possible wages as exemplified by the fact that summer upon summer she chose to return to Camp Howdy where she earned lower pay than other jobs she would have had available to her. Understandably, she made that choice because she enjoyed the work there.

**284**  The plaintiff has not established a basis for any award of past wage loss.

***4. Cost of Future Care***

**285**  The purpose of awarding damages for the cost of future care is to compensate for a financial loss reasonably incurred to sustain or promote the mental and/or physical health of an injured plaintiff. The cost must be justified as reasonable in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them based on the evidence. In *Kuskis*, the court summarized the relevant principles in relation to a claim for cost of future care at paras. 163-164:

An award for the cost of future care is notional and imprecise in nature: *Strachan (Guardian ad Litem of) v. Reynolds*, [*2006 BCSC 362*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23RN-00000-00&context=). The court must consider evidence regarding what care is likely in the injured person's best interest and calculate its present cost, with appropriate adjustment for contingencies in all of the circumstances of the case: *Courdin v. Meyers*, [*2005 BCCA 91*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S184-00000-00&context=).

See also *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), [*208 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=).

**286**  In support of the plaintiff's claim for damages under this head, she relies to a large extent on the recommendations made by the medical experts she called as well as Mr. Kerr. They recommended that the plaintiff embark on a comprehensive therapeutic regimen incorporating several modalities, including physiotherapy, massage therapy, a supervised exercise program, and possible chiropractic care. Mr. Kerr provided detailed evidence breaking down the costs of the suggested therapies.

**287**  I am persuaded that additional physiotherapy and massage therapy, as well as a customized exercise program aimed at improving the plaintiff's residual symptoms and assisting her in the management of their intermittent but lingering ongoing difficulties, are reasonably necessary. Accordingly, I award the following amounts in respect of the treatment and pain management of the plaintiff's injuries caused by the accident:

1. Physiotherapy - $2,400 to cover initially intensive sessions and future intermittent appointments;
2. Massage therapy - $3,400 to cover initially intensive sessions and future intermittent appointments;
3. Pulsed signal therapy in respect of the plaintiff's neck and low back - $3,000;
4. Acquisition of TENS machine for ongoing pain management - $400;
5. Supervised exercise program for one year - $360;
6. Pain medication - $75; and
7. Cognitive behavioural therapy in respect of the plaintiff's driving apprehension - 5 sessions at a cost of $160 per session = $800.

**288**  In my view, the evidence does not sustain an award for homemaking assistance, yard work/home maintenance or child care support.

***5. Special Damages***

**289**  The plaintiff seeks special damages in the amount of $2,215. Included within that aggregate amount are travel and parking costs related to Dr. Patel, who refused to treat the plaintiff for her injuries from the accident, and to Dr. O'Kane. They are not compensable. Also incorporated is the cost of the plaintiff's medication for anxiety and depression, and for physiotherapy sessions aimed at treatment for her knee, which are not compensable. Nor is reimbursement for her yoga classes compensable.

**290**  Based on the foregoing, the total award for the plaintiff's special damages is $635.

***6. Income Tax Gross-up***

**291**  The plaintiff seeks an order that the income tax gross-up be in an amount to be agreed by counsel and, if an agreement cannot be achieved, that the parties have liberty to seek an order. That is granted.

***7. Costs***

**292**  In the event that the parties are unable to reach an agreement on costs, the plaintiff's counsel is at liberty to file written submissions within 60 days of these reasons. Counsel for the defence is to file submissions in response within 45 days of receipt of plaintiff's submissions. Any reply submissions are to be filed within 15 days thereafter.

S.K. BALLANCE J.

\* \* \* \* \*

**CORRECTION**

Released: March 29, 2010

1. In the last line of paragraph [240] on page 61, the last word, "them", has been replaced with "injury"; and
2. In the first line of paragraph [241] on page 61, the word "was" has been replaced with "is" ("... fit young woman who is plagued ...").

**End of Document**

[***Lamont v. Stead, [2010] B.C.J. No. 579***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62MR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

L.W. Bernard J.

Heard: April 30, May 1 and November 9, 2009.

Judgment: March 31, 2010.

Docket: M108002

Registry: New Westminster

**[2010] B.C.J. No. 579** | 2010 BCSC 432 | 187 A.C.W.S. (3d) 726 | 2010 CarswellBC 793

Between Anne Patricia Lamont, Plaintiff, and Maurice Ronald Stead, Defendant

(52 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Pre-existing injury — Action by plaintiff for damages for personal injury allowed — Plaintiff's vehicle struck by defendant's vehicle while stopped at intersection — Plaintiff, a physiotherapist age 50, suffered soft tissue injury to neck that caused ongoing pain — Court found that accident caused permanent partial disability — Symptoms affected recreation but not employment due to modified duties — Contention that symptoms were due to pre-existing condition refuted — Plaintiff awarded $60,000 for non-pecuniary damages, $25,000 for lost earning capacity, $10,735 for past wage loss and $1,073 for special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Employment status — Extent of incapacity — Pre-existing medical conditions — Loss of earning capacity — Retroactive loss of income — Non-pecuniary loss — Action by plaintiff for damages for personal injury allowed — Plaintiff's vehicle struck by defendant's vehicle while stopped at intersection — Plaintiff, a physiotherapist age 50, suffered soft tissue injury to neck that caused ongoing pain — Court found that accident caused permanent partial disability — Symptoms affected recreation but not employment due to modified duties — Contention that symptoms were due to pre-existing condition refuted — Plaintiff awarded $60,000 for non-pecuniary damages, $25,000 for lost earning capacity, $10,735 for past wage loss and $1,073 for special damages.**

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| Action by the plaintiff, Lamont, against the defendant, Stead, for damages to compensate for injuries suffered in a motor vehicle accident. In December 2006, the plaintiff's vehicle was stopped at an intersection when the defendant's vehicle struck the left rear corner of her vehicle while attempting to pass from behind. Each vehicle suffered moderate damage. The plaintiff suffered soft-tissue injuries that caused neck spasms and ongoing neck pain. The plaintiff, age 50, worked as a physiotherapist and had three teenage children. The plaintiff acknowledged a history of neck, shoulder and arm problems that she successfully managed with physiotherapy. She asserted that she was unable to maintain her workplace and household responsibilities due to her ongoing pain. The plaintiff was unable to return to work until March 2007 and did not return to full time work until August 2007. She undertook regular physiotherapy. She was unable to resume her active pursuit of leisure activities. A physician concluded that the plaintiff was likely to continue with a level of pain that left her impaired, but not disabled. Physicians noted some pre-existing degenerative disc disease that might have caused future pain or exacerbated the plaintiff's current pain. Liability for the accident was admitted. The defendant submitted that the plaintiff's injuries were substantially resolved within nine months, and that any pain thereafter was attributable to her pre-existing condition. The defendant further submitted that the plaintiff failed to prove any substantial possibility of future income loss.  HELD: Action allowed.  The plaintiff's account of her injuries was credible. With accommodation from her employer and modifications to her duties, she successfully resumed full-time employment, but was unable to achieve similar success with her leisure pursuits. Her prospects for significant improvement in her neck pain were poor, depriving her of the physically active lifestyle she pursued pre-accident. The defendant failed to establish a pre-existing history of chronic neck pain or similar symptoms caused by degenerative disc disease. The plaintiff suffered a permanent partial disability caused by the accident. She was awarded $60,000 for non-pecuniary damages, $25,000 for lost earning capacity, $10,735 for past wage loss and $1,073 for special damages. The award for diminished earning capacity compensated the plaintiff for the remote negative contingency of being less marketable in the event of a change in employer. |

**Counsel**

Counsel for Plaintiff: R.L. Aldana.

Counsel for Defendant: J.W. Burgoyne.

**Reasons for Judgment**

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| **L.W. BERNARD J.** |

**1**   On December 9, 2006, a car operated by the defendant struck the left rear corner of a car operated by the plaintiff. At the time of the collision, the plaintiff was stopped at a red light for eastbound traffic on Kingsway, at 14th Avenue, in Burnaby, BC. The defendant approached from behind and, in an attempt to pass on the left, caught the left rear of the plaintiff's vehicle with the right front of his vehicle. The impact was unexpected. It caused moderate damage to both cars.

**2**  The plaintiff sustained soft-tissue injuries in the collision. She continues to suffer from neck pain, which she attributes to the collision. She seeks $135,000 in damages. Liability is admitted. The issues in dispute relate to: (1) the quantum of non-pecuniary losses; and (2) proof of lost future income-earning capacity. The parties have agreed upon the awards for past wage losses ($10,735) and for special losses ($1,073).

**3**  The essence of the defendant's position is that the injuries the plaintiff sustained in the collision were substantially resolved within nine months; that any pain thereafter is attributed to pre-existing and chronic neck and shoulder pain linked to degenerative disc disease. In relation to non-pecuniary loss, the defendant submits that an appropriate award would be closer to half of that sought (i.e. $37,500) and that the plaintiff's claim for lost income-earning capacity ought to be dismissed for failure to prove a substantial possibility of any future loss.

**B. Evidentiary Synopsis**

**4**  The plaintiff is 50 years of age. She is a physiotherapist, wife, and mother of three teenagers. She works full-time at Royal Columbian Hospital and has the primary responsibility for child-rearing, cooking, and housekeeping at home. She says that she assumed most of the parenting and household responsibilities because her husband is self-employed and has very long work-days.

**5**  The plaintiff asserts that since the collision she has been unable to return to her pre-collision status in relation to performing her workplace and household responsibilities. She also says that she has been unable to resume most of her leisure activities.

**6**  The plaintiff says that prior to the collision she was pain-free, although she acknowledges that she has a history of neck, shoulder and arm problems, all of which she says were successfully managed with physiotherapy. She draws a distinction between the neck pain she attributes to the accident, and her past complaints.

**7**  At the time of impact from the collision, the plaintiff says that she was looking in the rear-view mirror with her head turned slightly to the right. She was shaken by the collision and began experiencing severe neck pain and muscle spasms that same evening.

**8**  Three days after the collision, the plaintiff attended to her family physician, Dr. Beck, and complained of neck pain and muscle spasms across her trapezius muscles and thoracic spine. She was referred to a physiotherapist and took treatments until July 2007. By August 2007, the plaintiff says that she felt that she had "plateaued" and was "just managing" her pain. In this same period she gradually returned to full-time work; however, she says that she has never been able to resume the heavier and more strenuous aspects of her job, such as aggressive chest therapy. In January 2007, the plaintiff made an attempt to return to work on a graduated basis; however, in her words "it didn't go well" and, thus, it was postponed until the end of March 2007. The plaintiff's employer has a duty to accommodate and it has done so for the plaintiff.

**9**  The plaintiff says that she presently has symptoms of mechanical neck pain most of the time, and that the pain is exacerbated if she exerts herself. She says that she manages the pain by using Ibuprofen, a heating pad, an ice pack, stretching, strengthening, resting and walking. The plaintiff says that working full-time leaves her with no physical tolerance for household duties and leisure activities. She reports that she now must drive to work because she cannot carry her backpack for the walks or bus-rides she used to take.

**10**  In regard to household duties, the plaintiff says that she needs assistance with heavy items in the kitchen; that she needs help carrying laundry and shifting heavy wet loads; that she has difficulty hanging clothes on a line to dry; that her tolerance for vacuuming is limited to 15 minutes and that she cannot move furnishings in the process; that she needs help with moving groceries; and, that she can no longer assist in the garden beyond light weeding.

**11**  In relation to parental duties, she says that she is now restricted to driving for no more than 45 minutes at one time, and that this affects her ability to drive her children to distant soccer matches.

**12**  As for pre-collision leisure pursuits, the plaintiff says that she was very active in sports such as downhill skiing, hiking, running, kayaking, swimming and boating. She says that these activities, which she usually shared with her family, are ones in which she can no longer participate. For example, she reports that she has not skied because any pulling/pushing motion exacerbates her pain symptoms. Similarly, she says that she can kayak for only 15 minutes (versus 2 hours, pre-accident), that she can no longer hike with a backpack, and that when she swims she can no longer do the breaststroke or the front crawl. The plaintiff and her husband own a 36-foot motorboat which is used for family vacations. She reports that she now faces significant limitations in relation to participating in this pastime.

**13**  The plaintiff says that she is frustrated and angered by the post-collision changes in her life. She reports feeling guilty that her husband and children must take on responsibilities which were once hers. In relation to work, she says that she can no longer imagine working until age 65, given how she feels at the end of each work day. She says she manages at work by seeing fewer patients, seeking assistance from colleagues, trading patients, and declining to work in the ICU, the orthopaedic unit, and the cardiac-care unit.

**14**  In relation to pre-collision health and prior injuries, there were three specific events of note:

1. In 1984, the plaintiff tore her rotator cuff from over-training for the swimming portion of a mini-triathlon. She said that within six months the injury had fully resolved and she returned to mile-long swims.
2. In October 2004, the plaintiff awakened one morning to sudden pain in her left shoulder and arm, and the inability to move her left arm. There was no apparent precipitating event. The cause was thought to be nerve root impingement caused by osteophytes encroaching the exit foramina. The plaintiff was diagnosed with degenerative disc disease ("DDD") a condition which is common among her age-group. She undertook physiotherapy (including postural correction and taping) and she estimates that the problem was resolved within three-to-four weeks. The plaintiff believes she missed about one week of work.
3. In May 2006, the plaintiff suffered a recurrence of her symptoms from October 2004. She described it as "a small flare-up" or "slight exacerbation" for which she attended to her physiotherapist for "gentle mobilization". She thinks she may have missed one day of work because of this flare-up. The plaintiff asserts that pain resolved quickly and that she kayaked without difficulty in the summer of 2006.

**15**  In addition to the foregoing three events, the plaintiff was cross-examined about an October 20, 2004, notation by her physiotherapist, Mary Sheu, which suggested that the plaintiff had reported to Ms. Sheu that she had suffered from "chronic neck symptoms", and had an episode "one year ago". In response to this line of questioning, the plaintiff said that she could not recall having much neck pain in the past, notwithstanding that the therapist's notes appeared to suggest otherwise. She said that she did not have any sort of neck pain for greater than two years for which she sought help. In relation to the notation in question, Mary Sheu testified that she makes notes as she interviews a patient, and that the notes are in her own words, not those of the patient. In relation to the word "chronic" she said that she ought to have used the word "recurrent" because there was only an indication of one prior episode.

**16**  Mary Richardson is an expert in occupational therapy and physical capacity evaluation. On June 18, 2008, she performed a comprehensive physical capacity evaluation on the plaintiff. In her report she wrote:

The results of physical testing, as listed below, confirm reports of difficulty with performance of work tasks, activities of daily living, and recreational activities.

**17**  In relation to limitations on employment, Ms. Richardson said:

In my opinion, with consideration only to her present physical capacity, Mrs. Lamont is employable on a full-time or part-time basis in occupations within her physical capacity. She has physical limitations that affect her ability to perform some work tasks and therefore is not considered to be competitively employable. Depending on the physical demands of any given occupation, she may require accommodation in the form of job modification, the ability to take micro-breaks and/or change activities and postures, use of ergonomic equipment and assistance from co-workers. Such accommodations may require a supportive employer. Her physical restrictions may limit the number of job titles that she is able to obtain or maintain.

**18**  Ms. Richardson testified that the plaintiff gave "good effort" during the testing, and that the plaintiff's complaints of pain and symptoms were consistent with the test results and objective signs of pain.

**19**  Lynn Beck has been the plaintiff's family physician for the past 12.5 years. Dr. Beck treated the plaintiff for the soft-tissue injuries from the December 2006 motor vehicle collision. On the first examination (December 12, 2006), Dr. Beck found spasm and moderate tenderness of the bilateral nuchal muscles, tenderness at "C5 left", global decreased range of motion of the neck with greater pulling and pain on left lateral rotation than on the right. She diagnosed the plaintiff as suffering from "grade 2" soft tissue injury to the neck, shoulders, and upper back. In an x-ray, she noted no change from October 2004, to the plaintiff's DDD. On December 22, 2006, Dr. Beck noted that the plaintiff continued to suffer from spasms; that her shoulders had a constant knot in the mid-trapezius; and that the right shoulder was worse than the left.

**20**  Dr. Beck continued to see the plaintiff regularly through 2007, noting gradual improvement, particularly in the plaintiff's ability to resume work. On October 23, 2007, she wrote a medical-legal report which she closed as follows:

In summary, Ms. Lamont suffered a mild-moderate impact MVA on Saturday, December 9, 2006, during a rear-end collision to her vehicle. The impact of the MVA caused a grade 2 soft tissue injury to her neck, shoulders, and upper back. Ms. Lamont had a prior mild neck (left) chronic problem, secondary to mild degenerative disc disease. She had been seen for this in the fall of 2004, but with physio and exercises she was able to maintain her full workload and leisure activities with a minimum of symptoms. She had not been seen for her neck symptoms again after the fall of 2004 until the MVA.

Ms. Lamont has been extremely compliant and diligent in her attendance at physio and performance of daily exercises. She is extremely motivated to return to work duties as quickly and fully as possible and to resume full leisure activities. Ms. Lamont was very physically fit and active prior to the MVA and this lifestyle has contributed positively to her favourable progress and recovery. However, Ms. Lamont is still not recovered sufficiently from her soft tissue injuries to resume the full duties of her physically demanding position as a physiotherapist at Royal Columbian Hospital. She still has pain and stiffness in her neck and upper back after working with heavy patient workloads. After this length of time, the prognosis is uncertain whether Ms. Lamont will be able to function at fully [sic] the heavy duties she was capable of prior to the MVA.

**21**  Dr. Beck testified that the plaintiff had, prior to December 12, 2006, never complained of right-sided pain.

**22**  In relation to the October 2004 event, Dr. Beck said that the x-ray of Ms. Lamont's spine showed a narrowing of the disc space which brings the vertebrae together -- a common occurrence as people age. She said that there was an indication of nerve encroachment from osteophytes and that this may cause sequelae from nerve irritation. She testified that Ms. Lamont responded to exercise and physiotherapy and had returned to "full function" by April 2005. In her report she wrote:

Ms. Lamont did have a prior problem with her neck in 2004. She had woken up in the morning very stiff with a spasm in her left neck and left shoulder. She had a prior left rotator cuff injury in 1985, but had had no problems since with her left shoulder. C-spine x-ray on October 27, 2004, revealed degenerative disc disease (DDD) with left-sided spurs encroaching on C5,6 foramen. Physio helped relieve the symptoms, and by April 2005 she had improved greatly. The diagnosis was rotator cuff injury; DDD neck with referred pain and mild weakness left arm from C5 radicular impingement. Regular exercises and proper posture and sleep position kept her neck symptoms to a minimum prior to the MVA of December 9, 2006.

**23**  Rhonda Shuckett is an expert in rheumatology and internal medicine. She examined the plaintiff on October 15, 2008. She diagnosed the plaintiff as suffering from: (a) a neck injury from musculoligamentous and suspected zygapohyseal joint capsular injury, with decreased motion in the neck; (b) myofascial pain syndrome of neck and shoulder girdle regions, bilaterally; and (c) some mild left shoulder impingement syndrome. In relation to issue of causation she said:

[Ms. Lamont] did have evidence of degenerative disc disease of the neck before the subject MVA on a neck x-ray done to assess her left arm pain before the subject MVA. Most patients over 45 have some degenerative change on x-ray. This structural change of her neck may have rendered her neck more susceptible to injury with the subject MVA. Still, the neck injury from the MVA is what created and led to new persistent onset of symptoms of actual neck pain and stiffness, from what I glean. She did have some remote episodes of toticollis of the neck which were self-limited in nature. She had some pre-MVA cyclical migraine headaches but depicts that her post-MVA headaches were different; these headaches have gone back down to her pre-MVA cyclical migraines.

She does have an osteophyte at the left C5-6 vertabral foramen. This would have been a pre-existing degenerative change and may have rendered her neck more susceptible to injury with the subject MVA. The left neck C5-6 osteophyte may have been rendered symptomatic with the MVA and may even have contributed to her pre-MVA left upper arm symptoms. However, I suspect her left neck injury since the MVA is mainly attributable to soft tissue and perhaps zygapophyseal joint injury.

**24**  As to the plaintiff's prognosis for recovery, Dr. Shuckett said:

It is already approaching two years since the subject MVA and she remains symptomatic. I think there is a good chance that she is going to continue with her current level of pain. She is not disabled but is impaired to some degree ...

**25**  Dr. Shuckett testified that it is not inevitable that DDD will progress as one ages. She agreed that if the plaintiff had a history of chronic (i.e., for greater than two years) neck pain prior to October 2004, and a subsequent flare-up, then these factors would be "significant" although not necessarily related to DDD. She said that she was aware of the plaintiff's June 2006 flare-up when she wrote her report, but she was not aware of an alleged pre-October 2004 history of chronic neck pain (as suggested by an October 2004 physiotherapy note.)

**26**  John Wade is a rheumatologist, tendered by the defendant as an expert witness. He examined the plaintiff on December 3, 2008. In his report he noted the plaintiff's pre-December 2006 MVA medical history; in particular, the October 2004 event and the corresponding x-rays showing "degenerative changes and mild left foraminal encroachment at the C5-C6 level". In relation to causation he said:

As a direct result of a motor vehicle accident of December 9, 2006, Anne Lamont sustained a probable mild to moderate musculoligamentous injury of the cervical and upper thoracic spine. Over the period from December 2006 through to my assessment of December 2008, Anne Lamont self-estimates improvement in the order of 80 to 845 percent ...

It would be my opinion that her symptoms in the cervical and thoracic spine were in part aggravated by the accident of December 9, 2006. It is likely that her symptoms have been more severe and more prolonged as a result of this accident.

It is possible that over time, Anne Lamont would have developed similar symptoms independent of the accident of December 9, 2006, but is likely that the symptoms of onset were sooner as a result of this injury.

It would be my opinion that Anne Lamont is competitive for full-time work as a physiotherapist as she has demonstrated. It is likely that she is less competitive for heavy jobs within physiotherapy that she has identified. As mentioned above, this may ultimately have happened independent of the accident of December 9, 2006 ...

In the future I would expect Anne Lamont to continue to have intermittent symptoms of mechanical neck pain ...

**27**  During his testimony, Dr. Wade's attention was drawn to the October 2004 physiotherapist note suggesting that the plaintiff had a history of chronic neck pain. Dr. Wade was not aware of this alleged history and he stated that if it were true then it would be his opinion that the plaintiff's long-term symptoms "may not be affected" by the motor vehicle accident in December 2006.

**C. Findings and Analysis**

**28**  The plaintiff testified in a forthright manner about the pain she has suffered since the December 9, 2006 collision and the consequences it has wrought upon her life, particularly as they relate to her leisure pursuits and home life. By all accounts the plaintiff was a very fit, active, energetic, and hard-working woman prior to the collision. After the collision, she pushed through the pain, took physiotherapy, and returned to work as soon as she could manage it. With some accommodation by her employer and modifications to her duties, the plaintiff successfully resumed full-time employment.

**29**  The plaintiff has not, unfortunately, achieved similar success in resuming her pre-accident activities in her life outside the workplace. Working full-time with chronic pain now exhausts her. I accept as true her testimony that by the day's end she has little energy for household chores, parental duties, sports, and leisure. I am also satisfied that her neck pain precludes her from engaging in most of the sports and leisure activities which she once enjoyed either with her family or alone. It also significantly limits her ability to carry out some household tasks and parental responsibilities.

**30**  The evidence establishes that the plaintiff's prospects for any significant improvement in her neck pain are poor. As a consequence, she faces a considerably altered future; particularly as it relates to her life outside the workplace. Her chronic pain deprives her of much of the enjoyment she found in being physically active, in attending to her family, and in participating in family activities.

**31**  The defendant attempted to call into question the plaintiff's pre-collision health; in particular, he sought to rely upon a clinical note of a physiotherapist suggesting that the plaintiff reported "chronic neck pain" in 2004. The plaintiff, in her testimony, seemed genuinely perplexed by this note. She claimed no recall of, or reason for, making such an assertion. She added that she did not remember having any sort of neck pain that could reasonably be characterized as chronic.

**32**  The physiotherapist who made the note in question had no specific recollection of what caused her to make the notation; accordingly, she testified about it by: (a) drawing upon her usual practice, and (b) explaining the meaning of these words, to her, at the time. In relation to the former, she said that she makes notes, using her own words, of essential information gleaned from a patient. In relation to the latter, she said that she used the word "chronic" when she ought to have used "recurrent" because her notes reveal only one prior incident of neck pain.

**33**  I am not persuaded that much can be made of the physiotherapist's note as evidence that the plaintiff suffered from chronic neck pain prior to the collision. The evidence of the note is, at best, equivocal and, in relation to pre-existing chronic neck pain, it stands alone despite a fairly well-documented medical history; moreover, the plaintiff was a credible witness who denied having such a pre-accident medical history.

**34**  In relation to other aspects of Ms. Lamont's pre-collision health, I am not persuaded that the evidence establishes anything which might reasonably account for the chronic neck pain from which she now suffers. The medical evidence shows that the plaintiff has some degenerative disc disease typical for women of her age. Prior to the collision, the plaintiff enjoyed a very physically-active lifestyle and was mostly asymptomatic. Transitory strains, aches, and pains are common among persons who engage in rigorous and physically-demanding activities. When Ms. Lamont did suffer from symptoms which were apparently attributed to DDD (in October 2004 and May 2006), they were not the same as those of which she now complains; moreover, she quickly responded to physiotherapy and experienced full recovery. The plaintiff's post-accident experience has been markedly different, notwithstanding physiotherapy and every reasonable effort to recover and resume her pre-accident lifestyle.

**35**  In summary, I am satisfied that the plaintiff's pain is chronic, partially disabling, and likely permanent. Similarly, I am satisfied that the evidence establishes that the plaintiff's neck pain was caused by the defendant's ***negligence***, in the sense that it directly caused or materially contributed to it. There is a substantial connection between the plaintiff's chronic neck pain and the collision, and the plaintiff has shown, on a balance of probabilities, that but for the ***negligence*** of the defendant, she would not have chronic neck pain: see *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=).

**D. Assessment of Damages**

1. Non-pecuniary losses

**36**  The plaintiff seeks an award of $75,000 for non-pecuniary damages. In support of this position she cites the following cases: *Schroeder v. Shaw*, [*2008 BCSC 1757*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B37X-00000-00&context=), [*[2008] B.C.J. No. 2499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B37X-00000-00&context=) ($75,000); *Bancroft-Wilson v. Murphy*, [*2008 BCSC 1035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M324-00000-00&context=), [*170 A.C.W.S. (3d) 528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M324-00000-00&context=) ($70,000); and *Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=), [*169 A.C.W.S. (3d) 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) [*Kuskis*] ($65,000).

**37**  The defendant submits that the plaintiff is entitled to "about half" of the amount she seeks. In support of this position he cites: *Gozra v. Wunderlich*, [*2009 BCSC 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B15J-00000-00&context=), [*[2009] B.C.J. No. 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B15J-00000-00&context=) ($35,000); *Heinze v. Dulay*, [*2008 BCSC 969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M38P-00000-00&context=), [*[2008] B.C.J. No. 1624*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M38P-00000-00&context=) ($40,000); and *Reichennek v. Archibald*, [*2008 BCSC 1304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PB-00000-00&context=), [*[2008] B.C.J. No. 1939*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3PB-00000-00&context=) ($22,000).

**38**  Non-pecuniary damage awards made in similar cases serve as a useful guide for determining a fair and equitable award in the instant case; ultimately, however, the award must reflect each case's unique facts.

**39**  From a review of the aforementioned cases, I am satisfied that the *Kuskis* case bears the most similarities to the case at bar. A noteworthy distinguishing factor is the age of the respective plaintiffs: 37 years for Ms. Kuskis and 50 years for Ms. Lamont.

**40**  The loss of enjoyment of life due to chronic neck pain is undoubtedly greater for Ms. Lamont than it would be for a person who has led a more sedentary lifestyle. Ms. Lamont has been actively engaged in strenuous sport throughout her adult life, and this has been a significant feature of life with her husband and children. It is, understandably, a source of great frustration and sadness to her that she has been deprived of the capacity to engage in most of the activities she loved, and to experience them with her family.

**41**  Given the relatively profound nature of the loss to this plaintiff (including compromised household management and parenting), the chronic pain which she must endure, the age of the plaintiff, and the very poor prospects for significant improvement, and, having regard to the similarities between the cases cited by the parties and the case at bar, I assess the non-pecuniary losses of the plaintiff at $60,000.

2. Loss of Income-Earning Capacity

**42**  The plaintiff seeks an award of $50,000. The plaintiff acknowledges that she has, with the cooperation of her employer and without income loss, been able to modify her employment in order to meet her post-accident physical limitations. The thrust of her claim is that she is no longer competitive in the field of physiotherapy and that she has been rendered less marketable should she lose employment with Royal Columbian Hospital. In this regard the plaintiff relies upon the evidence of Mary Richardson, the occupational therapist who opined that Ms. Lamont was no longer competitive in the field of physiotherapy.

**43**  The defendant opposes the making of any monetary award for future loss. He submits that the plaintiff has failed to meet the "real and substantial possibility" threshold for proof of future losses; more specifically, he says that the plaintiff has failed to show that there is a real and substantial possibility that she has been precluded from future employment in which there would be a reasonable prospect of engagement. In this regard the defendant relies upon the evidence that Ms. Lamont's job was modified to meet her physical limitations; that Ms. Lamont's employment with the hospital has been relatively long-term and is probably quite secure; that her employer has a duty to accommodate its employees; and that there is no suggestion that Ms. Lamont will not continue to work in her chosen field of physiotherapy until she retires from the workforce.

**44**  The evidence establishes that it is likely that the plaintiff will continue full-time employment as a physiotherapist with the Royal Columbian Hospital for the foreseeable future. Her employer has made reasonable accommodations to meet her physical limitations caused by the defendant's ***negligence***; accordingly, the plaintiff is unlikely to suffer any future income loss while in her present employment.

**45**  The evidence also establishes that the injuries caused by the defendant have limited the plaintiff's ability to perform some of the more physically taxing aspects of physiotherapy. Despite her employer's accommodation, it is clear that the plaintiff's abilities as a physiotherapist have diminished, rendering her less valuable in a competitive employment market. In this regard I accept the evidence of Mary Richardson that Ms. Lamont is not considered "competitively employable" as a full-time physiotherapist; that she may need a supportive and accommodating employer; and that she may be restricted in terms of future employment positions.

**46**  It well established that the purpose of an award for lost income-earning capacity is to compensate for the loss of earning capacity as a capital asset: 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=), [*24 A.C.W.S. (3d) 959*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.), leave to appeal ref'd [*[1991] S.C.C.A. No. 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-JPP5-24PH-00000-00&context=); however, before such an award may be made, the plaintiff must show a real and 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=).

**47**  I am satisfied that the plaintiff has established a real and substantial possibility of a future income loss. Her employment with the Royal Columbian Hospital is not guaranteed for the balance of her working years. She may lose her position or need to give it up for any number of reasons, including a personal relocation. In either circumstance she would find herself facing a job market in which she has been rendered less marketable as a result of the defendant's ***negligence***. Even if she were to remain until retirement in her present employment, she may have to forego new and more remunerative opportunities and/or positions because of her physical limitations. In addition to the foregoing possibilities, her physical limitations, accommodated by her present employer, reasonably preclude her from taking advantage of new and possibly more remunerative positions with other potential employers.

**48**  Notwithstanding all the foregoing, I think there is merit in the defence position in relation to an assessment of the likelihood of these possibilities occurring. I am satisfied that the likelihood of occurrence must be assessed as low. I find that it is very likely that Ms. Lamont will remain in the employ of the Royal Columbian Hospital for the balance of her working years and that she will continue to earn a competitive wage for physiotherapists practicing within the medical system in British Columbia. Ms. Lamont is thus entitled to compensation for the relatively remote possibility that she will suffer a future loss due to her lost earning capacity.

**49**  Quantifying such a loss is difficult. It is well-established that it is a matter of assessment rather than mathematical calculation, and an assessment must take into account future negative contingencies often referred to as the "usual chances and hazards of life".

**50**  Taking all the foregoing into account, I assess the plaintiff's future loss of income-earning capacity at $25,000.

3. Special Damages and Past Wage Loss

**51**  The parties have agreed upon the quantum of these damages, as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (a) | Special | $1,073.74\* |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (b) | Wage loss (net) | $10,735.52 |  |

(\* minus all parking receipts incorrectly submitted, as acknowledged by the plaintiff in her testimony)

**E. Costs**

**52**  The plaintiff claims her costs and disbursements. If the parties are unable to reach agreement on this issue then they are invited to make written submissions.

L.W. BERNARD J.

**End of Document**

[***Mackie v. Gruber, [2009] B.C.J. No. 1629***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

R.W. Metzger J.

Heard: February 16-20 and 23-25, 2009.

Judgment: August 13, 2009.

Docket: 06-4737

Registry: Victoria

**[2009] B.C.J. No. 1629** | 2009 BCSC 1106 | 180 A.C.W.S. (3d) 269

Between Pamela Maureen Mackie, Plaintiff, and Kenneth Michael Gruber, The Gray Line of Victoria Ltd., and Greyhound Canada Transportation Corp., Defendants

(174 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Head injuries — Headaches — Action for damages for personal injury allowed — Plaintiff's primary complaints three years after being injured in a motor vehicle accident were neck and upper back pain and headaches — Chronic pain caused plaintiff loss of enjoyment of life which justified non-pecuniary damages of $75,000 — Plaintiff awarded $19,546 for past loss of income and $130,000 for loss of earning capacity as she was less capable of earning income, less marketable, unable to take advantage of opportunities and less valuable to herself as a person capable of earning income — Plaintiff awarded $10,800 for costs of future care.**

**Damages — Types of damages — General damages — Categories of — Loss of enjoyment of life — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Action for damages for personal injury allowed — Plaintiff's primary complaints three years after being injured in a motor vehicle accident were neck and upper back pain and headaches — Chronic pain caused plaintiff loss of enjoyment of life which justified non-pecuniary damages of $75,000 — Plaintiff awarded $19,546 for past loss of income and $130,000 for loss of earning capacity as she was less capable of earning income, less marketable, unable to take advantage of opportunities and less valuable to herself as a person capable of earning income — Plaintiff awarded $10,800 for costs of future care.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Rules of the road — Action for damages for personal injury allowed — Plaintiff had stopped at a stop sign to exit a parking lot, and entered the highway when the curb lane was clear — She was struck by the defendant's bus as it changed lanes into the curb lane — No witnesses observed a turn signal by the bus — Defendant was fully liable for the collision — Plaintiff's vehicle was fully into the curb lane when the defendant started to change lanes and the plaintiff met her obligations to determine that the highway was clear and to yield to oncoming traffic.**

**Transportation law — Liability — Civil actions — Action by plaintiff for damages sustained in a motor vehicle accident allowed — Defendant 100 per cent liable as plaintiff's vehicle was fully into curb lane when defendant started to change lanes and plaintiff met obligation to determine that highway was clear and to yield to oncoming traffic.**

|  |
| --- |
| Action by plaintiff for damages sustained in a motor vehicle accident. The plaintiff was injured when her vehicle was struck by the bus driven by the defendant. The plaintiff had stopped at a stop sign waiting to exit a parking lot onto the highway. When the curbside lane was clear, she began her turn onto the roadway and was struck by the bus driven by the defendant as it made a lane change from the second lane to the curbside lane. Although the defendant indicated that he signalled his lane change, neither the plaintiff nor other witnesses to the accident observed a turning signal. As a result of the accident, the plaintiff claimed to have suffered neck and upper back pain, headaches, jaw pain, concussion, fractured teeth, anxiety and depression. Her most significant complaints were neck and upper back pain and headaches as her other injuries had diminished over time. The plaintiff had undergone various treatments for her neck and upper back pain including physiotherapy, acupuncture, trigger point injections, cervical facet nerve blocks and botox injections and her doctor recommended radio frequency neurotomy treatment. Most of the costs of her various treatments had been covered by her health care provider. The plaintiff also used prescription medication, ice packs and a neck collar to provide pain relief. The plaintiff's dentist had diagnosed her with myofascial pain dysfunction and fractured lines and vertical fracture symptoms, but could not say whether the plaintiff's fractured teeth were the result of the accident. Prior to the accident, the plaintiff did most of the housework, but for approximately seven months after the accident, a housekeeper assisted with the cleaning. The plaintiff also had a sporadic sporting life, was an active gardener and participating in numerous social functions prior to the accident and had not regained her former level of activity. In addition, the plaintiff had become introverted after the accident whereas prior to the accident she had been very outgoing. At the time of the accident, the plaintiff worked from home as a commissioned salesperson for an internet marketing company concentrating on realtors and real estate and was a partner in an internet-based advertising and marketing business for child care providers. After the accident, the plaintiff had used some of her vacation time to recover from her injuries. When she returned to work full-time, she found she took longer to complete her work and could not devote the necessary time to her internet business, which was eventually sold. Subject to a decision on liability, the parties agreed on special damages and the value of lost paid vacation time.  HELD: Action allowed.  The defendant was 100 per cent liable as the plaintiff's vehicle was fully into the curb lane when the defendant started to change lanes and the plaintiff met her obligation to determine that the highway was clear and to yield to oncoming traffic. The chronic pain suffered by the plaintiff caused her a loss of enjoyment of life which justified an award of $75,000 in non-pecuniary damages. In addition, the plaintiff was entitled to $1,846 for loss of opportunity to earn commission, $2700 for lost paid vacation time and $15,000 for lost earning from her business. The plaintiff was less capable of earning income, was less marketable as an employee, had lost the ability to take advantage of opportunities open to her and was less valuable to herself as a person capable of earning income in a competitive labour market which justified an award of $130,000 for loss of earning capacity. The parties agreed to special damages in the amount of $11,652 for treatment, damage to her vehicle and accelerated depreciation. The plaintiff was awarded $10,800 for the costs of future care for physiotherapy, medications and the possibility of receiving radio frequency neurotomy. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 151*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0G8-00000-00&context=)(a), s. 176(2)

**Counsel**

Counsel for the Plaintiff: M. Durando and D. Thompson.

Counsel for the Defendants: L. Beukman and J. Murray.

**Reasons for Judgment**

|  |
| --- |
| **R.W. METZGER J.** |

**INTRODUCTION**

**1**  Ms. Pamela Mackie claims damages from injuries sustained in a motor vehicle accident that occurred on June 20, 2006 (the "Accident"). The parties contest liability and damages.

**2**  Subject to a decision on liability, the parties have agreed to special damages in the amount of $11,650 and have valued the paid vacation time lost by the plaintiff as a result of the Accident at $2,700.

**3**  The defendant, Kenneth Gruber, was driving the Greyhound bus involved in the Accident. The case against the defendant, The Gray Line of Victoria Ltd., was dismissed by consent at the outset of trial.

**EVIDENCE ON LIABILITY**

**4**  The Accident occurred southbound on the Trans-Canada Highway in Duncan, British Columbia, immediately adjacent to a shopping centre parking lot south of Trunk Road. Ms. Mackie was exiting from the mall parking lot near the Dog House Restaurant when the Accident occurred.

**5**  In the vicinity south of Trunk Road the Trans-Canada Highway has two lanes coming south and two lanes going north. In parts, the highway is divided by a cement median. A broken or dotted line separates the lanes themselves.

**6**  All the witnesses, except for Mr. Gruber, described the traffic as "rush hour" for Duncan. Mr. Gruber described the traffic as "normal".

**7**  Ms. Mackie was driving a 2006 Ford "Sport Ranger" truck. Shortly before the Accident, the plaintiff and her partner, Mr. Bruce Romkey, had stopped in the Safeway mall area where the plaintiff purchased two cold coffee drinks. Both Mr. Romkey and the plaintiff testified that the plaintiff's drink was in the truck's cup holder at the time of the Accident. Mr. Romkey was in the front passenger seat.

**8**  Ms. Ginger Penner gave evidence that she witnessed the Accident from a vantage point in her own vehicle. Ms. Penner was waiting in the northbound lane of the Trans-Canada Highway, in line with Safeway's north entrance to the shopping mall, preparing to turn into the mall at Safeway at the southern entrance. The Trunk Road intersection light was still red when she approached, but there was traffic coming southbound from Trunk Road. When that traffic cleared, the intersection light had turned green and she decided to wait.

**9**  Ms. Mackie and Mr. Romkey testified that the plaintiff came to a complete stop at the stop sign at the Dog House Restaurant exit before exiting onto the highway. Mr. Romkey testified that their truck was stopped for about three seconds.

**10**  Ms. Mackie focused on the light- coloured vehicle in the southbound curb lane and began her turn onto the Trans-Canada Highway after she was satisfied that it was about to make its turn into the Dog House Restaurant entrance to the shopping mall. Ms. Mackie's evidence is that there was traffic approaching southbound behind the light-coloured vehicle.

**11**  Mr. Romkey first viewed the light-coloured vehicle as it was travelling southbound just south of Trunk Road by the corner gas station. Mr. Romkey admitted he did not actually recall where it turned.

**12**  The defendant bus driver, Mr. Gruber, believes that the light-coloured vehicle turned right either at the Trunk Road intersection, or at the first entrance to the Shell gas station on the Trans-Canada Highway, just past the Trunk Road intersection.

**13**  Ms. Penner did not notice the light-coloured vehicle. She testified that there was no traffic traveling in the curb lane alongside the bus when it crossed Trunk Road travelling southbound.

**14**  Ms. Mackie and Mr. Romkey testified that their truck was stopped in the mall exit at a slight angle in order to make the turn on to the southbound lane of Highway 1.

**15**  Ms. Mackie testified that she first noted the bus at the same time she saw the light-coloured vehicle approaching in the curb lane.

**16**  Mr. Romkey testified that as Ms. Mackie began her exit from the Dog House Restaurant exit, her curb lane was clear of traffic. He stated that he was first and foremost paying attention to the curb lane "like any driver would." Ms. Mackie says that she saw the bus when it was in the second lane, next to the light-coloured vehicle. At this point, Mr. Romkey believes the bus was approximately 50 or 60 feet away.

**17**  The witnesses were consistent in testifying that there was no traffic ahead of the bus and no traffic ahead of the light-coloured vehicle immediately before the Accident.

**18**  Ms. Mackie testified that upon seeing the light-coloured vehicle begin its turn into the Dog House Restaurant entrance, she turned her head to the right to check that no pedestrians were present and turned her head left again to ensure that her lane was still clear. She testified that she checked to see that the bus was still travelling southbound in the second lane and that she had enough room in her curb lane to exit onto the Trans-Canada Highway. Ms. Mackie proceeded to make her turn on to the highway.

**19**  Ms. Mackie testified that when she saw the bus for the second time it was almost right beside the light-coloured vehicle, coming up at the vehicle's left. At this point, according to Ms. Mackie, the bus was one or one-and-a-half car lengths away from her truck. Her evidence is that she began her turn "very quickly" after seeing the bus this second time.

**20**  Mr. Gruber's evidence is that he began a gradual lane change from the second lane to the curb lane very shortly after seeing the light-coloured vehicle turn right in his right-hand mirror.

**21**  Mr. Romkey testified that when the light-coloured car started to turn, the plaintiff pulled out on to the highway and started to drive south as the Accident occurred. Mr. Romkey described that, as the plaintiff pulled out southbound on to the Trans-Canada Highway, the bus was immediately beside their truck. The bus then started to change lanes. The defendants speculate that the truck may have pulled out simultaneous to the bus changing lanes. I disagree given the uncontradicted evidence of Ms. Penner.

**22**  Ms. Penner had an unobstructed view of the southbound traffic. She was a careful, forthright and independent witness. Ms. Penner testified that when the plaintiff's truck turned out of the Dog House Restaurant exit, traffic had started to travel south on the Trans-Canada Highway and the southbound curb lane was clear. Ms. Penner, who admitted that she is not good with distances, believed that the front of the bus was even with or just past the truck when the bus began to change lanes. The bus eased over into the curb lane and the Accident occurred.

**23**  At the time of the Accident, Mr. Richard Anthony was in his own vehicle waiting northbound on the Trans-Canada Highway, preparing to turn left on Trunk Road. Mr. Anthony testified that his attention was drawn to the Accident by a loud scraping sound. He explained that "it sounded like the bus had picked up something underneath it." Mr. Anthony did not view the Accident.

**24**  All of the witnesses who viewed the Accident were consistent in testifying that the Accident between the bus and the plaintiff's truck occurred in the curb lane, southbound on the Trans-Canada Highway.

**25**  Neither Ms. Mackie nor Mr. Romkey observed what the bus was doing immediately prior to the Accident. Ms. Mackie testified that the third time she saw the bus, it appeared in her peripheral vision as a "big piece of metal" and collided with her truck on her left side. Mr. Romkey described hearing what he believed to be a revving of the bus engine immediately before the Accident. He was looking at his partner and saw the bus through her window, moving towards the truck. Mr. Romkey described the collision between the truck and the bus as making a "scraping" noise for less than a second at the point of impact.

**26**  At the time of the Accident, neither Ms. Mackie nor Mr. Romkey could see the front of the bus.

**27**  Ms. Mackie testified that at the moment that the Accident occurred, she had already left the Dog House Restaurant exit and was fully in the curb lane. She testified that she believes she had gone southbound for approximately 20 to 25 feet in the curb lane at the point of the Accident. At other points in her testimony, Ms. Mackie explained the distance as one or one-and-a-half car lengths. Mr. Romkey described the distance variously as six or seven car lengths, then, in cross-examination, five or six car lengths. Mr. Romkey agreed that the Accident took place at a point "just past" the Dog House Restaurant exit. Mr. Anthony believes that the plaintiff's truck was stopped on the highway 20 or 30 feet from the Dog House Restaurant exit with debris some distance in front of the driver's side of the truck. Mr. Gruber places the front of his bus almost immediately south of the Dog House Restaurant exit at the point of collision.

**28**  Mr. Gruber's evidence is that he was in the process of completing a lane change from the second southbound lane to the curb lane at the time of the Accident, and that the front of his bus was one-half to two-thirds into the curb lane when the truck collided with the bus.

**29**  Ms. Mackie's evidence is that their truck did not move to the right as a result of the Accident. She does not recall swerving or turning her steering wheel.

**30**  Mr. Romkey could not say how many seconds passed after their truck left the exit and the Accident occurred.

**31**  Ms. Penner had first noticed the bus when it was stopped in the second lane at the Trunk Road intersection. Ms. Penner testified that the truck had turned out of the Dog House Restaurant exit before the bus began its lane change. She testified that the bus thereafter travelled southbound in the second lane, and that the plaintiff's truck was fully out in the curb lane travelling southbound as she could see the truck's grill when the Accident occurred.

**32**  I am satisfied that Ms. Mackie's truck was fully into the curb lane when the bus started to change lanes.

**33**  Mr. Gruber's evidence is that he engaged his right-hand turn signal immediately after clearing the Trunk Road intersection. He says that he waited for the light-coloured vehicle to make a right turn before commencing his lane change to the curb lane. His evidence suggests that the front of the bus at the commencement of the lane change was somewhere between the Trunk Road intersection and the Dog House Restaurant entrance.

**34**  Ms. Mackie's evidence is that she looked for a turn-signal light on the bus, but did not see one. She says that she looked at the bus twice before making her turn on to the highway. She says further that if the bus signalled, she did not see its signal.

**35**  Mr. Romkey did not notice a turn-signal light on the bus as it changed lanes.

**36**  Ms. Penner testified that when the bus started to change lanes there was no turn-signal light on the bus to indicate the lane change. The evidence is that the turn signal did work at Mr. Gruber's pre-trip inspection of the bus before the Accident, and on Mr. Gruber's pre-trip inspection the following morning.

**37**  The witnesses agree that the bus appeared to be "flowing with traffic" and travelling at a "normal" speed as it travelled southbound towards the Dog House Restaurant entrance.

**38**  The evidence of Ms. Mackie and Mr. Romkey satisfies me that their truck was travelling at approximately 15 kilometres per hour.

**39**  After the truck and bus collided, Ms. Mackie immediately brought the truck to a stop and put it into Park. The plaintiff says that after she put her truck into Park, her "eyes went black" for three to five seconds. She then telephoned 911 on her cellular telephone and asked for emergency assistance.

**40**  After the Accident, the bus kept going a short distance southbound down the Trans-Canada Highway, then pulled into the Safeway parking lot at its south entrance.

**41**  Ms. Mackie remained in her vehicle until the ambulance arrived and both she and Mr. Romkey agree that she left the truck and walked to the ambulance without assistance. Although Mr. Romkey believes that the plaintiff was taken on a gurney to be placed in the back of the ambulance, the plaintiff testified that she sat upright on the ride to the hospital after being offered the opportunity to lie down.

**42**  The witnesses each described the damage to the plaintiff's truck as consisting of damage in the area of the front left quarter of the vehicle. The front bumper was dislodged at the left side and part of the bumper was resting on the ground after the Accident. Photographs and witnesses' evidence show denting to the front of the left front quarter panel extending in close proximity to the headlight. The left front headlight and turn signal were broken in the Accident. The truck's airbags did not deploy. There was no damage to the doors or wheels. Aside from the bumper, the front of the vehicle was not damaged.

**43**  Mr. Romkey explained that it looked as though the bumper had been scraped forward in the Accident. He tied it to the vehicle using a strap. The truck's front left-hand lights and other debris also appeared to have been scraped forward from the truck. The debris came to rest 15 to 20 feet forward of the truck's final resting position.

**44**  Mr. Romkey drove the truck to the hospital to meet his partner approximately 45 minutes later.

**45**  Mr. Gruber places the damage to the bus on the right-side battery compartment, behind the bus' front right wheel. A photograph of the damage taken by Mr. Gruber using his telephone camera after the Accident indicated a scrape along the side of the bus.

**46**  In weighing the evidence of the various witnesses, I remind myself of the statement in *Wallace v. Davis*, [*[1926] O.J. No. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=), [*31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=), p. 203, per Riddell J.A.:

... the credibility of a witness in the proper sense does not depend solely upon his honesty in expressing his views. It depends also upon his opportunity for exact observation, his capacity to observe accurately, the firmness of his memory to carry in his mind the facts as observed, his ability to resist the influence, frequently unconscious, of interest to modify his recollection, his ability to reproduce in the witness-box the facts observed, the capacity to express clearly what is in his mind - all these are to be considered in determining what effect to give to the evidence of any witness.

**47**  Mr. Gruber testifies that his signal light was on for two or three seconds before he changed lanes. No other witness saw such a signal, including Ms. Penner who had an uninterrupted view and watched the Accident unfold from beginning to end.

**48**  Mr. Gruber attended the scene a week or two after the collision, intending to take photographs of the point on the highway where the collision occurred so that the Greyhound representative, who asked him to take the photos, could understand what happened. Mr. Gruber took photos of the wrong entrance/exit (Safeway north) on a stretch of road that he said that he was thoroughly familiar with. This is typical of the carelessness of his conduct since the collision. It also illustrated his inability to make accurate observations and to remember the observations he had made.

**49**  Additional examples of his continued carelessness are his:

1. Failure to follow company policy respecting loading slips that served as witness statements;
2. Failure to get the name and address of the pedestrian witness who he says told him the plaintiff was at fault;
3. Incomplete preparation of the accident report, which he alternately acknowledged to be an important part of his duties and dismissed as internal company paperwork of little importance;
4. Seeking to justify the poor report because his memory is so good;
5. Excusing the poor report on the basis that he was treating the matter as a minimal damage "fender-bender";
6. Failure to produce the trip report and log book extract, which were relevant documents; and
7. Giving evidence on oath at his discovery that the collision occurred near the Safeway north entrance on to the highway when it was the south entrance.

**50**  Mr. Gruber also lied. Examples of such behavior are:

1. He told the ICBC adjuster there were six witnesses when he knew for a fact there were only two;
2. He asserted at trial that he was not trying to photograph the collision site one to two weeks after the collision, having admitted at discovery that taking those photographs was precisely his purpose;
3. He asserted at trial, and for the first time in these proceedings or anywhere in the documentary evidence, that the plaintiff was on her cell phone at the time of the collision. This was not put to the plaintiff in cross-examination, which leads me to conclude it was of recent fabrication, as defendant's counsel was thoroughly professional during the whole course of this trial; and
4. He claimed in his evidence, but only on the second day of trial, to have seen Ms. Mackie's truck while it was in the parking lot. He had earlier testified at trial and discovery that he did not see the truck until he saw it out of his peripheral vision a fraction of a second before impact. I am satisfied that this was another recent fabrication to demonstrate that he had been keeping a proper lookout.

**51**  Mr. Gruber seemed unable to resist modifying his recollections. When confronted with the investigating constable's contemporaneous note that Mr. Gruber said he had "observed that a car had made a right turn into the parking lot at the Dog House restaurant," Mr. Gruber denied ever having made such a statement. The observation is consistent with the plaintiff's observation.

**52**  I reject Mr. Gruber's testimony whenever this is a conflict with the testimony of any other witness.

**LIABILITY**

**53**  The relevant sections of the *Motor Vehicle* Act, *R.S.B.C. 1996, c. 318* [*Motor Vehicle Act*], are:

151 A driver who is driving a vehicle on a laned roadway

1. must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 176 | (2) |  | The driver of a vehicle about to enter or cross a highway from an alley, lane, driveway, building or private road must yield the right of way to traffic approaching on the highway so closely that it constitutes an immediate hazard. |  |

**54**  As a driver about to enter a highway from a parking lot driveway, the plaintiff was obliged to determine that the highway was clear and to yield to traffic approaching on the highway so closely that it constituted an immediate hazard, pursuant to s. 176(2) of the *Motor Vehicle Act*. I find as a fact that she did so.

**55**  I reject the defendants' submission that the bus driver held the position of dominant driver under the applicable provisions of the *Motor Vehicle Act* and constituted an immediate hazard to the plaintiff under s. 176(2) of the *Act*, to whom she failed to yield.

**56**  Mr. Gruber's version of the Accident is rejected given my determination that his testimony is not trustworthy.

**57**  It is well accepted by the authorities that speed and distance generally determine what constitutes an immediate hazard.

**58**  At the time the plaintiff pulled out of the driveway to enter the highway, I am satisfied that the bus was at least one car length away and fully in the second lane. I accept the evidence of the witnesses that at the time that the plaintiff turned on to the highway, the bus had not yet commenced its move to the curb lane. The bus did not constitute an immediate hazard.

**59**  I am satisfied that at the time of the Accident the plaintiff had completed her right-hand turn out of the Dog House Restaurant driveway and was fully established in the curb lane.

**60**  I find the defendants 100% at fault.

**DAMAGES**

**61**  Ms. Mackie's primary complaints concern her neck and upper back, headaches, jaw pain, concussion, fractured teeth, anxiety and depression. The plaintiff concedes that any depression and post-concussion syndrome have diminished over time. Her most significant complaints involve neck and upper back pain and headaches.

**62**  Ms. Mackie gave evidence as to the injuries she suffered in the Accident, her symptoms, treatment, and effect these injuries have had on her life. Mr. Romkey and the plaintiff's friends and co-workers, Ms. Kimberly Garnett, Ms. Susan Wilson and Ms. Monica Hinch, also gave evidence as to the effect that these injuries appeared to have had on Ms. Mackie's personal and professional life. Expert opinion reports were tendered by: an anaesthesiologist, Dr. David Bond; a physiatrist, Dr. Lynne McKean; the plaintiff's family physician, Dr. Derek Saunders; and Ms. Mackie's family dentist, Dr. Jerome Nanos. Each of these medical witnesses was subject to cross-examination.

**63**  Ms. Mackie testified that her doctors agree that her overall range of movement is reduced and that she experiences most pain when moving her head forward and backward. Her evidence is that flexion and extension only reach 50% when the Botox treatment is applied. Ms. Mackie and her doctors believe that there has been significant improvement in the plaintiff's ability to move her head from side to side and in rotation without significant discomfort since the Accident. Ms. Mackie and her doctors agree that this improvement has been on-going since the Accident, but that it likely has reached a plateau.

**64**  As of November 2007, the lower part of Ms. Mackie's shoulders were "very close to normal" and the side-to-side movement of her neck was "almost normal." However, she still experienced limitations in the flexion and extension of her neck.

**65**  Dr. MacKean referred the plaintiff to Dr. Bond for treatment in January 2007. Initially, in March 2007, Dr. Bond used "trigger point" injections to intervene in the plaintiff's neck and upper back muscle pain. The plaintiff initially experienced some relief of headaches after the trigger point injections, but the benefits trailed off. Starting in May 2007, Dr. Bond conducted upper cervical facet "nerve blocks," which provided the plaintiff with good relief of pain for a few days at a time. Dr. Bond began injecting Botox in late November 2007 that has, thus far, been instrumental in reducing the plaintiff's complaints of neck pain and headache.

**66**  The plaintiff finds her Botox treatments to be of great benefit. By January 2008, the plaintiff reported a 50% improvement in headaches and shoulder pain following the Botox injections. The plaintiff has continued to receive Botox injections every four months and continues to report a similar improvement in symptoms for an average of three months after each treatment.

**67**  The plaintiff and Dr. Bond both testified that patients may only undergo a maximum of three Botox treatments in a single year (every 16 weeks). The plaintiff says that she feels relief from Botox treatments for approximately 10 to 12 weeks at a time.

**68**  Dr. Bond plans to continue the plaintiff's Botox treatments for the next one or two years and to repeat the facet block injections with a view to treating the plaintiff with radio frequency neurotomy. The latter promises to provide a 60% to 70% chance of improvement in pain symptoms for a more extended period of time, and a chance of improving the symptoms to a greater degree than Botox. There is a chance that the radio frequency neurotomy would have to be repeated 18 to 24 months after the first treatment.

**69**  To date, Ms. Mackie's health care provider has funded her Botox injections. Dr. Bond's evidence is that he does not believe that the provincial medical plan will cover radio frequency neurotomy treatments.

**70**  Ms. Mackie has been visiting a physiotherapist/acupuncturist, Ms. Imgard Quapp, since July 2006. Initially the visits cost $40, $15 of which was paid by Ms. Mackie. Recently the cost increased to $45, with Ms. Mackie paying $20 per visit. At present, Ms. Makie obtains physiotherapy and acupuncture twice per week at a weekly cost to her of $40.

**71**  Dr. Saunders agreed that, overall, the plaintiff's condition has improved since the Accident. I accept Dr. Saunders' opinion that it would be difficult for the plaintiff to work in an office setting outside her home. Dr. MacKean suggests that, as eight-hour shifts cause aggravation of Ms. Mackie's pain symptoms, it would be better for the plaintiff to work a four- to six-hour shift with a mid-day break.

**72**  Dr. MacKean, a physical medicine and rehabilitation specialist, has examined the plaintiff on two separate occasions in respect of Ms. Mackie's whiplash-related injuries. The first, in January 2007, at the request of Ms. Mackie's family physician and, the second, in November 2008, at the request of the plaintiff's counsel. She agreed that the plaintiff showed some signs of improvement between visits. The pain in Ms. Mackie's upper back and upper trapezius region has improved. The plaintiff's primary complaint, according to Dr. MacKean, concerns her upper cervical spine. Dr. MacKean recommends that the plaintiff continue to follow up with Dr. Bond, and that she continue physiotherapy and acupuncture. Dr. MacKean expects that the plaintiff will continue to see continued improvement over the next two to three years but believes that it is unlikely that Ms. Mackie will fully recover.

**73**  The plaintiff testified that she had suffered from occasional migraines before the Accident. She had not taken special migraine medication before the Accident and stressed that the migraines she has suffered since the Accident are materially more debilitating than the ones that she had before. The plaintiff described her post-Accident migraines as "pounding" and "crippling," with associated vomiting and sensitivity to sound and light. When these migraines occur, the plaintiff lays down in a room with closed blinds.

**74**  Ms. Mackie also says that she suffered from "stress headaches" once every couple of months before the Accident. Ms. Mackie explained that these tension headaches come up in the lower part of her neck and scalp and radiate through her head. These headaches are not as severe as migraines and the plaintiff feels that she can release them with exercise, ice and physiotherapy.

**75**  Ms. Mackie was initially prescribed Zomig to assist with her migraines. By four months post-Accident, Ms. Mackie explained that her headaches were getting better. She agreed that by October 2006, it was "very possible" that the headaches could have "lessened in intensity."

**76**  Ms. Mackie also agreed that the Botox treatment has been instrumental in reducing the number and intensity of headaches. She testified that when the Botox treatment is in effect she suffers, on average, one to two migraines per week, and three to four when the treatment has worn off. She testified that, during the course of trial, she was suffering from a multi-day headache. Despite this, Ms. Mackie was able to give cogent evidence through the first day of trial, the second day until the lunch break, and the third day until 11:38 a.m.

**77**  This was a prime example of the fortitude of Ms. Mackie and her commitment to "get on with her life," despite the opportunity for self-pity given her ongoing pain.

**78**  The plaintiff's treating physician, Dr. Saunders, is of the opinion that Ms. Mackie probably suffered from mild depression since the Accident, but that it has apparently resolved. His opinion was formed as a result of the plaintiff's self-report in October 2008, in which the plaintiff claimed that she may have been slightly depressed for an extended period of time after the Accident, but that overall her mood was improving.

**79**  Dr. Saunders also diagnosed the plaintiff as exhibiting anxiety symptoms, as she admitted suffering from some driving anxiety after the Accident.

**80**  When driving the Malahat Highway one night in 2005, Ms. Mackie happened upon an accident for which she eventually came to administer first aid treatment to accident victims. She witnessed a woman trapped in a vehicle and burning to death. As a result of witnessing this Malahat accident, Ms. Mackie testified that she visited a psychologist between four and six times. I am satisfied that any anxiety Ms. Mackie experiences now or after the Accident is not due to the after-effects of witnessing that fatal motor vehicle accident.

**81**  Since the Accident, the plaintiff has neither seen, nor has she been referred to, a counsellor, psychiatrist or psychologist, to deal with either anxiety or depression.

**82**  It is understandable, given her obvious concern about being a safe driver, that Ms. Mackie described being anxious about highway driving when she is on heavy medication or when she is experiencing significant neck pain.

**83**  Dr. Saunders opines that the plaintiff might have suffered a mild concussion in the Accident and that the cognitive dysfunction symptoms that it might have caused had resolved between four to five months after the Accident. I accept Dr. Saunders' opinion that the plaintiff's headache symptoms, anxiety, and emotional distress might have also contributed to this period of cognitive dysfunction.

**84**  In a report dated August 27, 2008, Dentist Dr. Jerome Nanos diagnosed the plaintiff with myofascial pain dysfunction ("MPD"), consistent with the Accident, and "fracture lines and vertical fracture symptoms consistent with trauma impact." Dr. Nanos could not say whether it was more probable or not that the fractured teeth are the result of the Accident.

**85**  There is no evidence to suggest that Ms. Mackie hit her face in the Accident. She reported no cuts, bruises or bleeding to her mouth, head or face as a result of the Accident.

**86**  Over time, the plaintiff has been prescribed Tramacet, Zomig and Oxycontin to treat her headache and pain symptoms. Zomig is a preventative migraine medicine that Ms. Mackie will use when she detects the onset of a migraine headache.

**87**  In addition to prescription medication, the plaintiff uses ice packs three to six times a day to provide pain relief and, on occasion, wears a neck collar.

**88**  Ms. Mackie did most of the housework before the Accident. For seven months after the accident a housekeeper assisted Ms. Mackie with her cleaning chores. No evidence has been introduced as to the cost of these services. For a time, Mr. Romkey assisted with heavier chores such as floor and shower cleaning. At present, Ms. Mackie takes on all of the cleaning duties except the bathroom shower tiles, as she fears that the necessary overhead reaching might "bring on a flare-up in her neck."

**89**  Cooking and dishwashing duties have been consistently shared between the plaintiff and Mr. Romkey. Ms. Mackie testified that she alone continues to do the family laundry.

**90**  Prior to the Accident, Ms. Mackie and Mr. Romkey completed extensive landscaping work at their home. He built the gardens; she did the planting and designing. Since the Accident, according to both Ms. Mackie and Mr. Romkey, the plaintiff has not returned to her pre-Accident level of gardening, instead restricting herself to occasional planting.

**91**  Before the Accident, Ms. Mackie had a very sporadic sporting life. Although she has not been a member of an athletic club since living in Ontario, the plaintiff testified to jogging one to three times per week in the summer months and swimming on occasion. After moving to Shawnigan Lake she would swim in the lake when the weather was appropriate. Ms. Mackie testified that she attempted to swim using a boogie board at the lake at some point after the Accident, but found it too painful to continue. Her evidence is that before the Accident she would swim "once a month, or once a week, or all weekend."

**92**  Ms. Mackie also spoke of enjoying tennis before the Accident and that she had played with people in her neighbourhood a total of eight or ten times in the ten years prior to the Accident. Ms. Mackie also gave evidence of rollerblading before the Accident at the Dallas Road boardwalk up to four times per month when the weather was nice, and before her 2003 move to Shawnigan Lake.

**93**  Ms. Mackie also testified that she started to go to the driving range to hit golf balls in the two years before the Accident. She explained that, at that time, she would go to the range with a friend two to three times per month in spring and summer. She says that she has not gone golfing since the Accident.

**94**  Ms. Mackie currently walks her dogs "a couple of times a week" and testified that for eight months after the Accident she did not walk them.

**95**  Ms. Mackie explained that she is no longer able to attend charity dances that she used to enjoy two to three times per year before the Accident. She testified that she has not been able to dance at a concert since June 2006.

**96**  Ms. Mackie's evidence is that after the Accident she took between one and two weeks of holiday time to start recovery from her injuries. The parties have agreed that the value of this holiday time is $2,700. The plaintiff testified that since that time, she has continued to use holiday time to take care of herself, attend to medical treatments and the like. There is no evidence of how much of her holiday time was utilized for these or other purposes. Ms. Mackie did testify, however, that "before the accident [she] was only taking one or two days a year" in holiday time.

**97**  Ms. Mackie expressed that she might now need to work until age 65. She testified that, prior to the Accident, she had dreams of growing her partnership business with Ms. Garnett such that she would be able to retire at age 55 to concentrate on renovating and landscaping her home, and continuing to work in online sales. Mr. Romkey suggested that before the Accident he and the plaintiff had goals to retire at age 55 or 56. Since the Accident, Mr. Romkey believes that he and the plaintiff will likely have to work until age 60.

**98**  Ms. Mackie described her home office as including a desk, computer, fax machine, telephone, bookshelves, and filing cabinets. Her home office has been used in the course of her employment. At some point after the Accident, Ms. Mackie purchased a new keyboard and mouse, a new telephone, new telephone headset, and a new office chair with more padding. These are all the changes to her home office made on the recommendation of physiotherapist Ms. Quapp. Ms. Quapp did not visit the home office, but told Ms. Mackie what she needed to purchase. Ms. Mackie has not been referred to, or sought assistance from, an ergonomic specialist or occupational therapist in relation to her home office setup.

**99**  Mr. Romkey, who works full-time outside of the family home, observed that, since the Accident, the plaintiff has become "fairly introverted." She will make excuses so that the two will not have to go out of the house and, when they do go out, she often complains of neck pains and headaches leading to an early return home. Mr. Romkey further observed that since the Accident Ms. Mackie spends evenings using her ice pack and has become "a couch potato" on evenings and weekends.

**100**  Mr. Romkey believes that prior to the Accident, the plaintiff was "very outgoing, happy go lucky, like a cheerleader." His evidence is that before the Accident, the plaintiff would work out, go swimming, visit friends, and walk their dogs. On occasion, the two would go dancing and attend a number of silent auctions and children's benefits each year. They would also attend racing events where Ms. Mackie would dance at his clubhouse.

**101**  Mr. Romkey suggested that he drives the plaintiff to most medical appointments.

**102**  Mr. Romkey agreed that the plaintiff's condition has improved since the Accident, but would not agree that she was "a lot" better. According to Mr. Romkey, the plaintiff "has good days and bad days."

**103**  Ms. Kimberly Garnett's close personal friendship with the plaintiff started at some point after the two began working together at the Times Colonist newspaper in approximately 2001/2002.

**104**  Before Ms. Mackie moved from Victoria to Shawnigan Lake in 2003, she saw Ms. Garnett outside of work at least once a week. It is evident that the plaintiff and Ms. Garnett did not see each other very often. The two would meet face to face every two weeks, but would speak on the telephone several times a day. After the move, and when meeting face to face, Ms. Garnett would most often drive up to Ms. Mackie's home every second weekend when it was not snowing. Ms. Garnett testified that after starting the Canada Child Care Directory business, much of her relationship with the plaintiff was business oriented.

**105**  Ms. Garnett's evidence is that in the years before the Accident she would go up to visit the plaintiff on weekends where the two enjoyed barbecues and walks on the beach. Since the Accident, the two still speak very often by telephone, but Ms. Garnett does not see Ms. Mackie as much as she would like. Visits, when they occur, are not as long as they used to be before the Accident.

**106**  Ms. Garnett described the plaintiff as being "bubbly, outgoing, fun loving, social, interesting, a hard worker, full of life," a person who "loved having people around" before the Accident. According to Ms. Mackie, after the Accident the plaintiff was "isolated, antisocial, distanced" and "sad."

**107**  At some point after the Accident, in 2008, Ms. Garnett encouraged Ms. Mackie to return to employment with the Times Colonist in the same position as she held previously. However, Ms. Garnett testified that the plaintiff did not fare well in this environment. Ms. Garnett testified that, at times, Ms. Mackie would be in tears by the end of a four-hour shift. Ms. Garnett also testified that as of June 6, 2008, the plaintiff was a contract worker at the Times Colonist. She could not say how long the plaintiff remained at the job. No evidence was offered to explain the hours Ms. Mackie worked for the Times Colonist in 2008, or what income she might have earned from that work.

**108**  Ms. Susan Wilson attended high school and worked with the plaintiff in Barrie, Ontario, and moved to Victoria in 1994. She and Ms. Mackie resumed their close friendship when the latter moved to Victoria the following year. Ms. Wilson is the godmother of Ms. Mackie's only daughter.

**109**  Ms. Wilson believes that prior to the Accident, the plaintiff was "full of life." After the plaintiff moved to Shawnigan Lake in 2004, Ms. Wilson would visit her friend four to six times a year and would speak by telephone every two to three weeks. Now the two see each other, on average, twice per year. Ms. Wilson's evidence is that she never visited the plaintiff at Shawnigan Lake, rather, Ms. Mackie would travel to Victoria when the two would meet.

**110**  In mid-1997, the plaintiff was recruited by the owner of her current employer, Most Referred Real Estate Agents ("Most Referred"), an operating arm of Most Home Real Estate Services Inc., itself a company owned by Most Home Corp., of Maple Ridge, British Columbia.

**111**  While working for Most Referred, Ms. Mackie has always worked from an office located in her home. Most Referred is an internet marketing company concentrating on realtors and real estate across Canada and the United States.

**112**  All of Ms. Mackie's work has been conducted over the telephone and internet. Ms. Mackie did not meet customers face to face.

**113**  Ms. Mackie starts her workday at 6:00 a.m., in part, to account for the time zone differences inherent in her job. At present, she works Monday to Friday, though on occasion she checks her email on the weekends. She is expected to work at minimum a 40-hour work week, but might work additional hours to meet certain sales goals. Since the Accident, Ms. Mackie has, at times, experienced difficulty in completing an eight hour work day in eight hours. As a result, she occasionally must work 10 to 12 hours to complete the requirements of her employment. Most Referred has accommodated her in this regard. Ms. Mackie's evidence is that since the Accident she must apply ice to her neck a number of times throughout the day in order to reduce or eliminate any pain she might experience.

**114**  Evidence was given by Ms. Monica Hinch, the plaintiff's supervisor at Most Referred. Ms. Hinch testified that she did not have any concerns with the plaintiff's work performance after the Accident. Furthermore, she would have "no hesitation" giving the plaintiff a good recommendation to prospective employers.

**115**  Although Most Referred has experienced a decline in revenue since the Accident, Ms. Hinch is unable to conclusively attribute any of that decline to Ms. Mackie. Ms. Hinch's evidence is that the product offered by Most Referred is coming to the end of its lifecycle. Mr. Galpin described the business as providing a "legacy" product.

**116**  Mr. Galpin, who has been with Most Home Corp. since 2000, expected that Most Referred, an operational division of Most Home Real Estate Services Inc., would be closed down by February 2010. He did not know what Ms. Mackie's role might be with Most Referred should it be sold. Mr. Galpin explained that the only appropriate position that might be available to the plaintiff would be in the company's contact centre and that her annual salary for that job would be approximately $40,000.

**117**  I am satisfied that Ms. Mackie's uncertain future with Most Referred is entirely unrelated to the Accident. Each of Mr. Galpin, Ms. Garnett, and Ms. Hinch agreed, without hesitation, that they would provide positive references for Ms. Mackie if references were sought of them.

**118**  Ms. Mackie was sporadically employed by the Victoria Times Colonist as a newspaper subscription telemarketer starting in June 1999. She remained with the Times Colonist as a contract employee until mid-2005 when she left that job to concentrate on other business activities. The plaintiff does not make any claim for lost or future income arising from her Times Colonist work.

**119**  In 2005, the plaintiff and Ms. Garnett established an internet-based advertising and marketing business under the trade name Canada Child Care Directory. The Canada Child Care Directory was a website that offered child care providers a place to advertise their services online for a modest fee. Consumers of child care services were able to utilize the directory without charge.

**120**  This business combined the plaintiff's experience in telephone and internet sales with Ms. Garnett's background in early childhood education, internet design and "search engine optimization." Ms. Garnett also handled the initial marketing of the business. Ms. Mackie did the banking and payment processing and checked the business post office box in Mill Bay, British Columbia. All sales for this business were made over the telephone or the internet.

**121**  Ms. Garnett testified that the Canada Child Care Directory was set up between her and the plaintiff as a limited liability partnership and start-up costs were minimal. The two partners had intended to start the venture as a side-business to their regular jobs and, if and when the Canada Child Care Directory business became more profitable, they would each move to the new venture in a full-time capacity.

**122**  By September 2005, Ms. Garnett and Ms. Mackie believed that the Canada Child Care Directory business was getting too busy, so Ms. Mackie left her employment at the Times Colonist to concentrate on that business in addition to her regular duties for Most Referred. From this point onward, it is apparent that when Ms. Mackie was not working for Most Referred, she was working on the Canada Child Care Directory business.

**123**  In its first year, the Canada Child Care Directory business was not particularly profitable. The evidence suggests that Ms. Mackie took in $544 from the business, before taxes. In the second year, the evidence suggests $7,408 was brought in by Ms. Mackie before taxes. Ms. Garnett testified that by the time the business was sold, they had over 400 paying customers and were considering opening the product to allow for advertising from "external" advertisers.

**124**  Both the plaintiff and Ms. Garnett testified that the Canada Child Care Directory business was sold because the plaintiff was unable to devote the necessary time and attention to it after the Accident. The decision to shut down or sell the business was taken within a few months after the Accident, as Ms. Mackie was unable to continue to devote the approximately 60 hours per week that the business required on top of her regular employment at Most Referred. The plaintiff and Ms. Garnett each testified that the proceeds of the business were split equally once it was sold to a third party in December 2006. No documentary evidence was offered in respect of this business. No partnership agreement or contract of purchase and sale was entered. Ms. Garnett testified that she has copies of the sales agreement and the financial statements in her possession, but no such statements were offered in evidence. There was no evidence of what particular business assets were sold to the third party.

**125**  There is no clear evidence of how much in commission Ms. Mackie earned at Most Referred before or after the Accident, although she testified that she earned approximately $10,000 per year prior to the Accident. The best evidence offered was a blank reporting form from her employer that indicates the commission structure that was in place in June 2006. Ms. Mackie's evidence is that she was provided her commission details on a monthly basis for her review and approval, but that she has since destroyed these emails. Although the C.E.O. of Most Home Corp. and the plaintiff's supervisor at Most Referred were called to give evidence, neither provided any evidence as to the commission structure or the amounts actually earned by Ms. Mackie. It is also apparent that neither Ms. Mackie nor Ms. Suzy Wilson, a friend who filed Ms. Mackie's tax returns, fully understood the plaintiff's income tax returns.

**126**  Ms. Mackie's income tax returns were compiled and filed each year by her friend Ms. Wilson starting in 2000, 2001, or 2002. Ms. Mackie would provide the necessary information to Ms. Wilson and the latter would complete the returns using the "Quick Tax" computer program. Although Ms. Mackie was able to identify various amounts on her tax returns, she was unable to provide any accurate detail as to how those amounts were calculated.

**127**  The evidence suggests that Ms. Mackie earned a total income of:

1. $47,701 in 2001;
2. $51,960 in 2002;
3. $67,788 in 2003;
4. $83,366 in 2004; and
5. $72,722 in 2005.

**128**  Commission income is reported on Ms. Mackie's income tax returns from 2001 through 2005, however it is unclear whether this commission income was earned from Most Referred or the Times Colonist. Ms. Garnett wrote to the plaintiff on June 6, 2008, confirming Ms. Mackie's gross employment income from the Times Colonist from September 7, 1999 through September 19, 2005. She reported that from her employment at the Times Colonist that Ms. Mackie earned a total of:

1. $6,695.23 in 2000;
2. $7,284.84 in 2001;
3. $6,471.54 in 2002;
4. $22,205.77 between 2003 and 2004 (an average of $11,102.86 per year); and
5. $12,019.58 in 2005.

**129**  After the Accident, Ms. Mackie continued to be employed by Most Referred and also operated the Canada Child Care Directory in partnership with Ms. Garnett.

**130**  Ms. Mackie returned to her Most Referred work the day after the Accident, but was unable to work because of her injuries, so she took two to three weeks off after the Accident.

**131**  Ms. Mackie explained that between five and seven months post-Accident she returned to full-time hours with Most Referred.

**132**  Ms. Mackie's income tax return for 2006 indicates a total income of $92,530.20, of which $67,708.02 is reported as employment income, $22,406.38 as taxable capital gains, and $7,408.25 as business income.

**133**  Ms. Garnett took care of selling the Canada Child Care Directory business. Ms. Garnett and Ms. Mackie each testified that a third party paid the partnership approximately $45,000 for the business and that the proceeds of sale were split equally between the two partners.

**134**  There is a lack of documentary evidence regarding the sale of the Canada Child Care Directory business.

**135**  A review of Ms. Mackie's 2006 income tax return reveals no documentation supporting the evidence of Ms. Mackie and Ms. Garnett concerning the sale of the Canada Child Care Directory business for any amount. Ms. Mackie gave evidence that in 2006 she sold shares of Most Home Corp. and recorded a capital gain. She was unable to recall the proceeds of that sale.

**136**  Ms. Wilson's evidence is that the report for "Most Home Corp." in the Capital Gains (or Losses) portion of the 2006 return is a typographical error and should instead relate to the sale of the Canada Child Care Directory. Ms. Mackie could not say if that particular entry refers to the sale of the directory business or the sale of shares in Most Home Corp. In turn, Ms. Wilson could not recall whether she reported Ms. Mackie's sale of Most Home Corp. shares in 2006, the value of that sale, or where that sale might be reported in the plaintiff's 2006 income tax. She further testified that she likely would have referred Ms. Mackie to a third party for assistance with the plaintiff's taxes if a share sale and the sale of the business took place in the same year. This does not correspond with Ms. Mackie's evidence that she did sell Most Home Corp. shares in 2006.

**137**  The Capital Gains (or Losses) portion of the 2006 return indicates 100,000 units of "publicly traded shares, mutual fund units, deferral or eligible small business corporation shares, and other shares" being disposed for $69,812.76. The "name of fund/corp. and class of shares" is recorded as "Most Home Corp." The year of acquisition is 2006. The adjusted cost base of these units is reported as $25,000, leaving a gain of $44,812.76. No evidence suggested an initial investment of $25,000 in the Canada Child Care Business Directory business or a sale for $69,812.76. The Canada Child Care Business Directory business was started with "minimal" investment in relation to registration of the business and internet address.

**138**  In turn, the "Statement of Business Activities" portion of the 2006 return reports on a business named "A-1 Online Business Directory," an internet advertising business that the plaintiff is reported to have shared in equal partnership with Ms. Garnett. No evidence was adduced in respect of what the "A-1 Online Business Directory" might be. For 2006, Ms. Mackie and Ms. Garnett are reported to have shared a total of $14,816.50 net income, or $7,408.25 each. The return further indicates that 2006 was the final year for this business. No mention was made of "A-1 Online Business Directory" throughout the course of trial.

**139**  In 2007, Ms. Mackie earned total income of $71,591.

**140**  Ms. Mackie's evidence is that she earned $63,910.41 from Most Home Real Estate Services Inc. in 2008. Although Ms. Garnett's evidence is that Ms. Mackie did attempt a return to work at the Times Colonist in 2008, there is no evidence of what income the plaintiff earned from that source in the 2008 tax year. Ms. Mackie's evidence was that she has not returned to the Times Colonist since September 19, 2005.

**A. GENERAL DAMAGES**

**141**  General damages are intended to compensate a plaintiff for pain and suffering and the loss of amenities occasioned by the ***negligence*** of the tortfeasor. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), [*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=).

**142**  The defendants submit that an appropriate award for non-pecuniary damages in the circumstances is between $45,000 and $55,000 and have referred the court to *Kuskis v. Hon Ton*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=), [*169 A.C.W.S. (3d) 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=) [*Kuskis*]; *Delgado v. Parra*, [*2002 BCSC 1345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-6062-00000-00&context=); [*116 A.C.W.S. (3d) 869*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-6062-00000-00&context=); *Krogh v. Swann*, [*2005 BCSC 761*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0NN-00000-00&context=), [*140 A.C.W.S. (3d) 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0NN-00000-00&context=); and *Tardiff v. Toews*, [*2004 BCSC 1009*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0CY-00000-00&context=), [*133 A.C.W.S. (3d) 451*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0CY-00000-00&context=).

**143**  The plaintiff submits that an appropriate award for non-pecuniary damages in the circumstances is between $80,000 and $95,000 and has referred the court to *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=); *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=), [*6 C.P.C. (6th) 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=); *Lee v. Troy,* [*2006 BCSC 1841*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61F5-00000-00&context=), [*[2006] B.C.J. No. 3199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61F5-00000-00&context=); *Foran v. Nguyen*, [*2006 BCSC 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B20P-00000-00&context=), [*149 A.C.W.S. (3d) 419*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B20P-00000-00&context=).

**144**  I find the chronic pain has made Ms. Mackie reclusive and morose. She has gone from a "bubbly, fun-loving, outgoing, social, interesting" person, to someone who is anti-social, with bouts of depression and sadness. From the evidence of the plaintiff and Ms. Garnett, I find that the plaintiff defines herself as a very hardworking woman, but that the chronic pain prevents her exhibiting her previous commitment to work.

**145**  This loss of enjoyment of life and identity is given considerable weight.

**146**  I am satisfied the plaintiff is resilient and stoic by nature, and I do not doubt the extent of her pain and suffering. She has endured a regime of injections in order to retain some of her employment capacity. Plaintiffs are not to receive a lesser damage award because of their stoicism.

**147**  I am satisfied that the plaintiff's injuries and ongoing limitations are more like those cited in the plaintiff's authorities and therefore I award her $75,000 in non-pecuniary damages.

**B. PAST LOSS OF INCOME**

**148**  The parties have agreed to value the paid vacation time lost by the plaintiff as a result of the Accident at $2,700.

**149**  Ms. Mackie's evidence is that her base salary at Most Referred has never been reduced.

**150**  Although Ms. Mackie suggested that she earned approximately $10,000 per year in commission from Most Referred in the years before the Accident, and that she lost commission income after the Accident, it is not readily apparent what amounts she actually did earn or the method by which the commission was calculated in those years. There is evidence that the plaintiff lost the opportunity to earn commission of $1,846.16 in the two weeks after the Accident, thus, there will be an award in that amount.

**151**  The plaintiff claims $50,000 for the lost earnings from the Canada Child Care Directory business, over the past 32 months, reduced to an award of $37,500 in order to take account of income tax that would have been payable on the business earnings. In 2006, the Canada Child Care Directory business produced a net income of $7,400 for each partner. I arbitrarily set the amount at $15,000: see *Pallos v. Insurance Corporation of British Columbia* [*(1995), 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=), [*100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=), at 43 [*Pallos*].

**152**  The total past loss of income award is $19,546 ($15,000 + 1,846 + 2,700 = $19,546).

**LOSS OF FUTURE EARNING CAPACITY**

**153**  The plaintiff bears the onus of establishing that there is a substantial possibility that she will suffer a loss of income-earning capacity in the future as a result of injuries sustained in the Accident. The Court of Appeal has held that the "substantial possibility" approach and the "capital asset" approach to this head of damages are equal alternatives: *Pallos,* at para 27.

**154**  The Court of Appeal reviewed the principles that guide the assessment of damages for loss of earning capacity in *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=).

**155**  In *Vaillancourt v. Molnar Estate*, [*2002 BCCA 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3NP-00000-00&context=), [*8 B.C.L.R. (4th) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3NP-00000-00&context=), at para. 72, the Court of Appeal affirmed that a plaintiff's past earnings are a significant factor that must, at law, be considered in assessing a loss of income earning capacity.

**156**  There is no functional capacity evaluation to suggest that the plaintiff is not capable of performing certain employment tasks. The defendants submit that in light of the fact that the plaintiff's injuries have not affected her ability to earn income since the Accident, there is no reasonable basis to infer that there is a substantial possibility that her ability to earn income in the future will be diminished.

**157**  I am satisfied the plaintiff, as set out at para. 8 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=), [*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=) (S.C.), is less capable overall of earning income from all types of employment, is less marketable or attractive as an employee to potential employers, has lost the ability to take advantage of all job opportunities open to her, and is less valuable to herself as a person capable of earning income in a competitive labour market.

**158**  I base these conclusions on the following:

1. She continues to suffer neck and upper back pain and headaches;
2. Her overall range of movement is reduced and she continues to experience most pain when moving her head forward and backward;
3. That although her improvement has been ongoing since the Accident, it likely has reached a plateau;
4. Botox injections have been, thus far, instrumental in reducing the plaintiff's complaints of neck pain and headache. However, patients may only undergo a maximum of three Botox treatments in a single year (every 16 weeks). I am satisfied that the plaintiff gets relief with the Botox treatments for approximately 10 to 12 weeks at a time. Botox treatments will continue for the next one or two years. There is a 60% to 70% chance that treating the plaintiff with radio frequency neurotomy will result in improvement in pain symptoms for a more extended period of time to a greater degree than Botox. There is a chance that the radio frequency neurotomy would have to be repeated 18 to 24 months after the first treatment.
5. I accept Dr. Saunders' opinion that it would be difficult for the plaintiff to work in an office setting outside her home as eight-hour shifts aggravate Ms. Mackie's pain symptoms. The plaintiff will have to look for a job with a modified work day.
6. Dr. MacKean expects that the plaintiff will continue to see continued improvement with the complaints in her upper cervical spine over the next two to three years but believes that it is unlikely that Ms. Mackie will fully recover.
7. The plaintiff continues to suffer post-Accident migraines as "pounding" and "crippling," with associated vomiting and sensitivity to sound and light. When these migraines occur, the plaintiff needs to lie down in a room with closed blinds.

**159**  One legitimate approach to an assessment of loss of capacity, explicitly recognized as such by Finch J.A. (as he then was) in *Pallos,* at 43, is to "award the plaintiff's entire income for one or more years."

**160**  In the case at bar, I am satisfied that the plaintiff's pre-accident capacity has a $65,000 per *annum* value. Given the plaintiff's uncertain medical and vocational prospects, I award the plaintiff two years earnings of $130,000.

**C. SPECIAL DAMAGES**

**161**  The parties have agreed to special damages in the following amounts:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Treatment | $ 4,645.88 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Damage to Truck | 4,005.70 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Accelerated Depreciation | 3,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $11,652.58 |  |

**D. FUTURE COST OF CARE**

**162**  The plaintiff must demonstrate that there is medical justification for the future cost of care claim, and the claim itself must be reasonable: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=), (3d) 233, [*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=) (C.A.) aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=), [*6 A.C.W.S. (3d) 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=).

**163**  In *Kuskis* at paras. 163-164, Dickson J. summarized the principles applying to the assessment of cost of future care claims. An award for cost of care is "notional and imprecise in nature."

**164**  The plaintiff claims $25,000 for the cost of her future care.

**165**  There is a claim for physiotherapy/acupuncture at $45 per treatment plus transportation at $5.00 for a total of $50 per visit. I am satisfied that the plaintiff is entitled to $3,000 per *annum*.

**166**  There is a claim for medications: three Botox treatments at $500 equaling $1,500 per *annum*; plus Zomig and Tramacet or T-3 instead, at $500 per *annum* for a total of $2,000 per year.

**167**  The housekeeping/gardening and gym membership claims are rejected. The plaintiff is now able to complete all of her pre-Accident house chores with the exception of cleaning bathroom shower tiles. She has never joined or sought to join a gym since moving to British Columbia in 1995. The plaintiff also has an elliptical trainer in her home.

**168**  There is a possibility of the plaintiff receiving a $1,700 radio frequency neurotomy. As it is only a possibility I award her $800.

**169**  There will be no award for counseling, as since the Accident the plaintiff has neither seen, nor has she been referred to, a counsellor, psychiatrist or psychologist, to deal with either anxiety or depression.

**170**  There will be no award for dental work, as Dr. Nanos could not say for certain whether it was more probable than not that the fractured teeth are the result of the Accident.

**171**  I fix the total award for cost of future care at $10,800 to fit with the various contingencies arising out of the prognoses offered by the doctors.

**DECISION**

**172**  The defendant is 100% at fault.

**173**  Damages are awarded as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | a. | Non-pecuniary | $ 75,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | b. | Past loss of income | 19,546 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | c. | Loss of future | 130,000 |  |
|  |  | earning capacity |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | d. | Special | 11,650 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | e. | Future cost of care | 10,800 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL** | **$246,996** |  |

Plus court order interest

**E. COSTS**

**174**  The parties are at liberty to speak to costs.

R.W. METZGER J.

**End of Document**

[***McMahon v. Harper, [2017] B.C.J. No. 2585***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R7H-T5F1-JX3N-B0P5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

V. Gray J.

Heard: July 4-5, 2017.

Judgment: December 15, 2017.

Docket: M150213

Registry: Victoria

**[2017] B.C.J. No. 2585** | 2017 BCSC 2328

Between Kenneth Blair McMahon, Plaintiff, and Joe Patrick Harper, Defendant

(271 paras.)

**Case Summary**

**Civil Litigation — Civil procedure — Applications and motions — Witnesses — Discovery — Production and inspection of documents — Affidavit or list of documents — Conclusiveness — Sufficiency — Objections and compelling production — Remedies for failure to produce — Privileged documents — Solicitor-client privilege — Costs — Particular orders — Special orders — Increase in scale of costs — Cross-application by defendant for declaration that plaintiff's first notice of application (NOA) was nullity, striking portions of affidavits filed on behalf of plaintiff, cross-examination on affidavits, and order that plaintiff waived solicitor-client privilege over communications with law firm allowed in part — Defendant alleged plaintiff and law firm intentionally delayed production of documents — Defendant was not prejudiced by length of NOA — Portions of affidavits containing speculation, argument and inadmissible opinion were struck — Cross-examination on affidavits was denied — Plaintiff did not put communications with lawyer in issue and thereby waive solicitor-client privilege — Plaintiff awarded special costs — Supreme Court Civil Rules, Rules Rule 1-3, 1-3(2), 7-1(8), 9-7, 22-7(1).**

**Civil Litigation — Civil evidence — Documentary evidence — Affidavits — Sufficiency or validity — Striking out — Privilege — Privileged relationships — Solicitor and client — Witnesses — Compellability — Lawyer of party — Compelling attendance by subpoena — Setting aside — Application by plaintiff to strike subpoena served on plaintiff's lawyer allowed — Cross-application by defendant for order that plaintiff waived solicitor-client privilege over communications with law firm dismissed — Defendant alleged plaintiff and law firm intentionally delayed production of documents — Defendant sought to compel plaintiff's lawyer to give evidence — Plaintiff did not put communications with lawyer at issue and waive solicitor-client privilege — There was no evidence that plaintiff and law firm intentionally concealed documents — It was unlikely lawyer had any material evidence to provide — Subpoena against lawyer was set aside — Supreme Court Civil Rules, Rules Rule 1-3, 1-3(2), 7-1(8), 9-7, 22-7(1).**

**Legal Profession — Barristers and solicitors — Retention of counsel — Representation — Application for removal of counsel — Application by plaintiff for removal of counsel for defendant from record dismissed — Shortly before scheduled trial date for plaintiff's personal injury action, lawyer for defendant served subpoenas on plaintiff's lawyer and other employees at law firm — Actions of defendant's lawyer in serving subpoena on plaintiff's lawyer was abuse of process — It was not necessary to remove lawyer as counsel or advisor — Replacement lawyer would be able to make same arguments at trial — Removing lawyer would not remedy delay — Lawyer's actions could be dealt with in costs.**

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| Application by the plaintiff McMahon for cross-examination of the lawyer for the defendant Harper, setting aside Harper's notice to admit, setting aside the Foley subpoena, and removing Harper's lawyer as counsel of record. Cross-application by Harper for a declaration that McMahon's first notice of application (NOA) was a nullity, striking portions of affidavits filed on behalf of McMahon, cross-examination on affidavits, and order that McMahon waived solicitor-client privilege over communications with Acheson Sweeney. McMahon commenced an action for damages for injuries suffered in a 2013 motor vehicle accident. McMahon's claim was set for an 18-day jury trial commencing April 3, 2017. On March 23, 2017, Harper's counsel, Hargreaves, served subpoenas on several people who then or previously worked at the Acheson Sweeney law firm, which was counsel for McMahon. One of the subpoenas was served on Foley, who was legal counsel for McMahon. The trial was adjourned. McMahon argued that Hargreaves conduct was an abuse of process justifying his removal as counsel for Harper.  HELD: Application and cross-application allowed in part.  McMahon's first NOA exceeded the 10-page limit set out in the Supreme Court Civil Rules. The length of the NOA did not cause any prejudice to Harper. The cross-applications raised complex issues. McMahon's first NOA was not a nullity. Portions of the affidavits of Foley and Dunning, which were filed by McMahon, were struck for containing speculation, argument or inadmissible opinion. Portions of the affidavit of Hargreaves were speculation and must be ignored. Harper's request to cross-examination the deponents of McMahon's affidavits was denied. They had no information to add to the reason for delayed production documents. The cross-examination of Hargreaves was also unnecessary to resolve the applications. McMahon was not required to provide an affidavit verifying his second list of documents. McMahon was questioned about the documents during his examination for discovery. McMahon did not put his communications with Foley at issue, and thereby waive solicitor-client privilege. There was no evidence that McMahon or Acheson Sweeney intentionally concealed the delayed production documents. It was therefore unlikely that Foley would have any material evidence to provide. The Foley subpoena was set aside. It was not necessary to remove Hargreaves as counsel or advisor. Even if he were removed as counsel, his replacement would be able to make any arguments at trial which Hargreaves could make. The other effects of the issuance of the Foley subpoena as an abuse of process, other than delay, could be addressed in costs. Removing Hargreaves as counsel would not remedy the delay. Harper was ordered to pay special costs to McMahon. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 1-3, Rule 1-3(2), Rule 7-1(8), Rule 8-1(4), Rule 8-1(10), Rule 9-7, Rule 22-7(1), Rule 22-7(2)

**Counsel**

Counsel for the Plaintiff: S.M. Kelliher, D.C. Redman.

Counsel for the Defendant: R.C. Brun, QC.

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**V. SUMMARY**

**Reasons for Judgment on Applications**

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| **GRAY J.** |

**I. INTRODUCTION**

**1**  The parties have brought cross-applications. They all relate to the failure of the plaintiff's first list of documents dated March 11, 2014 ("Plaintiff's First LOD") to disclose 16 pages of documents ("Delayed Production Documents"). Those documents were listed in the plaintiff's second list of documents dated about two and one-half years later, on October 14, 2016 ("Plaintiff's Second LOD").

**2**  This case is a personal injury claim. Mr. McMahon alleges that he was injured on April 7, 2013, when he was rear-ended in what I will term the "Accident". Mr. McMahon's claim for damages includes a claim for past and future wage loss. The defendant has denied liability, and says that Mr. McMahon did not sustain any injuries in the Accident.

**3**  At the time of the Accident, Mr. McMahon was 55 years old, and he is now 60 years old. He is a retired military corporal, who served in the Canadian Armed Forces from 1977 to 1996, which is about 19 years. He held a variety of jobs in the following 17 years.

**4**  At the time of the Accident, Mr. McMahon was living in Courtenay, B.C. and working at the Comox Valley Regional District ("CVRD") in a part-time union position. His job title was Facility Maintenance Worker, and his duties included performing ice maintenance duties such as driving a Zamboni ice resurfacing machine.

**5**  Unfortunately, the relationship between trial counsel has become very acrimonious.

**6**  Mr. McMahon's claim was set for an 18-day jury trial commencing April 3, 2017. On March 23, 2017, being about ten days before the scheduled trial date, defence counsel, Mr. Hargreaves, served Subpoenas on several people who then or previously worked at a law firm I will refer to as "Acheson Sweeney", counsel for the plaintiff. The firm's name has changed over the material period but it is not necessary to review the various names. One of the subpoenas ("Foley Subpoena") was served on Ms. Foley, who was legal counsel for Mr. McMahon, and had been his counsel for about three years.

**7**  On March 28, 2017, being the Tuesday prior to the scheduled commencement of the trial on Monday, April 3, 2017, the trial was adjourned generally.

**8**  Mr. McMahon seeks several orders, including the following:

1. cross-examination of Mr. Hargreaves;
2. setting aside the defendant's notice to admit dated March 6, 2017 ("NTA");
3. setting aside the Foley Subpoena;
4. removing Mr. Hargreaves as counsel of record for the defendant and prohibiting him from providing any further assistance or advice to the defendant or his solicitors with respect to this proceeding; and
5. special costs.

**9**  Mr. McMahon seeks that relief on the basis that Mr. Hargreaves's conduct has been an abuse of process. I refer to Mr. Hargreaves's law firm as "Jones Emery" for convenience, although the proper name is longer.

**10**  The defendant is opposed to the court granting any of the orders sought by Mr. McMahon. The defendant also seeks several orders, including the following:

1. a declaration that the First McMahon NOA (defined below) is a nullity owing to its length;
2. striking out portions of the affidavits filed on behalf of the plaintiff;
3. requiring Mr. McMahon to swear an affidavit verifying the Plaintiff's Second LOD;
4. in the alternative that the court admits into evidence the affidavits of Ms. Foley, Mr. Dudding, and Mr. McMahon, an order that the defendant be permitted to cross-examine them on their affidavits;
5. an order that Mr. McMahon has waived solicitor-and-client privilege over all his communications with Acheson Sweeney and over all communications among members of Acheson Sweeney relating to the omission of the Delayed Production Documents from the Plaintiff's First LOD; and
6. an order that Acheson Sweeney pay the costs of the cross-applications personally.

**11**  The cross-applications proceeded to a hearing lasting about two days, on the basis of five affidavits, one from each of Ms. Foley, Mr. Dudding, Mr. Sweeney, Mr. McMahon and Mr. Hargreaves. Mr. Kelliher, who is not a member of Acheson Sweeney, represented the plaintiff on the cross-applications. Mr. Brun, Q.C., who is not a member of Jones Emery, represented the defendant. I am grateful to counsel for their very thorough submissions.

**12**  The cross-applications raise a tangle of legal issues, including the proper form of notices of application and affidavits, cross-examinations, abuse of process, waiver of solicitor-client privilege, agency, and spoliation.

**II. ISSUES**

**13**  The cross-applications raise the following questions:

1. Is the First McMahon NOA (as defined below) a nullity owing to its length?
2. Are the following affidavits inadmissible in whole or in part on the cross-applications?
3. Affidavit #1 of Ms. Foley;
4. Affidavit #1 of Patrick Dudding; and
5. Affidavit #1 of Mr. McMahon.
6. Should the court order cross-examination of any deponents on their affidavits?
7. Should the court order that Mr. McMahon swear an affidavit verifying the Plaintiff's Second LOD?
8. Has Mr. McMahon waived legal advice privilege over all his communications with, and over all communications within, Acheson Sweeney regarding the Delayed Production Documents and the Plaintiff's First LOD?
9. Should the court set aside the Foley Subpoena because the defence has not established that Ms. Foley likely has material evidence?
10. Was any of the following conduct of Mr. Hargreaves an abuse of process:
11. serving the NTA;
12. issuing and serving the Foley Subpoena;
13. sending the Email Offer.
14. If any of the defendant's impugned conduct was an abuse of process, what is the appropriate remedy?
15. What is the appropriate order for costs?

**III. FACTS**

**14**  In early April 2013, Mr. McMahon was working part-time for CVRD in a job which included cleaning duties and driving a Zamboni to resurface ice. He had been so employed for a period of about four and one-half years, including periods of seasonal layoff. His work history included about nineteen years in the Royal Canadian Air Force as an aero engine technician. For about eleven years after that, he held various jobs as a technician or working in construction, landscaping, or cleaning. His educational history included completion of numerous courses related to work as an aero engine technician.

**15**  As stated, Mr. McMahon alleges that he was injured in the Accident on April 7, 2013. He has not returned to the paid workforce since the Accident, although he volunteers.

**16**  In July 2013, Acheson Sweeney received a two-page cover letter dated July 19, 2013 from CVRD, with 50 pages of attachments, being a total of 52 pages. Sixteen of those pages are the Delayed Production Documents, and I will refer to the other 36 pages as the "Timely Production Documents". The cover letter is one of the Timely Production Documents, and it states "[a] complete copy of Mr. McMahon's employment file is enclosed."

**17**  Ms. Acheson, Q.C., then of Acheson Sweeney's Courtenay office, commenced this lawsuit on Mr. McMahon's behalf on November 27, 2013. As stated, Mr. McMahon claims damages, including damages for lost earning capacity.

**18**  Jones Emery sent Acheson Sweeney the defendant's response to civil claim and defendant's list of documents with its letter dated January 15, 2014. The letter also requested Mr. McMahon's list of documents, and provided a list of the documents the defence specifically requested from Mr. McMahon. The letter requested medical documents, tax returns, and employment insurance records, but did not specifically request any records from CVRD.

**19**  As set out below, the Plaintiff's First LOD is dated March 11, 2014, but it is unsigned and does not appear to have been sent to Jones Emery at that time.

**20**  Jones Emery repeated the request for Mr. McMahon's list of documents and the specified documents. In a letter dated April 11, 2014, Jones Emery asked for the documents by May 30, 2014, failing which it intended to seek instructions to apply for an order for production of documents.

**21**  Ms. Foley first became involved in Mr. McMahon's file in the spring of 2014, when her firm took over a satellite office in Courtenay. She visited Courtenay from time to time until Mr. McMahon's file was eventually physically moved to the Victoria, B.C. office. Ms. Foley deposed that Ms. Acheson and Ms. Baxter worked on the file in the Courtenay office. Ms. Baxter had been called to the bar in August 2011, less than three years earlier. Ms. Foley was called to the bar in May 1998, and so had been practicing for about 16 years at the time she took over Mr. McMahon's file.

**22**  On May 1, 2014, Ms. Sykes, a paralegal at Acheson Sweeney, sent an email to Ms. McKenna, a legal assistant at Jones Emery. The email included the following:

McMahon is one of the files I just took over from the Courtenay office. Please give me some time to review the file -- I can then look at all outstanding requests.

**23**  As stated, the Plaintiff's First LOD was dated March 11, 2014. The copy in evidence has a line for Ms. Acheson's signature, but it has not been signed. The evidence on the cross-applications did not include a copy of a cover letter sending the Plaintiff's First LOD to Jones Emery. Mr. Hargreaves has deposed that he cannot tell from a review of the Jones Emery file when Jones Emery received the Plaintiff's First LOD.

**24**  The Plaintiff's First LOD listed documents under four of five listed headings. Under the heading "B Income Loss", item 6 had this entry: "[CVRD] - Employment records covering the period Nov 27/08 to Apr 8/13 (36 pages)". These 36 pages are what I refer to as the Timely Production Documents.

**25**  Among the Timely Production Documents was the CVRD cover letter referring to enclosing a complete copy of Mr. McMahon's employment file. The Timely Production Documents also included a CVRD job description dated July 22, 2013 for Mr. McMahon's position as Facility Maintenance Worker. The date of this document is about 3 1/2 months after the Accident, and after the April 8, 2013 date listed in item 6 of the First Plaintiff's LOD. The copy in the Timely Production Documents has a place for signature by an employee, but the copy is unsigned. Under the heading "Required Licenses, Certificates and Association Memberships (required for acceptance into the job)" are six bullet points, one of which is "5th Class Power Engineer Certificate with Refrigeration Endorsement". I refer to that qualification as the "Certificate".

**26**  Jones Emery received a letter dated May 26, 2014 from Acheson Sweeney which enclosed documents described in thirty line items. Some of those line items refer to document numbers which correspond to the Plaintiff's First LOD. Other line items do not refer to a number from the Plaintiff's First LOD.

**27**  It appears likely that Jones Emery received the Plaintiff's First LOD in May 2014, although it is puzzling that none of the affidavits filed on the cross-applications included a copy of a cover letter or a signed copy of the Plaintiff's First LOD.

**28**  By consent ordered entered July 14, 2014, the court file was transferred from the Courtenay Court Registry to the Victoria Court Registry for all purposes.

**29**  Ms. Baxter left Acheson Sweeney's Courtenay office at some point in 2014, but continued to work for Acheson Sweeney until January 16, 2015.

**30**  Mr. Hargreaves assumed conduct of the defence in the summer of 2015.

**31**  The Notice of Trial dated and filed October 2, 2015 scheduled the trial for not more than 18 days commencing April 3, 2017 in Victoria.

**32**  The defence Notice Requiring Trial by Jury was dated October 8, 2015 and filed October 21, 2015.

**33**  At some point, the Examination for Discovery of Mr. McMahon was scheduled to proceed on October 27 and 28, 2016. Ms. Foley deposed as follows:

1. ... It is routine in this circumstance [of an upcoming examination for discovery] for the Plaintiff to prepare an updated List of Documents in preparation. At that time it came to my attention from my paralegal that there were a number of pages of the employment file (16) that had not been included in the [Plaintiff's First LOD] provided in the spring of 2014. When I learned that these pages were not included in the original file, I immediately provided an updated List of Documents, dated October 14, 2016, [Plaintiff's Second LOD], clearly indicating an amendment of the employment file on the List of Documents, in accordance with Rule 7-1(9).
2. From my initial review of the 16 pages I did not place any particular significance on the materials. Leading up to the Discovery I was aware that Mr. Hargreaves had requested the 16 pages and I assumed they had been produced to him via our standard office procedures. There was no mention of the materials by Mr. Hargreaves either before or during the discovery of October 26 & 27.

**34**  The Plaintiff's Second LOD was dated October 14, 2016 and signed by Ms. Foley. It listed at least 1,150 more pages of documents than the Plaintiff's First LOD. The entry regarding the CVRD employment records had been altered to change the number of pages from 36 to 52, therefore including the sixteen pages of the Delayed Production Documents, and to change the date on which the document was listed to the date of the Plaintiff's Second LOD.

**35**  The Delayed Production Documents include the following:

1. a letter dated January 29, 2011 from CVRD to Mr. McMahon, referring to a second incident in which Mr. McMahon allegedly drove the Zamboni badly and struck gates, and stating that Mr. McMahon needs to make every attempt to avoid hitting the boards;
2. a letter dated February 3, 2012 from CVRD to Mr. McMahon, referring to a further incident on January 23, 2012 of Mr. McMahon allegedly hitting gates with the Zamboni, and stating that the letter was a written warning that immediate improvement in his work performance is required, and further incidents will result in disciplinary action;
3. a letter dated July 4, 2012 from CVRD to Mr. McMahon, stating that Mr. McMahon will not be eligible to apply for a full-time position unless he obtains a Certificate by December 3, 2012, and that unless he obtains a Certificate by June 30, 2013, he will receive a layoff notice (from his existing part-time position). Mr. McMahon appears to have signed the letter on July 4, 2012;
4. a handwritten letter from Mr. McMahon dated October 20, 2012 and addressed "[T]o whom it may concern", but apparently sent to CVRD, which states as follows:

With the understanding that I could challenge the 5th class eng exam, I proceeded to make enquiries as to a time and place to write the exam. After a few phone calls to the safety authority of B.C. I ended up talking to the head examiner. I explain (sic - explained) my situation to him when he informed me, I could not challenge the exam because I had not taken a formal course. So I intend to take the BCIT course to qualify to write the 5th class exam;

1. an email dated December 22, 2012 addressed "to whom it may concern" from Mr. McMahon and apparently sent to CVRD employees, which states as follows:

After having tried to challenge the BC safety exam for 5th class power eng. exam I was told I could not because I needed a formal course, so I applied for the BCIT course and now in the process of doing the course so I can write for my ticket. Therefore I request a 6 month extension to the letter dated July 4, 2012. Thank you for your consideration;

1. a letter dated January 17, 2013 from CVRD to Mr. McMahon which was also apparently signed by him. It included the following:

The employer has received your written request dated December 22, 2012, for an extension to the above deadline. The employer has provided you financial assistance to obtain your certification and there is a record of reimbursing you for a course you registered for in February 2010. In reviewing your request, the employer looked at the amount of time and support you had been given between February 2010 and December 31, 2012 (34 months), which is more than sufficient time to achieve certification and yet you have failed to do so. It is in the employer's view that another extension is difficult to justify.

In reference to the letter dated July 4, 2012, you shall remain a part-time facility maintenance worker and your work hours will reflect that. For you to retain this position, you are required to obtain your certification by June 30, 2013. ...; and

1. a letter dated July 9, 2013 from CVRD to Mr. McMahon, which includes the following:

...you stated that your doctor has indicated to you that due to your motor vehicle accident on April 7, 2013, you have suffered a severe concussion that is impacting your cognitive abilities and your ability to concentrate while reading; therefore, you have not been able to study towards obtaining your [Certificate] to meet the deadline of June 30, 2013.

In consideration of your situation as per the above, the Employer has decided to suspend your above deadline to obtain certification, until after you have safely returned to work. Upon your return, the Employer shall discuss with you at that point about how to proceed towards obtaining your certification. This decision is made by the Employer on a without prejudice and non-precedent setting basis.

**36**  The job description in the Timely Production Documents had disclosed that a Certificate was required for Mr. McMahon's position as of a few months following the Accident. The Delayed Production Documents disclosed, in addition, that Mr. McMahon was required to obtain a Certificate by June 30, 2013, being about ten weeks after the Accident, in order to retain his part-time position. The Delayed Production Documents also show that Mr. McMahon requested an extension of that deadline, but CVRD refused that request, and that CVRD paid for a course Mr. McMahon registered for in February 2010.

**37**  The evidence is not clear about how the Delayed Production Documents were omitted from the Plaintiff's First LOD.

**38**  Mr. Sweeney's affidavit includes the following:

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1. ... I recall I told [Mr. Hargreaves] that what I thought might hypothetically have happened was that the 16 pages had been separated out because Ms. Baxter was likely unsure of their significance (because of inexperience) when the records were received in August 2013, that she wished to have the pages reviewed by Ms. Acheson before they were released. The pages had been placed in a plastic sleeve within the file and appeared to have been overlooked until Ms. Foley discovered in October 2016 that the separated pages had not been listed.

**39**  While not entirely clear, this passage suggests that someone told Mr. Sweeney that the 16 pages were in a separate plastic sleeve within the file when somebody first saw them. I assume that Ms. Foley told Mr. Sweeney that, when she first found the 16 pages, which are the Delayed Production Documents, they were in a separate plastic sleeve in the file.

**40**  Jones Emery requested various documents, including the Delayed Production Documents, on October 20, 2016. Ms. Foley's assistant at Acheson Sweeney was out of the office due to a medical emergency from October 21-31, 2016, and the documents were not provided to Jones Emery until on or shortly after October 31, 2016.

**41**  In the meantime, Mr. Hargreaves conducted an examination for discovery of Mr. McMahon on October 27 and 28, 2016 ("First McMahon XFD"), in Courtenay, B.C. Mr. Hargreaves had not reviewed the Delayed Production Documents prior to the First McMahon XFD, but Ms. Foley did not know that.

**42**  At the First McMahon XFD, Mr. McMahon testified that, prior to the Accident, he had applied for a regular full-time position, that he was required to get his class five power engineering (being a Certificate), and that he had started a course from the British Columbia Institute of Technology ("BCIT") to obtain that qualification. Mr. McMahon testified that his work on aircraft "transferred over", and he basically had the qualifications he needed, and was just "getting it on paper". He testified that it was simply a different application of the hydraulics, fuel, oils, and generator information from the aircraft application.

**43**  Mr. McMahon testified at the First McMahon XFD that he had not submitted any exams to BCIT at the time of the Accident. He testified that he believed he enrolled in the program around November of 2012, and the program was supposed to take two years, and he thought he was on track for two years.

**44**  Mr. McMahon also testified at the First McMahon XFD that he did not know if he still had any of the records or paperwork or course work that he did. Mr. Hargreaves asked him to provide it, and to seek it from BCIT if he could not find it.

**45**  Mr. Hargreaves asked Mr. McMahon whether he was "taking the course just to stay current with [his] existing job, or [was he] taking the course so that [he] could compete for a better job?" Mr. McMahon answered, "I was taking the course to have the qualification for the job requirement, but also to compete for a permanent full time."

**46**  Although Jones Emery received the documents including the Delayed Production Documents in early November 2016, owing to an error in the office of Jones Emery, the "expanded employment file" (including the Delayed Production Documents) was labelled as "duplicate".

**47**  Ms. Acheson retired at the end of December 2016.

**48**  On January 11, 2017, Ms. Foley filed a trial brief on behalf of Mr. McMahon. She estimated three days for the plaintiff's direct examinations, cross-examinations, and submissions.

**49**  The Delayed Production Documents did not come to Mr. Hargreaves's attention until about February 2, 2017, about three months after Jones Emery received them. Presumably, the reason that the Delayed Production Documents did not come to Mr. Hargreaves's attention for about three months after his office received them was because someone in his office had erroneously marked them "duplicate" and he assumed that he had reviewed them previously.

**50**  On February 2, 2017, the day the Delayed Production Documents came to his attention, Mr. Hargreaves sent an email asking Ms. Foley to confirm that Acheson Sweeney had not received the Delayed Production Documents in 2013.

**51**  Around the time the Delayed Production Documents came to his attention, in early February 2017, Mr. Hargreaves contacted the personnel department of CVRD and inquired whether the CVRD had sent employment file material to Acheson Sweeney on one occasion or on more than one occasion.

**52**  Mr. Hargreaves received a response from CVRD by email dated February 6, 2017, which suggests that the CVRD sent Mr. McMahon's employment file material to Ms. Acheson only once, by letter dated July 19, 2013.

**53**  Ms. Foley responded to Mr. Hargreaves's request for confirmation that Acheson Sweeney had not received the Delayed Production Documents in 2013 by letter dated February 6, 2017 ("Apology"), which included the following:

Thank you for your email of 02 February 2016. I have now had the opportunity to review the file with regard to the issue raised therein.

It is clear that a portion of Mr. McMahon's employment file was not listed until the fall of 2016. I do not know how this happened, as I was not on this file at the time, and the lawyer who had carriage of the file during the relevant period is no longer with our firm.

...the complete file was listed on 14 October 2016. .. you were not provided with the records until after [the First McMahon XFD]. As such, I agree that you are entitled to further examination of Mr. McMahon on issues relating to the employment file.

I did not realize that you had not received the requested documents prior to the discovery, and for that I apologize. In hindsight, if I had that information at the time I would have discussed with you whether you would have wanted to adjourn the discovery.

**54**  Mr. Hargreaves responded to the Apology with a lengthy email dated February 6, 2017. It includes the following:

This is not a case of a photocopying error. This is a case of an intentional withholding of relevant documents, in a manner calculated to cause serious harm to the defence.

Somebody had to count the pages of the edited file. This is not a case of an employment file being listed, with no page count, and then a story later that there must have been an innocent error in copying it. Somebody, with a 50+ page file in hand, counted out the 36 innocuous pages and created List (sic - the list of documents) (and provided a copy of the listed document (sic - documents)) with the intention of actively misleading the defence.

A reference to an unidentified lawyer no longer with the firm is, in my view, an inadequate explanation, all the more so when the emails in the file suggest that you had become the responsible lawyer before the List was prepared, and were the responsible lawyer thereafter.

**55**  Mr. Hargreaves wrote a further email to Ms. Foley dated February 8, 2017. It includes the following:

I cannot overstate my concern about the employment file issue. Somebody in your office appears to have made an utterly incomprehensible, indefensible decision to intentionally conceal documents of potentially enormous effect on the claim, and this situation remained uncorrected for some two and a half years.

I had considered a report to the Law Society; not a complaint about you in particular but a complaint about your firm's treatment of the initial disclosure. However, I have decided not to do so. I mention it only to stress just how seriously I take this.

I accept that despite the fact that your paralegal wrote, May 1st 2014, that she would be doing the List, suggesting that the List was done after you became the handling lawyer, it is likely that the List was in draft form already and that you played no role in the decision to mislead opposing counsel in this egregious fashion.

What troubles me about your behaviour is that you appear to have recognized the deceit practiced on my firm and my client by the original lawyer but chose not to tell me about it. I cannot imagine being in your position and not picking up the phone to explain what had happened, to apologize profusely, and to immediately send over the missing documents.

Your claim that you did not know that the documents had not been given to me as of the discovery is very hard to accept. You listened to my questioning of your client. Did you feel no surprise that I did not ask him about the letter, signed by him, notifying him that he was losing his job as of June 30, 2013, absent getting his certificate?

In short, I am on a personal level disappointed that a fellow counsel could act as you have done.

On a professional level, I am advising my client to seek special costs of my further discovery of your client, necessitated by your firm's actions in this matter.

**56**  An email dated February 9, 2017 from Mr. Hargreaves to Ms. Foley included the following:

We further anticipate seeking special costs of any resulting application given that the relevance of this information should have been apparent to your firm, and to you, from early 2014 given the references to this subject in that part of the employment file apparently intentionally concealed by your office until October last year. We add to this the requests made in October and seemingly ignored since then, and I suggest that your client has a significant exposure here.

**57**  Mr. Hargreaves's trial brief on behalf of the defence is dated February 9, 2017, although it was not filed until March 8, 2017. Master Bouck made an order, by consent, that the defendant had leave to file that trial brief at the February 9, 2017 trial management conference, so I assume it was before the court that day.

**58**  Mr. Hargreaves's trial brief sets out an estimate of 14.75 hours, being less than four days, for the defendant's direct evidence, cross-examinations, and submissions. The defence trial brief did not list as witnesses to be called either Ms. Foley or anyone else who worked at the time or previously for Acheson Sweeney.

**59**  Together with the three days estimated by Ms. Foley, the total trial time estimated in the two trial briefs together was less than seven days, although the trial had been scheduled for 18 days or less.

**60**  On February 9, 2017, Mr. Dudding on behalf of Mr. McMahon, and Mr. Hargreaves on behalf of the defendant, attended a trial management conference before Master Bouck ("TMC"). Mr. Hargreaves referred to the fact that the timing of the disclosure of the Delayed Production Documents would necessitate a further examination for discovery of Mr. McMahon. Mr. Hargreaves did not mention an intention to subpoena Ms. Foley or anyone else associated with Acheson Sweeney, and he did not mention other issues which would have compromised the trial date.

**61**  While the letter itself is not in evidence, it appears that by letter dated February 17, 2017 to BCIT, Acheson Sweeney requested Mr. McMahon's application to BCIT, test and assessment results and any other information BCIT may have on file regarding Mr. McMahon.

**62**  BCIT's letter dated February 22, 2017 to Acheson Sweeney included the following:

To the best of our knowledge, other than the student's official transcript which you have already received, BCIT has no other educational records pertaining to your client.

Mr. McMahon was enrolled in the POWR 1210 - 5th Class course which is an online course that students have up to 52 weeks to complete. The full course description is available on the BCIT website at ... . Mr. McMahon's withdrawal from this course was processed on December 10, 2013.

Please note that in accordance with BCIT's records retention schedule, the minimum retention period for student information related to the management and administration of BCIT programs and courses including routine information required to contact students, track their progress, correspond and issue information related to their enrollment and attending BCIT is one year, after which these records may be destroyed.

**63**  This letter implies that BCIT might have destroyed information regarding Mr. McMahon after one year. If the year commenced on December 10, 2013, the date BCIT processed his withdrawal from the course, the information might have been destroyed on December 10, 2014. That is a date after the Plaintiff's First LOD dated March 11, 2014, and before the Plaintiff's Second LOD dated October 14, 2016.

**64**  Mr. Hargreaves conducted a further examination for discovery of Mr. McMahon on March 6, 2017 ("Second McMahon XFD"), and Mr. Dudding attended on behalf of Mr. McMahon. The Second McMahon XFD proceeded in Victoria, B.C., as requested by Mr. Hargreaves.

**65**  At the Second McMahon XFD, Mr. Hargreaves asked Mr. McMahon questions relating to the Delayed Production Documents. Mr. Hargreaves asked Mr. McMahon to locate the credit card statement including a record of his payment to BCIT to enroll in the course. Mr. McMahon testified that he first got information from BCIT about the course materials "I believe ... just before Christmas 2012." He testified that students registered online, and had to go online to get the tests from BCIT, but BCIT sent three or four books of study materials. Mr. Hargreaves asked "what happened to the books?" Mr. McMahon answered "I have no idea. They might have been thrown out."

**66**  Mr. McMahon testified at the Second McMahon XFD that his study habit is to go through the whole course so that he understands each part, whether it is boiler systems, pressure systems, hydraulics, or air conditioning, so that he can put everything together in his mind, and then he goes and writes the tests.

**67**  Mr. McMahon testified that he "did" the study material, but did not "do" any of the tests. He testified that he believed he got through three of the books. He testified that he could not recall whether he was making marks or putting highlighting in the books, or whether he was making notes on paper or anything like that. He testified that his wife must have thrown them out after the Accident, but he had no idea how soon after the Accident.

**68**  Mr. McMahon testified that he had not seen his employment file or reviewed it in preparation for the Second McMahon XFD. Mr. Hargreaves asked him if he reviewed it in preparation for the First McMahon XFD, but Mr. McMahon did not answer that question on the advice of Mr. Dudding, who took the position that the Second McMahon XFD was limited to questions arising from the Delayed Production Documents.

**69**  Mr. McMahon testified that he had not seen the Plaintiff's First LOD before Mr. Hargreaves showed it to him at the Second McMahon XFD.

**70**  Mr. McMahon testified at the Second McMahon XFD that, in his December 22, 2012 email, he requested a six-month extension of the period to obtain his Certificate as a "backup" or "buffer" or "comfort zone" for himself, to make sure he could finish the course on time. He testified that he was not worried that he might not be able to complete the course and take the exam by June 30, 2013.

**71**  Among the things Mr. Hargreaves said to Mr. Dudding during the Second McMahon XFD was the following:

Sir, when you withhold important documents that call into question your client's continued employment, you have no right to object to my exploring issues relating to your client's expectation of continued employment. If you want to make objections like that, then comply with your ethical obligations as counsel and disclose the documents in a timely fashion.

...

If you want to object to this line of questioning, I can assure you I'm going to be in chambers where I'm going to assure you that the judge or master is going to be aware of what your office did with these documents by way of disclosure. If you want that to become known in judicial circles, by all means persist with these objections.

...

Now, you may be very sensitive to the problems that will arise should this issue with the list of documents become wider known ...

**72**  Mr. Hargreaves's affidavit includes the following:

1. By March 6, 2017, I had researched the topic of spoliation of evidence and had satisfied myself that it might be open to the Defendant to argue at trial that there had been spoliation of evidence. In particular, I had developed an argument to the effect that the loss or destruction of the BCIT study materials and the unavailability of BCIT information with respect to anything that Mr. McMahon may have submitted to that institution could give rise to an adverse inference against Mr. McMahon based on the doctrine of spoliation.
2. My research persuaded me that such an inference would only be available if the Court accepted that the loss of the evidence had been brought about intentionally.

**73**  On March 7, 2017, the day following the Second McMahon XFD, Mr. Hargreaves issued the NTA. It asks Mr. McMahon to admit, among other things, that "[c]ounsel acting on behalf of Mr. McMahon made a conscious decision, in the preparation of the [Plaintiff's First LOD], to conceal 16 pages from the employment file." The NTA also sought admissions that the pages were concealed because they reflected poorly on Mr. McMahon's employment with the CVRD, and that the Delayed Production Documents were intentionally withheld from disclosure.

**74**  On the same day as he issued the NTA, Mr. Hargreaves filed the defendant's trial certificate. It states that Mr. Hargreaves estimates that the trial will last eighteen days, and that he will be ready to proceed on the scheduled trial date of April 3, 2017. It is not clear to me why Mr. Hargreaves estimated eighteen days, when the total time estimated in the two trial briefs was only about seven days.

**75**  Also on March 7, 2017, Mr. Hargreaves sent an email to Ms. Foley which is marked "without prejudice" and which apparently made a settlement offer ("Offer Email"). The terms offered were not in evidence on the cross-applications. The portions of the Offer Email which are in evidence on the cross-applications are the following:

I fully intend to explore with the jury the inferences that arise from:

1. Concealment of the relevant portion of your client's employment file until October of last year.
2. Destruction by your client of the physical evidence that would show what, if any, efforts he had made to complete the BCIT course, which destruction occurred after he was aware that he might not return to work, after he had retained your firm (and thus presumably been given advice about the need to retain/produce document (sic - documents)), and during the period of concealment of the relevant portions of the employment file.

I venture to suggest that juries typically strongly dislike claimants perceived by the jury to be trying to game the system. I venture to suggest that your client may well be perceived in that fashion, regardless of whether he was personally behaving in such a manner or had merely retained counsel who chose to do so.

I hasten to add that I do not believe that you personally had anything to do with the original concealment of the employment records, but I do not see that as assisting either you or your client.

Please note that my view that the records were intentionally concealed is based on inferences I have drawn, coupled with your apparent inability to proffer any innocent explanation. As I told Mr. Dudding yesterday, I would be pleased to learn of a plausible innocent explanation, since the alternative is conduct that strikes at the very heart of our system of civil justice, by undermining the ability of counsel, and parties, to rely upon the honest performance of duties by counsel. I do not, for a moment, think that you or Mr. Dudding behaved in that fashion, but (absent explanation) it seems to me clear that someone (then) in your firm did so.

You may protest that your client is innocent in this regard and that he is not responsible for the concealment of the records, and did not consciously intend to destroy evidence. However, any attempt to exculpate him must presumably include testimony by you that it was a lawyer or paralegal in your firm who concealed the records, and that your firm did not explain to your client the obligations imposed by the Rules in terms of document disclosure. I note that not only did your office conceal parts of the employment file, but also failed to list, as required by Rule 7-1(a) the BCIT study material. Had that been disclosed it would have led to questions as to why he was taking the course, and that in turn, assuming honest answers, might have led to earlier disclosure of the concealed employment records and the fact that your client was at risk of losing his employment.

In addition, a close review of the employment file suggests to me that the pages were deliberately numbered in a non-chronological fashion so as to enable the description of a 36 page document. Had the pages been numbered chronologically, your office would either have had to disclose more of the file or the numbering in the documents as provided to us would have revealed gaps (as I read the file, based on the perhaps mistaken assumption that the file was transmitted to your office in a chronologically organized condition).

As soon as you attempt to deflect responsibility from your client you will, in my view, have waived privilege. I caution you that the privilege is not yours to waive ... so I assume that should this happen, then you have obtained informed consent from your client to waive privilege. That will lead to my seeking leave to cross examine your client on all communications with your office up until the full employment file was disclosed, and I will likely want to call you to the stand as well. I am not prepared to allow you to 'testify' to the jury other than from the witness stand. It will be for the Court to rule on that, but I want you to understand my position.

With all of that in mind, I suggest to you that your client faces a very high likelihood that the jury will conclude, on a balance of probabilities, that your client was going to be unemployed as of June 30th, 2013.

His record of employment in the years before being hired by the CVRD shows that he often struggled to find any employment at all, and that such employment as he did find was sometimes at minimum wage.

His aerospace qualifications were, by 2013, many years out of date, and he had not used those skills for some 7 years, and even then for short periods of time.

Thus we see his claims for both past and future income loss as being problematic.

...

I await your response.

**76**  Ms. Foley responded with a without prejudice letter dated March 8, 2017. Again, only some of the letter was in evidence. The portions in evidence included the following:

Ken's [Mr. McMahon's] immediate supervisor, Les Hokanson, was the manager of recreational operations at the time of the [Accident]. ... Les knew Ken to be an excellent employee with a strong work ethic. ... Ken was in no risk of losing his job, apart from the need to obtain his 5th Class certificate. On that point, Les will say that CVRD would not fire an employee who was making "honest efforts" towards obtaining the certificate, for instance, employees who failed the written examination would be provided with opportunities to re-write. ...

...

In sum, assuming the court rejects Ken's testimony that, absent the [Accident], he would have obtained the 5th Class certificate before 30 June 2013, the evidence will nevertheless show that he likely would have retained his position at CVRD since he was a valued employee making "honest efforts" toward obtaining the certificate. Even if the court declines to accept the evidence of Ken's direct superior on that point, the evidence of the senior manager will prove it is more likely than not that Ken could have obtained alternate employment at CVRD. The defence position fails to appropriately account for the evidence of CVRD management, which contradicts the notion that Ken would have been unemployed as of 30 June 2013.

The defence position also attaches seemingly considerable weight on the timing of disclosure of portions of [Mr. McMahon's] CVRD employment file. This is collateral and irrelevant to the issues to be decided by the jury. If raised in the manner suggested without the judge's agreement it will more than likely result in a mistrial. ...

**77**  Mr. Hargreaves responded later that day with another email marked "without prejudice". This email includes the following:

I have your letter of this date.

I find parts of the letter to be inconsistent with my understanding of the likely evidence at trial.

...

As to the evidence, I have the advantage of having spoken directly with both Hokanson and Hwang, who are on my list of witnesses, and not yours, and who I may or may not call, depending on the state of evidence at the close of your case.

...

I will invite the Court, at the end of the trial, to instruct the jury as to the law relating to document disclosure, which is indeed a matter of law.

The Rules, of course, impose the obligation to comply upon the party, not the lawyer. Thus I will be able to demonstrate that your client concealed the existence of producible documents in breach of his statutory duty.

Any attempt by you to divert blame elsewhere may well result in that mistrial about which you are so concerned, but if the mistrial arises from your conduct in objecting to my questions and especially if it arises from an effort by you to make an unknown former lawyer responsible, then I shall seek special costs thrown away, to be paid by your firm.

Any attempt by your client to divert blame, on the basis that he was unaware of his legal obligation or unaware that his lawyer had breached that obligation, puts your client's state of mind in issue and that, in my view, amounts to a waiver of privilege.

Should that arise, I shall seek disclosure of the original file, including all notes and communications with your client up until the file was finally disclosed. I may also need to subpoena one or more present or former members or employees of your firm.

...

Frankly, I have great difficulty imagining that the responsible lawyer in your office, reading the complete employment file, didn't immediately contact or instruct staff to contact the client to find out whether he was taking steps to keep his job. An enquiry into that topic, enabled by waiver of privilege, will almost surely end unhappily for your firm, your client or, in all likelihood, both.

...

I also respectfully suggest that your client, either as a victim of poor (to be charitable) legal representation (before you assumed carriage of the file) or by active participation in the decision making, finds himself facing a potentially catastrophic outcome should the jury decide that they can't believe a word he says.

...

I know you had nothing to do with the decisions made in 2013 or early 2014, but that cannot and shall not affect how I deal with the arguments that those decisions have handed me now.

On rereading this before sending it, I can see that my reference to Ms. Acheson could be construed as implying that she was directly involved in the concealment of part of the employment file and/or the loss/failure to list the BCIT materials. I have known Ms. Acheson for many years, and I would have grave difficulty accepting that this would have happened by her direction. However, the buck stops someplace and she wrote to the CVRD, the CVRD sent the file to her, and the List of Documents was prepared in her name. While I do not believe that she would act in a deceitful fashion, someone to whom she, apparently, delegated her obligations seems to have done so.

In short, I have no ethical concerns about either you or Ms. Acheson but I have very significant concerns about unidentified (perhaps now former) members or employees of your firm and I owe it to my clients to advance these arguments vigorously.

**78**  Also on March 8, 2017, as stated, Mr. Hargreaves filed the trial brief dated February 9, 2017 on behalf of the defence.

**79**  Mr. McMahon's response to the NTA is dated March 15, 2017. Mr. McMahon refused to make most of the admissions sought, stating that they were irrelevant and an abuse of process.

**80**  Also on March 15, 2017, Mr. Hargreaves wrote to Ms. Foley as follows:

It is my view that in light of your response to the [NTA], it is inevitable that you will be found to be in conflict such that neither you nor any member of your firm may act as counsel. It is my view that such would likely have been the case in any event, but your refusal to make the requested admissions makes it, in my view, unavoidable.

**81**  Ms. Foley responded to Mr. Hargreaves that day, asking that if he intended to seek any rulings from the trial judge, he provide her with an application setting out the relief sought and the basis so that she could have an opportunity to prepare.

**82**  On March 22, 2017, Acheson Sweeney decided that Mr. Sean Sweeney would take over conduct of the trial and Ms. Foley would no longer act as counsel for Mr. McMahon.

**83**  On March 23, 2017, Mr. Hargreaves issued and served the Foley Subpoena. It states that Ms. Foley is to attend on a date "to be determined", rather than specifying on which of the 18 days scheduled for trial Mr. Hargreaves anticipated calling Ms. Foley as a witness.

**84**  Mr. Hargreaves's affidavit does not set out what material evidence he anticipated Ms. Foley could provide at trial. He referred to arguing that an adverse inference should be drawn on the basis of spoliation, and to arguing that solicitor-client privilege would be waived, and continued as follows:

1. A ruling that solicitor-client privilege had been waived in that regard would have been of no avail if the only witness I could ask questions about (sic - of) were Mr. McMahon because I would be seeking evidence as to the state of mind of his agents.
2. Accordingly, I issued and served Subpoenas upon Sherry Baxter, the associate I understood to have day-to-day carriage of the file as of March 2014, Ms. Sykes, the former paralegal employed by Ms. Foley who delivered to our office the List of Documents and the abbreviated employment file, and Ms. Foley. Ms. Foley was the responsible lawyer for the file, as best as I understood matters, as of the time that the truncated file was sent to us and was the lawyer of record at the time that the full employment file was sent to us.
3. I understood that taking these steps would be perceived as unusual and indeed I have never undertaken steps similar to this on any other file. Accordingly, I was at pains to attempt to explain to Ms. Foley not only what it was that I was planning to do but why it was that I felt that I had to do so in the interest of my client.

**85**  Also on March 23, 2017, Mr. Hargreaves wrote a lengthy email to Mr. Sweeney, including the following:

...

1. We infer that the file was transferred internally from Acheson/Baxter to Foley in or around April 2014. Gail Sykes, styling herself as 'paralegal to NATALIE FOLEY' advised late April or early May that she would be getting to the List very soon. In the event, the List later came over dated as of March 11, 2014 and prepared for the signature of (but not signed by) Acheson.
2. We infer that Sykes had been unaware that the List had been drafted before the file was transferred and we infer that someone other than Sykes/Foley was responsible for the creation of the List. We do not know this to be the case and we will not be speculating before the jury on this issue. However, for your purposes I want to let you know that at no time have I harboured any strong suspicion that either Foley or Sykes were involved in the decision to withhold the 16 pages (you will observe that I am inferring that a decision was made to that effect: I find it inconceivable that this was mere inadvertence).

...

1. I infer that someone in your firm made a conscious decision to deceive the defence with respect to the contents of the employment file. I have no knowledge of who that person was. I know that the List was prepared for the signature of Acheson. I know that it was likely prepared by or under the direction of Baxter. I obviously have no knowledge as to whether any lawyer was aware of the concealment of documents but I do not think that it is open to your office to point the finger at some unidentified employee, while avoiding the responsibilities that rest with counsel. In my opinion some explanation is required, and I have pointed out to Foley the difficulties that arise, in my view, should your client attempt to blame your firm for his failure (make no mistake: this is his failure ... it is his List and the Rules impose obligations on him, not on some clerical employee of your office). Moreover, I am not going to consent to any effort by counsel to 'accept' the blame, especially as I very much doubt that you would have any personal knowledge of the truth of whatever explanation you gave. I mean no disrespect to you in so stating: I see no indication that you have had any previous involvement with the file so I cannot imagine how you would have personal knowledge of what went on in early 2014. I also see no way that any apology or acceptance of blame, absent a personal appearance at trial, in the witness stand, of the person or persons responsible can be an adequate explanation of, or remedy for, the prejudice caused to the defence, as elaborated upon below.

...

1. ...It matters not, as far as I am concerned, whether the concealment was with the knowledge of the client or an adventure embarked upon by someone within your firm without seeking client approval. Your firm were and remain his agent. The deceit (or ***negligence*** if ***negligence*** be the explanation) of the agent is visited upon the principal if it arose within the scope of the agency, as it did here.

...

We intend to confront your client with the Lists and with the employment files that were disclosed at different times.

We face a practical problem with this, in that I expect your client to disclaim any knowledge of his Lists, or knowing the contents of the employment file or of what was disclosed.

This leaves me with no alternative that I can see to placing Ms. Foley under subpoena. While she, I assume, is innocent of any involvement in the original disclosure problems, it is apparent that she became aware of them at some time, since it was she who partially disclosed them in October 2016 and she who got a letter from BCIT in February 2017, before your client was questioned by me about the BCIT course, advising that there were no records available by which we could challenge his evidence.

I have tried to avoid this by delivery of a Notice to Admit ...

...

I cannot be certain that having the requested admissions would obviate the need to call Foley or others from your firm, past or present, but I drafted the Notice to Admit in order to reduce and, I hope, eliminate the need to do so.

You will note that this email is not written without prejudice. ...

**86**  On March 28, 2017, the trial scheduled to commence on April 3, 2017 was adjourned generally to permit Mr. McMahon's applications to proceed before trial.

**87**  The evidence included Mr. McMahon's evidence to the effect that he was very concerned when he was told that Mr. Sweeney would represent him rather than Ms. Foley, and that he was very concerned that Mr. Sweeney would not be able to represent him at trial and that he might have to find and pay another lawyer.

**88**  The evidence did not disclose what efforts, if any, either Acheson Sweeney or Jones Emery made to obtain evidence from either Ms. Baxter or Ms. Sykes about the Plaintiff's First LOD and its omission of the Delayed Production Documents.

**89**  These cross-applications were initiated by Mr. McMahon's notice of application dated April 28, 2017 ("First McMahon NOA"), which is 22 pages long and seeks relief including removal of Mr. Hargreaves as counsel. The First McMahon NOA refers to the inherent power of the court to control abuse of process, and cites numerous cases. The defendant's application response to the First McMahon NOA application ("Defence First NOR") is dated April 28, 2017, and is 10 pages long.

**90**  The defendant's notice of application is dated May 16, 2017 ("Defendant's NOA"), and seeks a number of orders, including cross-examination of Mr. McMahon, Ms. Foley, and Mr. Dudding, and an order that Mr. McMahon has waived solicitor-client privilege. The Defendant's NOA is 10 pages long. Mr. McMahon's response to the Defendant's NOA ("McMahon NOR") is 10 pages long.

**91**  Mr. McMahon's second notice of application dated May 26, 2017 ("Second McMahon NOA") seeks an order permitting cross-examination of Mr. Hargreaves on his affidavit. The Second McMahon NOA is 11 pages long. The defendant's amended application response to the Second McMahon NOA ("Defence Second NOR") is dated June 7, 2017 and is two pages long. However, it incorporates by reference ten pages of the Defence First NOR, and eight pages of the Defendant's NOA. As a result, the Defence Second NOR is effectively 20 pages long.

**92**  Mr. Kelliher's written argument on Mr. McMahon's behalf, filed June 28, 2017, is 28 pages long. Mr. Brun's written argument, filed June 29, 2017, is 20 pages long.

**IV. ANALYSIS**

**A. Is the First McMahon NOA a nullity owing to its length?**

**93**  The object of the *Supreme Court Civil Rules* [*Rules*], as set out in Rule 1-3, is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Rule 1-3(2) is as follows:

**Proportionality**

1. Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
2. the amount involved in the proceeding,
3. the importance of the issues in dispute, and
4. the complexity of the proceeding.

**94**  Rule 8-1(4) provides that "the notice of application, other than any draft order attached to it under paragraph (a), must not exceed 10 pages in length." That Rule also provides that the notice of application must "(c) set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the orders sought should be granted". Rule 8-1(10) imposes a similar 10-page limit on application responses.

**95**  Rule 22-7(1) is as follows:

**Non-compliance with rules**

1. Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify
2. a proceeding,
3. a step taken in the proceeding, or
4. any document or order made in the proceeding.

**96**  Rule 22-7(2) includes the following:

...if there has been a failure to comply with these Supreme Court Civil Rules, the court may

...

1. make any other order it considers will further the object of these Supreme Court Civil Rules.

**97**  As stated, three of the documents relating to the cross-applications exceed the 10-page limit in the *Rules*. They are the 22-page First McMahon NOA, the 11-page Second McMahon NOA, and the Defence Second NOR, which is effectively 20 pages long.

**98**  The defendant relied on the *Rules* and on the decision in *Dupre v. Patterson*, [*2013 BCSC 1561*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B2DW-00000-00&context=). Paragraph 56 is as follows:

[56] If counsel are coming to court with inadequate material that clearly fails to comply with the ***Rules***, and counting on being heard, they are misguided. Judges and masters are entitled to expect that counsel will prepare application materials (including affidavits) that comply with the ***Rules***, and do no less than this. Counsel who come to court with application materials that do not comply risk having their applications at least adjourned, with potential cost consequences, until proper materials are filed.

**99**  There is a good reason for a page length limit for a notice of application. It encourages brevity, and enables the court and the opposition to understand the application and the basis for it without undue investment of time.

**100**  In this case, the parties' arguments are relatively complex, and the hearing of the application occupied two court days. The written arguments were largely based on the notices of application and the application responses, and expanded on them.

**101**  The First McMahon NOA provided adequate notice to the defendant and the court of the relief Mr. McMahon sought and the basis for it.

**102**  It might have been better if the First McMahon NOA had complied with the ten-page limit, and Mr. McMahon's argument had been expanded in his written argument. Similarly, it might have been better if the Defence Second NOR had complied with the ten-page limit.

**103**  However, in all the circumstances, I am not persuaded that the length of the First McMahon NOA has caused any prejudice to the defendant, or that the court should insist on strict compliance with the page limits in this case. The cross-applications raised complex issues, as demonstrated by the length of the hearing and of these reasons for judgment.

**104**  In any event, as set out in Rule 22-7(1), the failure to comply with the *Rules* regarding the First McMahon NOA must be treated as an irregularity, and not a nullity, unless the court orders otherwise. The usual remedy for such an irregularity would address any prejudice to the application respondent, by adjourning the matter if necessary and potentially making appropriate orders concerning costs. It is difficult to conceive of a case in which the court would consider a notice of application to be a nullity only because of its length.

**105**  I dismiss the defendant's application for a declaration that the First McMahon NOA is a nullity based on its length.

**B. Are the following affidavits inadmissible in whole or in part on the cross-applications: Affidavit #1 of Ms. Foley, Affidavit #1 of Patrick Dudding, and Affidavit #1 of Mr. McMahon?**

**106**  I refer to the affidavits of Ms. Foley and Messrs. Dudding and McMahon together as the "Challenged Plaintiff's Affidavits" and to those three deponents together as the "Challenged Plaintiff's Deponents". The defendant did not challenge the admissibility of Mr. Sweeney's affidavit.

**107**  The defendant argued that the Challenged Plaintiff's Affidavits included inadmissible passages, including expressions of emotion, hearsay, opinion evidence, assumptions, commentary, speculation, and argument.

**108**  The court has the jurisdiction to strike portions of affidavits which contain passages which are inadmissible. See *Chamberlain v. School District #36 (Surrey)*, [*[1998] B.C.J. No. 2923*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2NJ-00000-00&context=) (S.C.), at para 15, as follows:

[15] The court has power to strike inadmissible evidence from affidavits: *Evans Forest Products Ltd. v. The Chief Forester of British Columbia* [*[1995] B.C.J. No. 729*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X122-00000-00&context=) (6 April 1995), Vancouver A943891 (B.C.S.C.). In practical terms, when there is no time between the application to strike inadmissible evidence and the hearing of the *lis*, this means portions of filed affidavits are given no weight by the court.

**109**  The mischief of including inadmissible "evidence" in affidavits is that it requires the opposing party to determine how to respond, lengthens the time required for the court and the parties to review and consider affidavits, and risks the decision-maker falling into legal error by relying on inadmissible material. The chambers hearing process is poorly suited to making rulings on admissibility of passages in affidavits. As a result, usually the court simply chooses not to give any weight to the inadmissible passages, without any formal order regarding the inadmissible passages.

**110**  Unfortunately, here the Challenged Plaintiff's Affidavits include passages which are in reality speculation or argument, and are inadmissible. In the circumstances of this case, it is appropriate to clarify that the following passages from the Challenged Plaintiff's Affidavits are inadmissible, because they consist of either speculation or argument or inadmissible opinion, rather than evidence of what the witness observed or did:

1. Ms. Foley's affidavit:
2. para. 12: ... "which I believe have culminated in an interference with the administration of justice";
3. para. 15 in its entirety, including Exhibit A;
4. para. 23, "it was clear to me that he was suggesting that there had been some nefarious activity on the part of members of my firm";
5. para. 31, after referring to the result that Ms. Foley might not be able to act for Mr. McMahon at trial, the words "I felt that was precisely Mr. Hargreaves's intention and I had a number of sleepless nights attempting to separate out the baseless allegations and manufactured arguments generated by Mr. Hargreaves from the real risk assessment in the case and what proper advice to provide my client.";
6. para. 32, the words "for something that had caused no prejudice";
7. para. 33 in its entirety;
8. para. 38 in its entirety;
9. para. 41, the words "clearly intended to undermine my relationship with my client and convince my client to accept his settlement proposal";
10. para. 47, the words "[T]he correspondence, communications and use of powers as an officer of the court by Mr. Hargreaves in this matter have been of the nature of a personal attack on myself and my firm" and "[T]he allegations and approach of Mr. Hargreaves made it impossible for me to effectively represent my client and put the evidence, facts and issues that merit consideration before the court for a proper and timely determination of Mr. McMahon's claim, thereby denying him access to justice"; and
11. Mr. Dudding's affidavit:
12. para. 20 in its entirety;
13. para. 25, the words "...I nevertheless understood him to be using the threat of bringing that issue to the attention of the court as a means for him to gain an advantage for his client in the litigation. It also appeared to me that Mr. Hargreaves wished to signal to my client that I had acted in an unethical way and that I had withheld documents, in a way that had compromised the plaintiff's claim"; and
14. para. 26, the words "I interpreted these things as signifying intense anger and aggression."

**111**  In addition, the following passages of Ms. Foley's affidavit are inadmissible for the reasons discussed below:

1. para. 16 and Exhibit B are inadmissible because the facts are irrelevant. They deal with another file involving both Mr. Hargreaves and Acheson Sweeney; and
2. para. 17 is inadmissible because it is a statement of alleged fact rather than evidence. This paragraph refers to the inadmissible statement in para. 16, and says "[A]t no time has Mr. Hargreaves denied making the above statement to Mr. Sweeney, or the truth of the contents of that statement". If Ms. Foley meant to say, "Mr. Hargreaves has not told me that he denied making the statement", or if she meant to say, "Mr. Sweeney informs me and I believe that Mr. Hargreaves has not told Mr. Sweeney that he denies making that statement", her affidavit should have said so. However, it is expressed as a statement of fact which it is unclear how Ms. Foley could know, and it is inadmissible.

**112**  The defence argued that a number of other passages from the Challenged Plaintiff's Affidavits were inadmissible. Many of the challenged passages provided evidence relating to how angry Mr. Hargreaves appeared to be when he was discussing issues related to the Delayed Production Documents. Mr. Hargreaves denies some of the facts alleged.

**113**  These passages could potentially relate to the question of whether Mr. Hargreaves intended to abuse the process of the court. As discussed below, it is not necessary for me to determine whether, as a matter of law, Mr. Hargreaves intended to abuse the process of the court. In this case, I found the evidence of how angry Mr. Hargreaves appeared to be at various times did not help me determine whether Mr. Hargreaves's conduct demonstrated that he intended to abuse the court process, or that he was simply taking an aggressive position on behalf of his client. Similarly, the fact that there has been a history of unhappy dealings between Mr. Hargreaves and members of Acheson Sweeney did not help me determine what were Mr. Hargreaves's intentions in this case, even if that is relevant.

**114**  The defendant argued that the court should strike passages which included hearsay. Ordinarily, hearsay is admissible if the application does not seek a "final order", as set out in Rule 22-2(13). In addition, there are circumstances where the court can provide leave for statements as to the information and belief of the deponent.

**115**  The balance of the Challenged Plaintiff's Affidavits, including all of Mr. McMahon's affidavit, are admissible on the cross-applications.

**116**  Mr. McMahon's counsel argued that numerous paragraphs of Mr. Hargreaves's affidavit were inadmissible as hearsay, speculation, commentary, argument, and opinion evidence. Mr. McMahon did not seek an order formally striking the paragraphs, instead asking the court "to take the deficiencies in Mr. Hargreaves's evidence into account when considering the weight to be given to his testimony".

**117**  Much of Mr. Hargreaves's affidavit appears to be directed to the question of his personal belief in the merits of his arguments regarding spoliation and waiver of solicitor-client privilege. As discussed below, I do not find the question of Mr. Hargreaves's personal belief to be determinative of whether Mr. Hargreaves's conduct amounts to an abuse of process. However, it appears to me that this question was raised by Mr. McMahon's argument and it was acceptable for Mr. Hargreaves to respond to it.

**118**  Mr. McMahon's counsel objected to portions of Mr. Hargreaves's affidavit which summarized evidence Mr. McMahon gave on examination for discovery. That evidence is admissible. It is not offered for the truth of the contents, but for the fact that Mr. McMahon gave the testimony, so it is not hearsay. However, where the excerpts from the transcript were attached, they provided better evidence of Mr. McMahon's testimony than Mr. Hargreaves's summary.

**119**  There are passages in Mr. Hargreaves's affidavit which were speculation and must be ignored. That includes the following:

1. para. 35, "That (having notice that Mr. McMahon was at risk of losing his employment as of June 30, 2013 due to a lack of a required trade designation) in turn would have led the Defendant to explore with the Plaintiff, in a then-timely fashion, what efforts he had been making to obtain the trade designation";
2. para. 36, "That in turn would inevitably have led to disclosure of his enrollment at BCIT and would have permitted and undoubtedly lead (sic - led) to the defence obtaining from BCIT all such records as were then in existence with respect to efforts made by the Plaintiff to complete the course"; and
3. para. 46, "[w]ere I aware at that time of the Plaintiff's June 30, 2013, deadline to obtain the certification or be terminated from his employment, I would have raised the issue of the completion of his course occurring well after that date".

**C. Should the court order cross-examination of any deponents on their affidavits?**

**1. Cross-examination of Challenged Plaintiff's Deponents**

**120**  I will first deal with the defendant's application for cross-examination of the Challenged Plaintiff's Deponents.

**121**  The defendant's written argument states that the court should order cross-examination of the Challenged Plaintiff's Deponents "so as to get to the bottom of the failure to make proper disclosure".

**122**  Mr. McMahon's position is that any cross-examination of those deponents should be limited to the following issues:

1. the state of mind of Ms. Foley and Mr. Dudding regarding the effect of Mr. Hargreaves's conduct on them;
2. the credibility of the evidence of Messrs. Dudding and Hargreaves concerning what was said between them prior to the TMC of February 9, 2017; and
3. the credibility of what was said between Messrs. Dudding and Hargreaves during the Second McMahon XFD.

**123**  Rule 22-1(4) is as follows:

**Evidence on an application**

1. On a chambers proceeding, evidence must be given by affidavit, but the court may
2. order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
3. order the examination of a party or witness, either before the court or before another person as the court directs,
4. give directions required for the discovery, inspection or production of a document or copy of that document,
5. order an inquiry, assessment or accounting under Rule 18-1, and
6. receive other forms of evidence.

**124**  Cross-examination often will be permitted where the evidence to be elicited is relevant to facts that are at issue on the application. See *Dakota Ridge Builders Ltd. v. Niemela*, [*2015 BCSC 581*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60R3-00000-00&context=), including para. 8, as follows:

[8] In exercising my discretion on whether to order cross-examination, it is relevant to consider whether cross-examination is necessary, whether it is relevant to the issues on the application and whether it is likely to produce any evidence that will support the side of the party seeking cross-examination: see *Tiessen v. Insurance Corp. of British Columbia*, [*2008 BCSC 1822*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B11S-00000-00&context=), and *Kvaerner U.S. Inc. v. AMEC E & C Services Limited*, [*2004 BCSC 730*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3SC-00000-00&context=).

**125**  In short, this court should order cross-examination of the Challenged Plaintiff's Deponents only if the cross-examination will likely assist in resolving the cross-applications before the court.

**126**  The applications before the court do not depend on how exactly the Delayed Production Documents were omitted from the Plaintiff's First LOD. Mr. McMahon's applications turn on whether Mr. Hargreaves or Jones Emery have abused the court process. As part of that analysis, there are issues relating to Mr. McMahon's alleged waiver of solicitor-client privilege and relating to an alleged defence argument regarding spoliation. However, further evidence concerning how the omission of the Delayed Production Documents from the Plaintiff's First LOD occurred is not required to resolve the cross-applications.

**127**  In addition, the evidence does not show that cross-examination of the Challenged Plaintiff's Deponents would resolve the question of how the omission occurred. There is no evidence showing that any of the Challenged Plaintiff's Deponents were directly involved in the preparation or service of the Plaintiff's First LOD, and they have already provided evidence about their knowledge and involvement.

**128**  As a result, I dismiss the defendant's application for cross-examination of the Challenged Plaintiff's Deponents.

**2. Cross-examination of Mr. Hargreaves**

**129**  I turn next to Mr. McMahon's application to cross-examine Mr. Hargreaves.

**130**  Mr. McMahon alleges that Mr. Hargreaves has abused the court process. Is Mr. Hargreaves's subjective intention relevant to that determination? If a lawyer does something which would be an abuse of process if the lawyer intended to abuse the process, but the lawyer did not intend to abuse the process, will the conduct escape characterization as an abuse of process? If a lawyer intends to abuse the process, but does something which would not otherwise be an abuse of process, does the lawyer's intention create an abuse of process?

**131**  The authorities do not answer those questions clearly.

**132**  In *Toronto (City) v. C.U.P.E., Local 79*, [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=), Madam Justice Arbour, for the majority, found as follows in respect to the doctrine of abuse of process:

[37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), [*2000 CanLII 8514*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B529-00000-00&context=) (ON CA), [*51 O.R. (3d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B529-00000-00&context=) (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [*[2002] 3 S.C.R. 307*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4DC-00000-00&context=), [*2002 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4DC-00000-00&context=) (CanLII))). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

[Emphasis added.]

**133**  In *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=) [*MacDonald Estate*], a case dealing with the removal of counsel due to a conflict of interest, Justice Sopinka, for the majority, held that courts have inherent jurisdiction to remove counsel of record where appropriate. The jurisdiction flows from the fact that: "lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction" (at p. 1245).

**134**  In *Everingham v. Ontario*, [*[1992] O.J. No. 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-JF75-M0JP-00000-00&context=) (ON SC) [*Everingham*], the Ontario Divisional Court found that the courts may remove counsel of record when the interests of justice requires, whether for a conflict of interest or otherwise, as follows:

It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached.

**135**  At issue in *Everingham* was a private meeting between a Crown lawyer and a mental patient (who the Crown was scheduled to cross-examine the following day), without the presence of the patient's lawyer, while the Crown lawyer was taking a tour of the mental hospital. The Divisional Court found that the removal order must stand, stating that:

The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the public. This is particularly so when the rights are at stake of powerless and vulnerable litigants like detained mental patients. The appearance of unfairness, oppression and deprivation of counsel is not, as noted above, cured by an eventual finding that a court prefers the evidence of the solicitor to the evidence of a detained mental patient. The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice. The sine qua non of the justice system is that there be an unqualified perception of its fairness in the eyes of the public.

[Emphasis added, citations omitted.]

**136**  In *781332 Ontario Inc. v. Mortgage Insurance Co. of Canada*, [*[1991] O.J. No. 1592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-JF75-M0BD-00000-00&context=) (ON SC), Justice Hoilett found that the power to intervene and remove counsel of record is not limited to conflict of interest situations. In removing counsel of record, the Court held as follows:

This court needs not impute motive, nor does it need to find impropriety. But it must be concerned with appearances which might reflect adversely on the integrity of the administration of justice. Mindful of that paramount consideration, therefore, I am of the opinion that the litigant's right to be represented by counsel of his/her choice must yield to the paramount public interest in preserving the integrity of the system, as well as its appearance.

**137**  In *Quebec (Criminal and Penal Prosecutions) v. Jodoin*, [*2017 SCC 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PVF-9W91-JP4G-63NW-00000-00&context=) [*Jodoin*], the Court upheld an award that a lawyer pay costs personally for engaging in an abuse of process. The abuse of process consisted of filing motions alleging bias by a judge for the improper purpose of adjourning a hearing. It is not clear from the decision of the Supreme Court of Canada whether the lawyer provided testimony about his intentions, or the court inferred it from his conduct.

**138**  The Court referred to conduct that would give rise to the inference that the lawyer had an improper purpose. The lawyer's conduct consisted of filing motions alleging that one judge was biased, and after learning that the cases had been reassigned to a second judge, filing another set of motions (on the same day as the first set) alleging that the second judge was biased.

**139**  It appears that the Court inferred from this conduct that the lawyer had an improper purpose. This is described in para. 42 of *Jodoin*, as follows:

[42] As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

**140**  As discussed in *Jodoin*, courts cannot award costs against a lawyer personally without observing procedural safeguards, and the lawyer should be given prior notice of the allegations against him or her and the possible consequences. As set out in *Jodoin* at para. 36, "[i]deally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits."

**141**  Here, Mr. McMahon has sought special costs from the defendant, but has not sought costs against Mr. Hargreaves or Jones Emery personally. As a result, Mr. Hargreaves's personal intentions are of little or no importance.

**142**  Ordinarily, the question for the court considering abuse of process is a question of the impact of the impugned conduct in the conduct of the case and on the reputation of the administration of justice. This depends primarily on an objective analysis of the conduct, rather than a subjective analysis of the lawyer's intention. A lawyer may commit an abuse of process unintentionally, and a lawyer who seeks to abuse the process may fail to do so.

**143**  I conclude that in rare cases, the lawyer's subjective intentions may be relevant. This may be particularly so in a case in which the lawyer is being asked to pay costs personally. In such cases, the court may choose to draw inferences from the lawyer's conduct, rather than relying on testimony from the lawyer.

**144**  In this case, I am not convinced that cross-examination of Mr. Hargreaves is necessary to resolve the applications.

**145**  Essentially, Mr. Hargreaves's evidence is that he acted in good faith and in pursuit of his client's interests, and not in order to abuse the process. His evidence is that he was pursuing arguments related to spoliation and waiver of privilege, as discussed below. In this case, an objective analysis of his conduct is sufficient to resolve the applications. Cross-examination of Mr. Hargreaves would lead to further delay and expense, and is not consistent with the purpose of the *Rules*.

**146**  I dismiss Mr. McMahon's application to cross-examine Mr. Hargreaves on his affidavit.

**D. Should the court order that Mr. McMahon swear an affidavit verifying the Plaintiff's Second LOD?**

**147**  The defence seeks an order that Mr. McMahon must swear an affidavit verifying the Plaintiff's Second LOD. Mr. McMahon is opposed.

**148**  Rule 7-1(8) is as follows:

**Affidavit verifying list of documents**

1. The court may order a party of record to serve an affidavit verifying a list of documents.

**149**  In *Gardner v. Viridis Energy Inc.*, [*2012 BCSC 1816*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2YN-00000-00&context=), Justice Pearlman discussed the circumstances in which it may be appropriate to order an affidavit verifying a list of documents, as follows (at para. 52):

[52] Rule 7-1(8) permits a court to order that a party provide an affidavit verifying its list of documents when in the absence of any adequate explanation, relevant documents have been omitted from a list of documents. Such an order may also be made where a party has shown a "dilatory and casual attitude to production of documents" leading to an inference that "**either deliberately or by wilful indifference relevant documents may be hidden**". Rule 7-1(8) should not be rigidly applied in a case involving very large numbers of documents. **There must be evidence showing relevant documents have been omitted or that the disclosure has been inadequate**: *Copithorne v. Benoit*, [*2010 BCSC 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0PD-00000-00&context=) (CanLlI) at paras. 11-14.

[Emphasis added.]

**150**  In *Copithorne v. Benoit*, [*2010 BCSC 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0PD-00000-00&context=), Justice Schultes found that an order for an affidavit verifying a list of documents may be appropriate where significant documents have been omitted or where it is reasonable to suspect that relevant documents may be hidden (at paras. 11 and 12):

[11] Rule 26(3) of the *Rules of Court* provides that a court may order that a party provide an affidavit verifying a list of documents. A useful authority on this issue is the decision of Mr. Justice Legg (as he then was) in *Foundation Co. of Canada Ltd. v. Burnaby (District)*, [*[1978] B.C.J. No. 557*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F8SS-626F-00000-00&context=) (S.C.) at para. 7:

When some documents which are significant to the defence or claim of one party, have, for whatever reason, been omitted from any list delivered under Rule 26(1), in the absence of any adequate explanation or reason for such omission, an order directing the delinquent party to deliver an affidavit verifying the list of discovered documents ought, in my view, to be made.

[12] In addition to responding to the omission of significant documents, such an order may also be necessary when a party has shown a "dilatory and casual attitude to production of documents" giving the other party "reasonable cause to suspect that either deliberately or by wilful indifference relevant documents may be hidden from them." Such an order tells the dilatory party in effect "no more missing documents." Those principles are drawn from *Synergy Management Group Ltd. v. Walker Systems Corp.*, [*[1992] B.C.J. No. 2109*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-62TM-00000-00&context=) (S.C.).

**151**  As stated, the object of the *Rules*, as set out in Rule 1-3, is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

**152**  The case law raises the question of whether Mr. McMahon, either deliberately or by wilful indifference, hid relevant documents. Mr. McMahon's evidence is that he did not see the Plaintiff's First LOD until Mr. Hargreaves showed it to him at the Second McMahon XFD.

**153**  The defence relies on inferences it asks the court to draw from the facts. The defence argued that the circumstances suggest that there was deliberate concealment of the Delayed Production Documents. The defence argues that the suggestion in the evidence, that Ms. Foley may have found the Delayed Production Documents separated into a plastic folder, strongly suggests that someone at Acheson Sweeney deliberately chose to conceal those documents.

**154**  As stated by Goldie, J.A. in *Souter v. 375561 BC Ltd.*, [*[1995] B.C.J. No. 2265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B221-00000-00&context=) (BCCA) [*Souter*], at para. 49:

... Late and incomplete delivery of documents is a common experience and there are a variety of reasons which have nothing to do with fraud for such late delivery.

**155**  It is very unlikely that Acheson Sweeney deliberately concealed the Delayed Production Documents, for the following reasons:

1. It is unlikely that lawyers would deliberately conceal documents to advance a single case, because it would risk their professional reputation and invite disciplinary proceedings;
2. If someone at Acheson Sweeney had intended to deliberately conceal the Delayed Production Documents, one would expect them to discard the documents, rather than leave them in the file;
3. It is unlikely that someone would deliberately conceal documents which would continue to exist in the CVRD files, and which could be discovered by Jones Emery through conversations with someone at CVRD. In this case, Mr. Hargreaves spoke to CVRD employees, as set out in Mr. Hargreaves's March 8, 2017 email;
4. The job description in the Timely Production Documents reveal that a Certificate was required for Mr. McMahon's position. The additional information in the Delayed Production Documents is that CVRD had set a deadline of June 30, 2013, and had declined to extend the deadline. If someone intended to conceal documents showing that Mr. McMahon needed to obtain a Certificate, they would likely have concealed the job description as well;
5. Ms. Foley is not likely to have deliberately concealed the documents, because she listed them in the Plaintiff's Second LOD, and because she admitted in the Apology that Acheson Sweeney should have listed the Delayed Production Documents earlier;
6. There are other inferences than fraud to be drawn from the possible existence of the Delayed Production Documents in a separate plastic folder. Two that come to mind are these:
7. The Plaintiff's First LOD may have been a draft which remained unsigned because it was never properly finalized, and someone such as Ms. Baxter may have intended to discuss the Delayed Production Documents with a senior lawyer before finalizing the Plaintiff's First LOD. This is consistent with the following facts:
8. the evidence on the cross-applications did not include a cover letter sending the Plaintiff's First LOD to Jones Emery;
9. the Plaintiff's First LOD was unsigned;
10. Acheson Sweeney's May 26, 2014 letter to Jones Emery enclosed many documents which are apparently not referred to in the Plaintiff's First LOD, suggesting that there would be a more comprehensive list of documents at some point including all the documents; and
11. around the time of the date typed on the Plaintiff's First LOD, Acheson Sweeney was moving the file from Ms. Acheson and Ms. Baxter in the Courtenay office to Ms. Foley and Ms. Sykes in the Victoria office;
12. Although the collective agreement governing Mr. McMahon was not in evidence, collective agreements can contain "sunset clauses" which require employers to remove letters of reprimand and the like from the employee's record within a specific period of time: see for example the clause discussed in *Carillion Services v. Canadian Union of Public Employees, Local 942*, [*2011 CanLII 10605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FBJ-YY61-F2MB-S34D-00000-00&context=) (ON L.A.). The Delayed Production Documents relate to employment discipline matters. As a result, it may be that Acheson Sweeney received the documents from the CVRD with the disciplinary documentation in a separate plastic folder, and that this led someone to keep the documents separate, which led to the failure to include the disciplinary Delayed Production Documents with the balance of the CVRD employment file.

**156**  I am troubled that Mr. Hargreaves's correspondence, beginning in early February 2017, asserts that there was intentional concealment of the Delayed Production Documents, because there is simply no evidence supporting that inference. One would hope that lawyers would understand that mistakes can happen innocently. For example, here, someone at Jones Emery incorrectly labelled the CVRD documents, including the Delayed Production Documents, as "Duplicate", apparently resulting in a three-month delay before Mr. Hargreaves reviewed the Delayed Production Documents.

**157**  The defence has failed to establish that Mr. McMahon, either deliberately or by wilful indifference, hid relevant documents or concealed them temporarily. The Delayed Production Documents have now been produced and there is no reason to think any other documents have been omitted from the Plaintiff's Second LOD.

**158**  In addition, here, the Second McMahon XFD occurred after the production of the Plaintiff's Second LOD. The defendant was able to question Mr. McMahon about his production of documents during that examination for discovery. Ordering Mr. McMahon to provide an affidavit verifying the Plaintiff's Second LOD would simply increase the procedure and the related expense in this case, contrary to the object of the *Rules*.

**159**  I dismiss the defence application for an order that Mr. McMahon provide an affidavit verifying the Plaintiff's Second LOD.

**E. Has Mr. McMahon waived legal advice privilege over all his communications with, and over all communications within, Acheson Sweeney regarding the Delayed Production Documents and the Plaintiff's First LOD?**

**160**  The defendant argues that, if Mr. McMahon's evidence was that he did not know anything about the preparation of the Plaintiff's First LOD, the intent of his lawyers, being his agents, would be imputed to Mr. McMahon, and would thereby waive solicitor-client privilege. Mr. McMahon's position is that there has not been any waiver of solicitor-client privilege.

**161**  The defendant's application response includes the following:

1. The Plaintiff filed an affidavit in support of the application wherein he addresses issues related to the subject matter of the application. This constitutes a waiver of solicitor/privilege that might relate to communications between the Plaintiff and the Plaintiff Firm: *Weir-Jones v. Taylor*, [*2013 BCSC 1633*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-235T-00000-00&context=) ("*Weir-Jones*").
2. A party is said to have waived privilege in instances in which a party states that a mistake arose by the reason of ***negligence*** or inadvertence by counsel: *Weir-Jones*, at para. 53; *Souter v. 375561 BC Ltd.*, [*[1995] B.C.J. No. 2265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B221-00000-00&context=) (BCCA); *Camosun College v. Levelton Engineering Ltd.*, [*2014 BCSC 1190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B124-00000-00&context=), at para. 19.
3. The above principle should apply to waiver of privilege in the present case. Here, the Plaintiff swore an affidavit in which he stated, among other things, that he felt that his counsel "was interfering" with Mr. Hargreaves, was given the impression his counsel was "trying to hide documents," and was worried that it was possible his counsel had "hidden documents" or "done something wrong".

**162**  The term "solicitor-client privilege" is a broad term, often used to describe three quite different things: confidential communications between solicitor and client (legal advice privilege), lawyer's brief privilege, and litigation privilege. Here, the privilege in question is legal advice privilege.

**163**  Legal advice privilege extends over confidential communications made for the purposes of giving or receiving legal advice. It is the "highest privilege" recognized by the courts because it is based on the fact that communications between lawyers and their clients is essential to the effective operation of the adversarial justice system.

**164**  Legal advice privilege is a rule of evidence, a fundamental civil and legal right, and a principle of fundamental justice in Canadian law: see *Canada (National Revenue) v. Thompson*, [*2016 SCC 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MFG-HB81-F361-M3JS-00000-00&context=).

**165**  The Supreme Court of Canada has consistently reaffirmed the principle that the protection of confidentiality provided by legal advice privilege must be as close as possible to absolute to ensure public confidence: *Blank v. Canada (Minister of Justice)*, [*2006 SCC 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B17G-00000-00&context=) at para 24.

**166**  The privilege holder or the holder's agent may waive privilege expressly or by implication. The party asserting that the privilege has been waived bears the burden to establish waiver: *Kamengo Systems Inc. v. Seabulk Systems Inc.*, [*[1998] B.C.J. No. 3003*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2RX-00000-00&context=) (BC SC) at para 15, citing McLachlin J. (as she then was) in *S. & K. Processors Ltd. v. Campbell Avenue Merring Producers Ltd.*, [*[1983] B.C.J. No. 1499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S05B-00000-00&context=) (BC SC).

**167**  As a result, the defendant would bear the burden of establishing that Mr. McMahon waived solicitor-client privilege over his communications with Ms. Foley or anyone else at Acheson Sweeney.

**168**  If a party to a lawsuit puts the legal advice at issue, the party may be held to have waived the privilege by implication: *Reid v. British Columbia (Egg Marketing Board)*, [*2006 BCSC 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23R4-00000-00&context=), at paras. 23-28.

**169**  The defendant argues that Mr. McMahon put at issue his communications with Ms. Foley, and thereby waived legal advice privilege.

**170**  However, it is the defendant, not Mr. McMahon, who has sought to put those communications at issue. The defendant seeks to do so by raising the issue of spoliation.

**171**  The defendant relied on a series of cases where clients had waived legal advice privilege. They are distinguishable because in each of them it was the privilege-holder who sought to rely on the communications at issue, as follows:

1. In *Weir-Jones*, the client was applying for an order extending the time for filing a jury notice. The client was required to establish the reason for his failure to file the notice in the period required by the *Rules*. As a result, by bringing the application to extend the time, the client waived privilege over the reason for the failure;
2. In *Souter*, the question of waiver of privilege arose in two ways. First, the client blamed mistakes in prior affidavits on his solicitors. Second, the defendant alleged that the plaintiff and his son had fraudulently concocted a fake promissory note, and the defendant sought to examine the plaintiff's lawyer on that issue. On the first issue, the court held that by relying on evidence which blamed the affidavit mistakes on his lawyer, the plaintiff thereby put in issue the state of his instructions to his lawyers, and waived privilege. Here, Mr. McMahon does not rely on the state of his instructions to his lawyers. On the second issue, Mr. Justice Goldie did not accept that privilege had been waived. The defendant could not waive the plaintiff's privilege by making allegations about a fraudulent promissory note, just as the defendant here cannot waive Mr. McMahon's privilege by making allegations about intentional concealment of documents; and
3. In *Camosun College*, the plaintiff pled and relied on the postponement provisions of the *Limitation Act*, asserting that he did not have certain legal knowledge. The court held that he had put his state of mind regarding that in issue and by doing so had waived privilege. The plaintiff also blamed his counsel for making an admission without instructions and for providing deficient legal advice concerning joinder of issues, and privilege was waived on that issue.

**172**  Here, Mr. McMahon does not rely on the late disclosure of the Delayed Production Documents as a basis for any of his applications or for the relief he seeks at trial. His applications rely on the alleged abuses of the court process. Further, the position of Mr. McMahon and Acheson Sweeney are in harmony, not in conflict, in responding that the defendant has not established a deliberate concealment of documents.

**173**  As a result, I dismiss the defence application for an order that Mr. McMahon has waived solicitor-client privilege.

**F. Should the court set aside the Foley Subpoena because the defence has not established Ms. Foley likely has material evidence?**

**174**  Mr. McMahon argued that the Foley Subpoena was issued as an abuse of process and should therefore be set aside. Mr. McMahon's position is that any evidence from Ms. Foley about the Delayed Discovery Documents would be inadmissible on the basis that it would be evidence relating to a collateral issue and, in addition, is privileged.

**175**  The defence position is that Ms. Foley's evidence would be admissible, in aid of the defendant's argument that the jury should draw an adverse inference on the basis of spoliation, and that the privilege is waived.

**176**  If Ms. Foley likely has material evidence, the Foley Subpoena would not likely be an abuse of process. As a result, I begin with an analysis of whether the defence has established that Ms. Foley likely has material evidence.

**177**  The issuance of a subpoena is a serious step. It puts citizens to the inconvenience, and often the expense and lost income, of attending at court. When the person under subpoena is trial counsel, the issuance of a subpoena may require counsel to withdraw, as occurred here. That is a serious matter because it has the effect of interfering with the lawyer-client relationship and the client's choice of legal counsel.

**178**  The onus is on the party who issued the subpoena to establish that the proposed witness likely has material evidence: see *Wexler v. Bhullar*, [*2006 BCSC 1466*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1M1-00000-00&context=) [*Wexler*], at para. 41, aff'd in [*2007 BCCA 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24MJ-00000-00&context=).

**179**  At para. 36 of the reasons for judgment of the British Columbia Supreme Court in *Wexler*, Justice Ehrcke wrote as follows:

[36] Where a party in a proceeding subpoenas counsel for the opposite party to give evidence and the subpoena is challenged, the court must carefully scrutinize the circumstances to determine whether that person's evidence is truly necessary to the proceeding or whether the opposing party has issued the subpoena for the improper and collateral purpose of disrupting the proceeding and causing prejudice to the opposing side. In such a case, the court may set aside the subpoena as an abuse of process. Thus, in ***Williams v. Stephenson***, [*2005 BCSC 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M4CF-00000-00&context=), Goepel J. held at paras. 56 - 57:

If a subpoena is challenged, the onus is on the party proposing to call a witness to establish that the witness is likely to give material evidence on an issue before the court: *Re Stupp et al. and The Queen* [*(1982), 70 C.C.C. (2d) 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DXWW-22N2-00000-00&context=) (Ont. H.C.J.) at 121. This is particularly so when the proposed witness is counsel for the opposing party. If Mr. Zworski is called as a witness he obviously cannot continue as counsel. A party should not be deprived of his or her choice of counsel without good cause: *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=). If it was otherwise, a party could disrupt at random the orderly course of a civil action and cause severe prejudice to the other side by merely issuing a subpoena to their counsel and forcing them to retain new representation.

As set out in Ms. Shergill's correspondence of October 4, 2004, she subpoenaed Mr. Zworski to give evidence about actions which occurred in August 2002 and thereafter. Any complaints the plaintiffs have against Crown counsel, the VPD and the VPD Property Office concerning events that took place in August 2002 and thereafter are independent of the matters complained of in the statement of claim and do not relate to the torts alleged in the present lawsuit. The statement of claim is limited to events that took place between 1998 and 2001. There is no suggestion that Mr. Zworski has any knowledge of those events or can give evidence material to an issue before the court. There is absolutely no basis for the subpoena. It is an abuse of process.

**180**  I begin by discussing the potential spoliation argument.

**181**  The defendant argued that the loss or destruction of Mr. McMahon's BCIT study materials and the unavailability of information from BCIT with respect to what Mr. McMahon may have submitted to BCIT could give rise to an adverse inference against Mr. McMahon. The defendant argued that such an adverse inference would only be available if the trier of fact accepted that the loss of the evidence had been brought about intentionally.

**182**  The defendant also argued that the state of mind of Mr. McMahon, or his agents if he disavowed any personal knowledge, would be relevant to the issue of spoliation of evidence.

**183**  As I understand it, the defence would seek to argue that the jury should infer that Mr. McMahon deliberately concealed the Delayed Production Documents for about two and one half years so that during that period of concealment BCIT and his wife would destroy documents which would have shown that he was unlikely to pass the test for a Certificate at all, or in time for the deadline of June 30, 2013 imposed by CVRD.

**184**  The concept of spoliation of evidence was discussed by the Court of Appeal in *Holland v. Marshall*, [*2008 BCCA 468*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2TC-00000-00&context=), at paras. 55, 59, 70, and 71, as follows:

[55] Justice Brooke stated his understanding of the law of spoliation based on four case authorities to which he was referred by counsel for the respondents. The following is a summary of what was stated:

1. A rebuttable evidentiary presumption arises where evidence of spoliation exists; the doctrine of spoliation is an evidentiary rule raising a presumption and not an independent tort giving rise to a cause of action (***St. Louis v. Canada*** [*(1896), 25 S.C.R. 649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3N1-JWXF-24ST-00000-00&context=)).
2. In an appropriate case, destruction of documents carries a procedural but not substantive remedy, an action for damages cannot be sustained solely on the ground that documents have been destroyed (***Endean v. Canadian Red Cross Society*** [*(1998), 48 B.C.L.R. (3d) 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S29T-00000-00&context=) (C.A.)).
3. Spoliation requires four elements in evidence: a) the evidence has been destroyed; b) the evidence destroyed was relevant to an issue in the lawsuit; c) legal proceedings were pending; and d) the destruction of documents was an intentional act indicative of fraud, or an intention to suppress the truth (***Dyk v. Protec Automotive Repairs*** [*(1997), 41 B.C.L.R. (3d) 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M14J-00000-00&context=) (S.C.)).
4. There is no common law duty of care to preserve property which may possibly be required for evidentiary purposes; such an obligation can only be imposed by court order granted pursuant to the *Rules of Court* (***Dawes v. Jajcaj***, [*1999 BCCA 237*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1KW-00000-00&context=), [*66 B.C.L.R. (3d) 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1KW-00000-00&context=), aff'g [*(1995), 15 B.C.L.R. (3d) 240*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B26G-00000-00&context=), leave to appeal ref'd [*[1999] S.C.C.A.. No. 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FCK4-G356-00000-00&context=)).

...

[59] In a legal context, the term spoliation refers to the destruction, mutilation, alteration or concealment of evidence. The harm to the trial process that spoliation can cause is well-recognized. The more difficult problem is finding an appropriate remedy for spoliation. The sanctions or remedies available to litigants who suffer due to spoliation include procedural remedies, evidentiary presumptions, contempt proceedings and costs orders. Preventive measures may also be taken through preservation orders.

...

[70] Spoliation has been described as "a form of cheating" which "threatens to undermine the integrity of civil trial process" (Charles Nesson, "Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action" (1991) 13 Cardozo L. Rev. 793 at 793). Some proponents of an independent cause of action take the view that the act of destroying evidence, especially intentionally, ought to be actionable in tort simply as a matter of policy (Virginia Nesbitt, "A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?" (2007) U. Mem. L. Rev. 555 at 582. See also Nesson; Steffen Nolte, "The Spoliation Tort: an Approach to Underlying Principles" (1995) 26 St. Mary's L.J. 351 at 401-402). As well, some commentators have pointed to product liability and medical malpractice as examples of cases where the destruction of evidence is particularly devastating to a plaintiff's claim (Richard Sommers & Andreas Seibert, "Intentional Destruction of Evidence: Why Procedural Remedies are Insufficient" (1999) 78 Can. Bar Rev. 38 at 39).

[71] A strong argument against recognition of an independent tort for spoliation is its inherently speculative nature with respect to injury, causation and damages. As a prerequisite to the claim, the evidence must not exist, as such the fact of harm and amount of damages is uncertain. While courts frequently deal with uncertainty in the quantity of damages, the uncertainty of any causation of harm is more of a problem. The fact-finder must guess how probative the absent piece of evidence might have been: by definition, the tort attempts to place a value on evidence that no longer exists, and whose exact content is unknown (Judge, at 454). As stated in ***Petrik v. Monarch Printing Co.***, 501 N.E. 2d 1312 at 1320 (Ill. App. Ct. 1986) and quoted in ***Cedars-Sinai***:

[I]t is impossible to know what the destroyed evidence would have shown ... It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff's success on the merits of the underlying lawsuit. Given that the plaintiff has lost the lawsuit without the spoliated evidence, it does not follow that he would have won it with the evidence.

**185**  The law of spoliation was summarized in *McDougall v. Black & Decker Canada Inc.*, [*2008 ABCA 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-JKHB-63S3-00000-00&context=), at para. 29, as follows:

[29] In conclusion, therefore, I would summarize the Canadian law of spoliation in the following way:

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.
2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.
3. Outside this general framework other remedies may be available - even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.
4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of ***negligence***, although these issues, in most jurisdictions, remain open.
5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.
6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

**186**  The trial judge would not be entitled to instruct the jury that they may draw an adverse inference without a threshold examination of the strength of such an argument. In *Buksh v. Miles*, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=), the Court of Appeal ordered a new trial because a trial judge instructed a jury about drawing an adverse inference. The Court of Appeal concluded that the judge should not have done so without first determining that a reasonable juror could draw the inference sought. At para. 31, Madam Justice Saunders, on behalf of the Court, wrote as follows:

It seems to me that the tactic of asking for an adverse inference is much over-used in today's legal environment, and requires, at the least, a threshold examination by the trial judge before such an instruction is given to the jury.

**187**  There are many difficulties with the defendant's argument that a jury could consider whether an adverse inference should be drawn against Mr. McMahon on the basis of spoliation. I discuss some of them below.

**188**  First, there is no evidence that Mr. McMahon lost or destroyed evidence, or that Acheson Sweeney lost or destroyed evidence. There is only evidence that Mr. McMahon's wife may have destroyed workbooks, and that BCIT may have destroyed records in the ordinary course.

**189**  Second, it is not clear that any material evidence has been destroyed. Mr. McMahon testified that he does not remember making markings on the workbooks. Even if he did, it is unlikely that a jury or even an expert could tell, by reviewing a workbook on, for example, hydraulics, whether Mr. McMahon would likely have passed the tests. Mr. McMahon's evidence is that he did not take any tests, so the evidence does not support the assertion that BCIT may have had evidence that Mr. McMahon took exams. If Mr. McMahon did not take any tests, it is difficult to see what relevant BCIT records may have been destroyed.

**190**  Third, there is no evidence that Mr. McMahon knew about BCIT's record retention policy, or that BCIT routinely destroys documents when the minimum period has passed. The evidence does not support the argument that the Delayed Production Documents were withheld for the period calculated to lead to document destruction.

**191**  Fourth, the allegedly missing evidence, of Mr. McMahon's workbooks and possibly something BCIT once had, is evidence which, in the context, would have only slight significance. Mr. McMahon had a working life lasting over 35 years before the Accident and was in a part-time position at the time of the Accident. The allegedly missing information relates only to his continued part-time employment with CVRD and the possibility that he might have obtained a full-time position with CVRD. It would be relevant to Mr. McMahon's past and future lost earning capacity, which considers far more than just his work at the time of the Accident.

**192**  Fifth, there is no evidence that anyone intentionally omitted the Delayed Production Documents from the Plaintiff's First LOD.

**193**  Sixth, Mr. Hargreaves's argument was that, if he could establish that someone at Acheson Sweeney deliberately omitted the documents, Mr. McMahon would be considered the principal and pursuant to laws of agency, he would be held to have deliberately omitted the documents. While Mr. Hargreaves is correct that an agent-principal relationship exists between barristers and their clients, his argument fails regarding the scope of the agency. The scope of a law firm's agency would be to act in the ordinary way, not to breach the *Rules* and professional obligations. See *Wigmore v. Canadian Surety Co.*, [*[1996] 9 W.W.R. 406*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-F8KH-X1RB-00000-00&context=) (SK CA); GHL Fridman, *Canadian Agency Law*, 1st ed (Markham, Ont: LexisNexis Canada, 2009) at 188.

**194**  The defendant argued that if someone, presumably Ms. Foley, found the Delayed Production Documents segregated and in a plastic sleeve, it must have been the result of an intentional decision to withhold the documents. As discussed above, that is not an appropriate inference. There are several reasons why the documents may have been separated in the Acheson Sweeney file, as discussed earlier.

**195**  The issue of the admissibility of evidence related to the defendant's proposed spoliation argument and the propriety of an instruction regarding an adverse inference would ordinarily be decided by a trial judge. In this case, I would have expected counsel to advise the trial judge about the alleged concealment and the intended spoliation argument, to enable the judge to rule on whether evidence relevant to that would be admissible at trial.

**196**  However, in order to decide these cross-applications, it is appropriate for me to consider whether the defendant has established that he would have been entitled at trial to argue that an adverse inference should be drawn against Mr. McMahon relating to the Delayed Production Documents.

**197**  I conclude that it would be theoretically possible to argue that, if Mr. McMahon intentionally concealed the Delayed Production Documents in the hope that other relevant documentation would be destroyed, and that the delayed production of them resulted in the destruction of relevant evidence, that the trier of fact could draw an adverse inference against Mr. McMahon. As a result, I conclude that the spoliation issue is not a "collateral issue".

**198**  However, the evidence does not support the spoliation argument. There is no evidence that Mr. McMahon intentionally concealed the Delayed Production Documents, or for that matter, that Acheson Sweeney did so. As discussed above, the inference that the omission was the result of oversight is overwhelming. Further, there is no evidence that Mr. McMahon destroyed any evidence or that he instructed anyone to do so.

**199**  It appears that, in addition to arguing that the court should infer intentional concealment of the Delayed Production Documents, the defence seeks to "fish" for evidence supporting intentional concealment, through issuing the subpoenas, including the Foley Subpoena.

**200**  Counsel should not issue a Subpoena "to fish" for material evidence. A subpoena is proper only if counsel can establish that the proposed witness is likely to provide material evidence.

**201**  In context, it would be disproportionate to permit the jury to consider making an adverse inference on the basis of spoliation related to the Delayed Production Documents. The Timely Production Documents included a job description, dated after the Accident, which stated that the Certificate was required for Mr. McMahon's position. At the First McMahon XFD, Mr. McMahon testified that he was taking the BCIT course "to have the qualification for the job requirement, but also to compete for a permanent full time" position. Had the defence chosen to question Mr. McMahon about this further at the First McMahon XFD, the deadline CVRD had imposed on Mr. McMahon to obtain the Certificate may have been revealed. The only additional information related to the Certificate provided by the Delayed Production Documents was the fact that CVRD had imposed a time limit of June 30, 2013 for obtaining the Certificate, a date about ten weeks after the Accident, and had declined Mr. McMahon's request for an extension of the deadline.

**202**  The Delayed Production Documents are only relevant to the issue of whether Mr. McMahon would have retained his job with CVRD if the Accident had not occurred. Mr. McMahon is a man who had a work history spanning over thirty years. Even if, had the Accident not occurred, he would have lost the CVRD job, he could have a claim for the loss in his earning capacity resulting from his injuries.

**203**  It would be disproportionate in this case to permit the defence to pursue the "spoliation" argument, even if there were evidence to support it. It would cause a jury to focus unduly on a minor part of determining the impact of the Accident on Mr. McMahon's earning capacity. In my view, the trial judge should not admit evidence relating to it or instruct the jury about taking an adverse inference on the basis of spoliation.

**204**  In short, while the evidence about the Delayed Production Documents would not be "collateral", because it theoretically could relate to a spoliation argument, the evidence does not support that argument. Even if the defendant were able to find evidence showing that there was intentional concealment of the Delayed Production Documents and that material evidence was destroyed by or at the instruction of Mr. McMahon, it would be inappropriate to permit that argument to be pursued in this case because it would be disproportionate in light of the importance to the issue of lost earning capacity to the claim of a man of McMahon's age and experience.

**205**  I return then to the question of whether the defence has established that Ms. Foley is likely to give material evidence.

**206**  There is no evidence that Ms. Foley provided the Plaintiff's First LOD to Jones Emery, or that she intentionally concealed the Delayed Production Documents. Indeed, she listed them in the Plaintiff's Second LOD. Mr. Hargreaves stated in numerous places in his correspondence, including his March 7, 2017 email, that he did not believe that she personally had anything to do with the "concealment" of the employment records.

**207**  Mr. Hargreaves's affidavit does not set out the material evidence he anticipated Ms. Foley would provide. In paragraph 68 of his Affidavit, quoted above, he simply states that "Ms. Foley was the responsible lawyer for the file, as best as I understood matters, as of the time that the truncated file was sent to us and was the lawyer of record at the time that the full employment file was sent to us."

**208**  That is insufficient to establish that Ms. Foley had any material evidence to provide at trial. It would not assist the jury to resolve the issues to learn when Ms. Foley was responsible for the file. Being "responsible" for a file is a different matter from having relevant, material evidence. Even if the defence were permitted to pursue the spoliation argument, the evidence does not demonstrate that Ms. Foley had any evidence material to that argument.

**209**  The Foley Subpoena must be set aside because the defence has failed to establish that Ms. Foley likely has material evidence.

**G. Was the following conduct of Mr. Hargreaves an abuse of process: Serving the NTA; Issuing and serving the Foley Subpoena; and Sending the Email Offer?**

**210**  Mr. McMahon alleges that Mr. Hargreaves delivered the NTA and served the Foley Subpoena for purposes irrelevant to the trier of fact, and for the sole purpose of disrupting the proceedings and causing wrongful prejudice, and that Mr. Hargreaves has made it clear that he intends to persist in this conduct. Mr. McMahon alleges that Mr. Hargreaves issued the Foley Subpoena to require Ms. Foley to cease acting as counsel of record, and to undermine the relationship between Ms. Foley and Mr. McMahon.

**211**  Mr. McMahon alleges that by issuing the Foley Subpoena, Mr. Hargreaves put Acheson Sweeney in the untenable position that they would be expected to cross-examine Ms. Foley, and that it was inevitable that Ms. Foley would be required to cease acting as counsel for Mr. McMahon, and that perhaps Acheson Sweeney will be required to cease acting for Mr. McMahon altogether.

**212**  Mr. McMahon alleges that the Apology adequately and completely addressed any potential risk of prejudice to the defendant from the delayed disclosure of the Delayed Production Documents.

**213**  In contrast, the defence position is that the defendant would have been entitled to rely on the doctrine of spoliation as a basis for asking the court to instruct the jury that it can draw an adverse inference. The defence position is that it issued the NTA and the Foley Subpoena properly, in pursuit of the spoliation argument.

**214**  Mr. McMahon also argued that, because the Foley Subpoena fails to specify the date on which Ms. Foley was to testify, it is plain that Mr. Hargreaves did not intend to actually call Ms. Foley to testify, and that the issuance of the Foley Subpoena was an abuse of process.

**1. NTA**

**215**  The NTA sought admissions which, if made, would have supported part of the spoliation argument. The spoliation argument is not collateral, but it would not be permitted at trial because it would be disproportionate to do so, and it is not supported by the evidence.

**216**  The NTA is unusual because it sought admissions of wrongful conduct. The purpose of notices to admit is to encourage the admission of undisputed facts, to shorten trials and thereby reduce expenses. It is unusual to use a notice to admit to seek admissions of contentious facts.

**217**  Does it bring the administration of justice into disrepute when a lawyer sends a notice to admit seeking admission of wrongful conduct, where there is no factual basis for the allegation?

**218**  Mr. McMahon could, and did, decline to make the admissions sought, on the basis that they were irrelevant. It is a relatively simple matter for a party to deny admissions sought by an NTA.

**219**  The allegations in the NTA are distasteful. While it is close to the line, in my view, the NTA was not an abuse of process, because the allegations could be easily denied.

**220**  While there could be a case in which the admissions sought in an NTA were such as to put the administration of justice into disrepute, in my view, the NTA here was not so egregious.

**2. Foley Subpoena**

**221**  As stated, the Foley Subpoena must be set aside because the defence has not established that Ms. Foley would likely have material evidence. Was the issuance of the Foley Subpoena an abuse of process? Was it manifestly unfair to Mr. McMahon, or would it in some other way bring the administration of justice into disrepute? Did Mr. Hargreaves issue the Foley Subpoena for the improper and collateral purpose of disrupting the proceeding and causing prejudice to Mr. McMahon?

**222**  I am not prepared to draw the inference that the absence of specifying the date for Ms. Foley's evidence demonstrates that the Foley Subpoena was sent in an abuse of process. Mr. Hargreaves may have failed to specify a date for Ms. Foley's testimony out of inadvertence, or because he intended to advise Ms. Foley later about the specific date for her testimony, and expected that as an officer of the court she would attend when required.

**223**  In considering whether the issuance of the Foley Subpoena was an abuse of process, the timeline of what occurred is of assistance. The key events were as follows:

1. the First Plaintiff's LOD, which was dated March 11, 2014, was received by Jones Emery, unsigned, at a date which is unclear but was probably in May 2014. The First Plaintiff's LOD listed only 36 pages of CVRD documents, excluding the Delayed Production Documents, but including the job description dated after the Accident which set out that Mr. McMahon's position required a Certificate;
2. in October 2015, the trial was scheduled for 18 days commencing April 3, 2017, and a jury notice was filed;
3. the first dates scheduled for an examination for discovery of Mr. McMahon were October 27 and 28, 2016. In advance of that, Ms. Foley provided Jones Emery with the Plaintiff's Second LOD, which changed the number of CVRD documents from 36 pages to 52 pages, thereby including the Delayed Production Documents;
4. Jones Emery requested the Delayed Production Documents from Acheson Sweeney, but did not receive them prior to October 27, 2016. Ms. Foley did not know at the time of the First McMahon XFD that Mr. Hargreaves had not seen all the documents on the Second Plaintiff's LOD, and in fact Ms. Foley assumed that Mr. Hargreaves had received the Delayed Production Documents;
5. At the First McMahon XFD, Mr. McMahon testified that he was taking the BCIT course "to have the qualification for the job requirement, but also to compete for a permanent full time" position;
6. Jones Emery received the Delayed Production Documents on or shortly after October 31, 2016;
7. due to an error in the office of Jones Emery, the Delayed Disclosure Documents did not come to Mr. Hargreaves's attention until early February 2017, about three months after receipt;
8. at the Second McMahon XFD on March 6, 2017, the defendant was able to question Mr. McMahon about the Delayed Production Documents;
9. by March 6, 2017, Mr. Hargreaves had researched the topic of spoliation and was persuaded that an adverse inference would only be available if the court accepted that the loss of the evidence had been brought about intentionally. The NTA dated March 6, 2017 asked Mr. McMahon to admit that counsel consciously decided to conceal the Delayed Production Documents from the Plaintiff's First LOD;
10. in the March 7, 2017 Offer Email, Mr. Hargreaves set out his position that by "attempting to deflect responsibility" from Mr. McMahon, Acheson Sweeney will have waived privilege, and that this "will lead to my seeking leave to cross examine your client on all communications with your office up until the full employment file was disclosed, and I will likely want to call you to the stand as well";
11. Mr. McMahon's response to the NTA is dated March 15, 2017, and refused to make most of the admissions sought; and
12. the Foley Subpoena is dated March 23, 2017, a date eleven days before the scheduled trial date. The trial date was adjourned on March 28, 2017.

**224**  Not every subpoena which is set aside for the failure of the issuer to establish that the proposed witness had material evidence would be an abuse of process. However, issuing a subpoena to opposing counsel is an unusual step, and immediately puts the lawyer who has been subpoenaed into an awkward position. Where time permits, the lawyer may seek to set the subpoena aside, a step which may require the involvement of counsel outside the subpoenaed lawyer's firm.

**225**  Here, the Foley Subpoena was issued very close to the trial date. Here, issuing the Foley Subpoena, without being able to demonstrate that Ms. Foley has material evidence, and doing so very close to the trial date and about six months after the Plaintiff's Second LOD listing the Delayed Production Documents, amounts to an abuse of the court process. It was manifestly unfair to Mr. McMahon because it disrupted his relationship with his lawyer and led to the adjournment of the trial. A party should not be deprived of his or her chosen counsel without good cause, as discussed in *MacDonald Estate*. It would bring the administration of justice into disrepute if counsel could issue subpoenas in such circumstances without consequences.

**3. Email Offer**

**226**  Was the Email Offer an abuse of process?

**227**  Mr. McMahon argued that it is improper to include, in a settlement offer letter, assertions that a law firm has acted inappropriately either with or without the client's instructions, because that suggests that the amount of the offer is lower as a result of conduct of legal counsel. Mr. McMahon argued that by including such assertions in the Email Offer, Mr. Hargreaves effectively created a conflict between Mr. McMahon and Acheson Sweeney. Mr. McMahon argues that this demonstrates an intention to misuse the court procedure to "coerce" a settlement.

**228**  The defence argued that the terms of the Offer Email simply set out what might occur.

**229**  Again, the questions for the court in considering whether there has been an abuse of process are whether the Email Offer was manifestly unfair to Mr. McMahon, or would it in some other way bring the administration of justice into disrepute? And did Mr. Hargreaves sent the Offer Email for the improper and collateral purpose of disrupting the proceeding and causing prejudice to Mr. McMahon?

**230**  The Offer Email includes the following:

You may protest that your client is innocent in this regard and that he is not responsible for the concealment of the records, and did not consciously intend to destroy evidence. However, any attempt to exculpate him must presumably include testimony by you that it was a lawyer or paralegal in your firm who concealed the records ...As soon as you attempt to deflect responsibility from your client you will, in my view, have waived privilege. I caution you that the privilege is not yours to waive ... so I assume that should this happen, then you have obtained informed consent from your client to waive privilege. That will lead to my seeking leave to cross examine your client on all communications with your office up until the full employment file was disclosed, and I will likely want to call you to the stand as well. ... With all that in mind, I suggest to you that your client faces a very high likelihood that the jury will conclude, on a balance of probabilities, that your client was going to be unemployed as of June 30, 2013. ...

**231**  I am not prepared to conclude that Mr. Hargreaves sent the Offer Email "for the purpose of disrupting the proceeding".

**232**  However, it is troubling that the Offer Email sets out arguments based on alleged concealment by Acheson Sweeney, and then makes an offer to settle the claim "with all that in mind". This suggests that the amount the defendant was willing to offer was reduced because of the conduct of Acheson Sweeney.

**233**  By suggesting that the amount of the offer was reduced because of the conduct of Acheson Sweeney, the Offer Email would be expected to disrupt the relationship between Mr. McMahon and Acheson Sweeney.

**234**  As a result, the Offer Email was manifestly unfair to Mr. McMahon. It would bring the administration of justice into disrepute for a party to suggest that an offer would differ based not on the merits of the claim, but instead on which lawyers were representing the party and how they have conducted the claim. It would be expected to disrupt the solicitor-client relationship.

**235**  The doctrine of abuse of process is focussed on the inherent power of the court to prevent the misuse of its procedure.

**236**  Rule 9-7 governs offers to settle. Offers to settle are governed by that rule if, among other things, they contain the words that the party "reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

**237**  Those words are not included in the portion of the Offer Email included in the evidence. As a result, I am not able to conclude that the Offer Email used the court process rather than the out-of-court process.

**238**  It can be argued that the Offer Email "used the court process" because it was sent in the context of a pending court trial. It can be argued that the court should take jurisdiction over conduct of lawyers relating to court proceedings.

**239**  In this case, it is not necessary for me to determine whether the court's jurisdiction to control abuse of its process can extend to settlement offers made in the context of litigation but which do not rely on the court process for making offers. That is because I have already concluded that the service of the Foley Subpoena was an abuse of process and the threat of calling Ms. Foley as a witness resulted in Ms. Foley ceasing to act as counsel. Nothing further resulted from the Offer Email.

**H. If any of the defendant's impugned conduct was an abuse of process, what is the appropriate remedy?**

**240**  I have concluded that the Foley Subpoena was an abuse of process. What is the appropriate remedy?

**241**  Mr. McMahon seeks the removal of Mr. Hargreaves as counsel for the defence, and an order that he cannot provide further assistance or advice to the defendant or his solicitors with respect to this proceeding.

**242**  The defence is opposed to removing Mr. Hargreaves as counsel and advisor.

**243**  Almost all the cases in which the court has prohibited a lawyer from acting are cases in which the lawyer was in a conflict of interest. The only way to remedy such a conflict was the removal of counsel.

**244**  The result of the threat of, and ultimate service of, the Foley Subpoena has been the involvement of Mr. Sweeney in preparation to act as trial counsel, the cross-applications which are before me, and the delay in the trial of Mr. McMahon's claim. Removing Mr. Hargreaves as counsel and advisor would not remedy any of those things.

**245**  The Court should interfere with a party's right to representation by counsel of their choice only in clear cases: *Cewe Estate v. Mid-Wilson*, [*2009 BCSC 975*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0HS-00000-00&context=), citing to *Manville Canada Inc. v. Ladner Downs* [*(1992), 63 B.C.L.R. (2d) 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61HD-00000-00&context=) (S.C.), [*88 D.L.R. (4th) 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNR1-JBM1-M0XY-00000-00&context=) (B.C.S.C.), aff'd [*(1993), 76 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-233D-00000-00&context=) (C.A.), [*100 D.L.R. (4th) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-233D-00000-00&context=) (B.C.C.A.).

**246**  The court should not interfere with the defendant's choice of counsel unless that is necessary. Mr. Kelliher argued that it was necessary here, because Mr. Hargreaves has indicated an intention to pursue the spoliation argument at trial.

**247**  In this case, it is not necessary to remove Mr. Hargreaves as counsel or advisor. Even if he were removed as counsel, his replacement would be able to make any arguments at trial which Mr. Hargreaves could make. In any event, I have concluded that the spoliation argument would not pass the threshold for presentation to the jury both because of the absence of required evidence and because of disproportionality.

**248**  The order setting aside the Foley Subpoena should enable Ms. Foley to resume as Mr. McMahon's trial counsel, although that is not required. The other effects of the issuance of the Foley Subpoena as an abuse of process, other than delay, can be appropriately addressed in costs. Removing Mr. Hargreaves as counsel would not remedy the delay.

**249**  I decline to remove Mr. Hargreaves as defence counsel.

**I. What is the appropriate order for costs?**

**250**  The position of Mr. McMahon is that the defendant has made unfounded allegations of misconduct against Acheson Sweeney. Mr. McMahon seeks special costs on that basis.

**251**  The defendant's position is that Mr. McMahon's solicitors, presumably meaning Acheson Sweeney, should personally pay costs in any event of the cause.

**252**  The leading statement on the law in relation to special costs is that of Justice Lambert in *Garcia v. Crestbrook Forest Industries Ltd.*, [*1994 CanLII 2570*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63HG-00000-00&context=) (BC CA), in which he held as follows (at para. 17):

17 Having regard to the terminology adopted by Madam Justice McLachlin in ***Young v. Young***, to the terminology adopted by Mr. Justice Cumming in ***Fullerton v. Matsqui***, [*[1992] B.C.J. No. 2986*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0V9-00000-00&context=) and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in ***Leung v. Leung*** [*[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=) in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in Leung v. Leung, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[Emphasis added.]

**253**  In *Taser International, Inc. v. British Columbia (Thomas Braidwood, Q.C. Study Commission)*, [*2010 BCSC 623*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-630M-00000-00&context=), the Court found that unfounded allegations of dishonesty can amount to reprehensible conduct, as follows (at para. 68):

[68] There is a long line of authority which establishes that unproven allegations of dishonesty can amount to reprehensible conduct. This is particularly so when the person who alleges the dishonesty is unable to demonstrate a reasonable basis for the allegation.

**254**  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=), the Court awarded special costs against a plaintiff who leveled unfounded allegations of impropriety against a lawyer, as follows (at para. 112):

[112] It is important to note that Mr. Blake sits as a member of the B.C. Benefits Appeal Board which examines, among other things, fraudulent welfare claims. To suggest that Mr. Blake, in the course of counselling a client, would counsel "morally wrong" conduct is, in my view, conduct deserving of rebuke. A lawyer relies on his reputation for integrity. When that reputation is falsely assailed, the court's reproof should be felt.

**255**  In *Insurance Corp. of British Columbia v. Blue Mountain Collision Ltd. et al*, [*2002 BCSC 1643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3FP-00000-00&context=), Justice Macauley awarded special costs against a plaintiff (lay litigant) who, among other things, issued a subpoena in circumstances amounting to an abuse of process.

**256**  I have dismissed several of the applications on both sides. I have also found that both sides included inadmissible passages in the affidavits filed on the cross-applications.

**257**  However, I have ordered that the Foley Subpoena should be set aside, and I concluded that its issuance and service constituted an abuse of process. I was troubled by the Offer Email, but was not required to determine whether it was within the court's jurisdiction to control abuse in settlement offers which do not use the court process. I did not conclude the NTA was an abuse of process, but it was close to the line.

**258**  This is a case in which the problems originated from the omission of the Delayed Production Documents from the Plaintiff's First LOD. The inference I draw from the evidence is that it occurred through some error in Acheson Sweeney's preparation of the Plaintiff's First LOD, but was not deliberate.

**259**  A lawyer should make reasonable efforts to ensure that a list of documents includes all the documents required by Rule 7-1. An old decision from the House of Lords, *Myers v. Elman*, [1940] A.C. 282 [*Myers*], is often cited for the proposition that a lawyer may be required to investigate further if he or she has reasonable grounds for questioning his or her client's advice that all relevant documents were produced. The decision was summarized as follows in British Columbia Civil Trial Handbook, Continuing Legal Education Society of British Columbia, 4th edition September 2015, at para. 15.9:

In *Myers v. Elman*, [1940] A.C. 282 (H.L.), a solicitor's duty to correct a false affidavit was examined. The facts, involving a civil fraud committed by judgment-proof wrongdoers, were complex. The following proposition emerged: if, before trial, a solicitor discovers that the affidavit of his client purporting to disclose all relevant documents is untrue and that important documents have been omitted, the duty of counsel to the other party and to the court is to inform the solicitors of the omitted documents. If his or her client does not assent, the solicitor must cease to act.

An affidavit of documents is no longer required in British Columbia. A party can call for one if the list of documents is suspect [Rule 7-1(8)]. To await such an order may invite censure if the failure to disclose was apparent and continued delay was itself prejudicial.

**260**  The issue for determination by the House of Lords in *Myers* was whether it was appropriate for the court to order that a solicitor pay costs personally. The House of Lords held that it was appropriate to make such an order. Several law lords gave speeches, including Lord Atkin, who said as follows:

From time immemorial judges have exercised over solicitors ... a disciplinary jurisdiction in cases of misconduct. ... If the Court is deceived or the litigant is improperly delayed or put to unnecessary expense, the solicitor on the record will be held responsible and will be admonished or visited with such pecuniary penalty as the Court thinks necessary in the circumstances of the case ... What is the duty of the solicitor? He is at the early stage of the proceedings engaged in putting before the court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth.

**261**  Lord Atkin considered that the court had a disciplinary jurisdiction to award costs against a solicitor arising by the solicitor's failure in his or her duty to the court itself, and he said as follows about the standard of misconduct:

... By misconduct ... is meant something which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute; for example wilfully misleading the Court in 'the conduct of a case.'

**262**  The law in England at the time of *Myers* did not permit pre-trial examinations for discovery, such as is available in British Columbia under Rule 7-2. Under the *Rules*, an opposing party can explore in examination for discovery what documents a party witness has or knows about, and so it is less significant now in B.C. than it was in *Myers* if a client's list of documents is incomplete.

**263**  Even though examinations for discovery are available under the *Rules*, I accept that there is a duty on counsel in B.C. to make reasonable efforts to ensure that a list of documents is complete.

**264**  In this case, the evidence does not support the inference that Mr. McMahon personally took any steps to omit the Delayed Production Documents from the Plaintiff's First LOD. The Delayed Production Documents were in fact obtained by Mr. McMahon's counsel from a third party, CVRD, and it is unclear why some of the CVRD file was not included in the Plaintiff's First LOD.

**265**  In short, the omission of the Delayed Production Documents from the First Plaintiff's LOD is troubling. However, any prejudice to the defendant was remedied by the Second McMahon XFD. The spoliation argument is not borne out by the evidence, and would be disproportionate to leave with the jury, if the evidence supported it.

**266**  It is the response by Mr. Hargreaves, and particularly the Foley Subpoena, which is the basis of most of the cross-applications. The issuance and service of the Foley Subpoena was an abuse of process and was reprehensible.

**267**  Mr. McMahon's counsel argued that the spoliation argument was a "contrivance", apparently implying that Mr. Hargreaves believed there was no merit to it. That is a serious allegation, but I have concluded that the cross-applications can be decided without further examination of Mr. Hargreaves's subjective intentions. The defendant's abuse of process by serving the Foley Subpoena, with the easily-anticipated resulting change of counsel and trial adjournment, in the context of continued assertions of intentional concealment with no evidence supporting it, is far more reprehensible than the allegation that the spoliation argument was a contrivance. The issuance of the Foley Subpoena resulted in the disruption to Mr. McMahon's relationship with his legal counsel of three years.

**268**  As a result, the defence should pay special costs of these cross-applications to Mr. McMahon. In addition, Mr. McMahon is entitled to recover, on a special costs basis, any costs thrown away arising from the issuance of the Foley Subpoena, such as the costs of instructing Mr. Sweeney in preparation for trial and the costs of instructing Mr. Kelliher on these cross-applications.

**V. SUMMARY**

**269**  In summary, the order is as follows:

1. the following passages are struck from Ms. Foley's affidavit:
2. para. 12: ... "which I believe have culminated in an interference with the administration of justice";
3. para. 15 in its entirety, including Exhibit A;
4. para. 16 and Exhibit B;
5. para. 17;
6. para. 31, the words "I felt that was precisely Mr. Hargreaves's intention and I had a number of sleepless nights attempting to separate out the baseless allegations and manufactured arguments generated by Mr. Hargreaves from the real risk assessment in the case and what proper advice to provide my client.";
7. para. 32, the words "for something that had caused no prejudice";
8. para. 33 in its entirety;
9. para. 38 in its entirety;
10. para. 41, the words "clearly intended to undermine my relationship with my client and convince my client to accept his settlement proposal";
11. para. 47, the words "[T]he correspondence, communications and use of powers as an officer of the court by Mr. Hargreaves in this matter have been of the nature of a personal attack on myself and my firm" and "[T]he allegations and approach of Mr. Hargreaves made it impossible for me to effectively represent my client and put the evidence, facts and issues that merit consideration before the court for a proper and timely determination of Mr. McMahon's claim, thereby denying him access to justice"; and
12. the following passages are struck from Mr. Dudding's affidavit:
13. para. 20 in its entirety;
14. para. 25, the words "...I nevertheless understood him to be using the threat of bringing that issue to the attention of the court as a means for him to gain an advantage for his client in the litigation. It also appeared to me that Mr. Hargreaves wished to signal to my client that I had acted in an unethical way and that I had withheld documents, in a way that had compromised the plaintiff's claim"; and
15. para. 26, the words "I interpreted these things as signifying intense anger and aggression."

**270**  I dismiss the following applications:

1. the defendant's application for a declaration that the First McMahon NOA is a nullity based on its length;
2. the defendant's application to strike out further passages from Ms. Foley's affidavit and Mr. Dudding's affidavit, and to strike out passages from Mr. McMahon's affidavit;
3. the defendant's application for cross-examination of Messrs. McMahon and Dudding and Ms. Foley on their affidavits;
4. Mr. McMahon's application to cross-examine Mr. Hargreaves on his affidavit;
5. the defence application for an order that Mr. McMahon provide an affidavit verifying the Plaintiff's Second LOD;
6. the defence application for an order that Mr. McMahon has waived solicitor-and-client privilege as regards all his communications with Acheson Sweeney and among members of Acheson Sweeney relating to the omission of the Delayed Production Documents from the Plaintiff's First LOD; and
7. Mr. McMahon's application for an order that Mr. Hargreaves be removed as counsel of record for the defendant and prohibited from providing any further assistance or advice to the defendant or his solicitors with respect to this proceeding.

**271**  The Foley Subpoena is set aside. Mr. McMahon is entitled to receive special costs from the defence of the cross-applications, and of costs thrown away as a result of the Foley Subpoena, including any costs of instructing Mr. Sweeney to act at trial and of instructing Mr. Kelliher to act on these cross-applications.

1. GRAY J.

**End of Document**

[***Mirsaeidi v. Coleman, [2014] B.C.J. No. 441***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61S5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W.J. Harris J.

Heard: September 30 and October 1-2, 2013.

Judgment: March 12, 2014.

Docket: M121357

Registry: Vancouver

**[2014] B.C.J. No. 441** | 2014 BCSC 415

Between Shervin Mirsaeidi, Plaintiff, and David Edward Coleman, Defendant

(87 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Head injuries — Headaches — Considerations impacting on award — Degree of impairment — Action by plaintiff for personal injury damages allowed — Plaintiff, age 27, was involved in rear-end collision in 2010 for which liability was admitted — Plaintiff experienced neck pain that resolved within three months, monthly headaches, and back pain that flared up intermittently, but less as time passed — Plaintiff was university student and competitive soccer player who was able to continue both by managing pain with medication — Plaintiff awarded damages totaling $27,331, comprised of $25,000 for non-pecuniary loss, $1,500 for future care costs, and $831 for special damages.**

**Damages — Types of damages — For personal injuries — Considerations — Duration of loss — Extent of incapacity — Cost of future care — Special damages — Non-pecuniary loss — Action by plaintiff for personal injury damages allowed — Plaintiff, age 27, was involved in rear-end collision in 2010 for which liability was admitted — Plaintiff experienced neck pain that resolved within three months, monthly headaches, and back pain that flared up intermittently, but less as time passed — Plaintiff was university student and competitive soccer player who was able to continue both by managing pain with medication — Plaintiff awarded damages totaling $27,331, comprised of $25,000 for non-pecuniary loss, $1,500 for future care costs, and $831 for special damages.**

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| --- |
| Action by the plaintiff, Mirsaeidi, against the defendant, Coleman, for damages to compensate for injuries suffered in a motor vehicle accident. In March 2010, the defendant rear-ended the plaintiff's vehicle while it was stopped and waiting to merge into traffic. The plaintiff, age 27, was a university engineering student and competitive soccer player. He had no pre-existing back or neck pain. Following the accident, he experienced a stiff neck, headaches and recurring back pain. The back pain arose two to three times per week and lasted two to three hours each instance. The plaintiff testified that chiropractic treatments alleviated his neck pain within two to three months. He experienced headaches approximately once per month. He underwent physiotherapy and consulted a kinesiologist. The kinesiology exercises lessened the frequency of his back pain. The plaintiff continued to play soccer, managing the pain with medication, and was able to continue his studies, but experienced pain when studying for extended periods.  HELD: Action allowed.  The motor vehicle accident caused headaches and soft tissue injuries to the plaintiff's back and neck. The intermittent neck pain resolved within three months. It was not established that the accident caused the plaintiff's spondylosis given the equivocal evidence regarding possible genetic causes. It was more probable that the plaintiff's condition was aggravated by the accident. The plaintiff continued to experience occasional back pain, but it had lessened considerably since the accident. The plaintiff was awarded damages totaling $27,331, comprised of $25,000 for non-pecuniary loss, $1,500 for future care costs, and $831 for special damages. |

**Counsel**

Counsel for the Plaintiff: R. C. Marcoux.

Counsel for the Defendant: J. Milligan.

**Reasons for Judgment**

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| **W.J. HARRIS J.** |

**The Motor Vehicle Accident**

**1**  The plaintiff claims damages for injuries resulting from a motor vehicle accident (the "MVA") caused by the ***negligence*** of the defendant. The defendant does not dispute his liability for the collision.

**2**  The MVA occurred on March 29, 2010, when the defendant's motor vehicle rear ended the plaintiff's motor vehicle on the Dollarton Highway on-ramp to the Second Narrow Bridge, in North Vancouver.

**3**  The plaintiff was stopped and waiting to merge into traffic when his vehicle was hit by the defendant's vehicle. The plaintiff did not hit his head or body on impact. He did not have any cuts or bruises from the MVA.

**4**  As a result of the MVA, the plaintiff's vehicle was damaged: part of the bumper was hanging down and the side of the vehicle was scratched.

**5**  The vehicle's air bags did not deploy at the time of the collision.

**Background**

**6**  The plaintiff is a 27 year old systems engineering student at Simon Fraser University.

**7**  At the time of the MVA, the plaintiff was active in various sports and outdoor activities, although his main interest has been soccer. He has played at a competitive level in North Vancouver, Burnaby and Vancouver.

**8**  Since the MVA, he has played soccer in the Vancouver Metro league for three years, which is at the highest amateur level in the area.

**9**  The plaintiff plays soccer all year round. During the period following the MVA, in addition to playing competitively, he played for various teams on a recreational basis. He also worked out regularly at a gym.

**10**  The plaintiff was ranked close to the top of his league in soccer. He played in division two of Vancouver Metro Soccer in 2010 and moved to division one in 2011.

**11**  The plaintiff moved to Ontario in September of 2013 to take a software development co-op position at Blackberry, as part of his university program.

**12**  He continued to play in division one until he moved to Ontario. In Ontario he plays recreational soccer.

**After the MVA**

**13**  The plaintiff testified that he was on his way to an examination at the university at the time of the MVA. He stated that he felt some pain immediately after impact, but, at the time, was preoccupied about not being late for the examination.

**14**  The plaintiff testified that he continued on to the university after exchanging information with the defendant.

**15**  He stated that later in the day, after he finished the examination, he felt pulsing pain in his back, he had a stiff neck and a headache. He had difficulty sleeping. The plaintiff testified that he had no pre-existing neck or back pain.

**16**  The following day he testified that he attended a walk in clinic, where the physician recommended chiropractic treatments. Under cross examination he agreed that the date of his first visit to the clinic may have been April 18, 2010, three weeks after the MVA. He said that this was because the pain was "bothering" him but not "killing" him. He said he went to the doctor as the pain kept coming back.

**17**  The plaintiff testified that his back pain was the worst during the month following the MVA. At that time, he had pain in his back approximately two to three times a week. He stated that the pain lasted for one to three hours. He said that the chiropractic treatments helped with the frequency of pain but did not reduce the intensity of the pain in his back.

**18**  He testified that that the chiropractic treatments also assisted with his neck pain and that by the end of his treatments it was "almost perfect". Under cross examination, the plaintiff agreed it was fully healed within two to three months after the MVA.

**19**  He testified that, after the MVA, he continued to experience headaches in the back of his head. He stated that he was getting about two headaches a month, for which he would take extra strength Tylenol. He said that the headaches decreased to once a month. He agreed that he complained to his physician in 2011 about right sided headaches as opposed to headaches in the back of the head.

**20**  Despite the MVA, the plaintiff continued to play competitive soccer, although he said that he had pain and difficulty sleeping after he played. He managed the pain with Advil.

**21**  The plaintiff testified that he did not miss any school due to the MVA and his grades were not adversely affected. However, he had back pain when he studied for long periods.

**22**  The plaintiff was referred by his family physician, Dr. Beheshti, for physiotherapy. After some delay, he started physiotherapy in August of 2011. He said that the therapy and recommended stretching exercises helped with the frequency of his lower back pain, which he described as a "pulsating pain", but it still did not reduce the intensity of the pain. He testified that, even after the physiotherapy, he continued to have pain approximately two to three times per month and the pain would last from two to three hours.

**23**  The plaintiff's physician subsequently recommended that he see a kinesiologist, which he did commencing in August of 2012. The plaintiff stated that the exercises recommended by the kinesiologist were "extremely helpful" as he knew about soccer and the exercises were focussed on his particular needs. He said that, as a result, he experienced less pain - about once a month. According to the plaintiff, the intensity of the pain remained the same.

**24**  Under cross examination, he agreed that he rated the intensity of his pain for the kinesiologist as "2/10" in October of 2012.

**25**  The plaintiff stated that he believed that his pain would be brought on by playing soccer and studying for long periods.

**26**  With respect to playing soccer, he testified that he did not get many injuries playing soccer, apart from minor aches and pains. Under cross examination, he stated that it is usually "overplaying" that hurts his back and that most of the time he plays without pain.

**27**  He testified that he has not experienced as much back pain since he has moved to Ontario as he is only playing soccer recreationally. His headaches have also improved.

**28**  With respect to studying, the plaintiff testified that he needs to move around and cannot sit for long periods. He stated that Blackberry has accommodated this condition. The plaintiff expressed a concern that other employers may not be so cooperative. He testified that he did not think that he could work the 10 hours a day expected of certain employers in the software industry.

**Medical and other Evidence**

**Family Physician**

**29**  Dr. Beheshti was the plaintiff's family physician. She first saw the plaintiff regarding the MVA in November of 2010, about eight months after the MVA.

**30**  On examination, Dr. Beheshti noted that there was no tenderness in his neck or lower back and his range of motion in the neck, back and legs was normal. She diagnosed the plaintiff with mild soft tissue injuries to his back.

**31**  She ordered an x-ray which showed that the plaintiff had a condition known as bilateral L5 spondylolsis. She testified that this condition can be genetic or caused by trauma and that the pain caused by this condition can return with physical activity. She testified that, in the plaintiff's case, the condition "can come back any time he is overactive".

**32**  Dr. Beheshti testified that the MVA was the most likely cause of the plaintiff's soft tissue injury to his back. She agreed that she relied upon what the plaintiff told her about his condition in coming to her opinion.

**33**  Dr. Beheshti saw the plaintiff on five occasions since the MVA. The plaintiff reported that his back pain was worse after playing soccer. Dr. Beheshti testified that the plaintiff also reported right sided headaches, which she diagnosed as migraines.

**34**  She last saw the plaintiff in April of 2012, at which time his examination was "normal". She reported that he still complained of headaches and back pain.

**35**  She concluded that the plaintiff will be able to overcome his pain with exercise and physiotherapy.

**Chiropractor**

**36**  Dr. Hafizi treated the plaintiff from May of 2010 to September of 2010 to decrease the pain and inflammation due to what he diagnosed as soft tissue injuries to his back, shoulder and neck.

**37**  Dr. Hafizi testified that the plaintiff reported to him that his neck and back pain was getting "better" and that he "feels good". The plaintiff also reported some pain and stiffness, mainly after playing soccer.

**Physiotherapist**

**38**  It is agreed that the plaintiff received 12 physiotherapy treatments from a physiotherapist, Mr. Jabbary, from August of 2011 to October of 2011. Mr. Jabbary did not give evidence at trial.

**Kinesiologist**

**39**  Mr. Karmi testified that he provided kinesiology services to the plaintiff from August of 2012 to October of 2012. He recommended exercises to strengthen and stretch the plaintiff's muscles in his legs and back to improve his range of motion. Mr. Karmi testified that the plaintiff reported to him a 70% improvement in pain, with some continuing soreness.

**Other Witnesses**

**40**  Two friends of the plaintiff, Amir Kassaisan and Mehdi Jalali, testified as to what they observed about the plaintiff's functioning after the MVA, including the plaintiff having to stretch more when playing soccer and having to change positions after sitting for extended periods. Mr. Jalali testified that the plaintiff had reduced the amount of recreational soccer he played in the summer.

**41**  Under cross examination, Mr. Jalali testified that the plaintiff was one of the better soccer players on the team, that the team has recently moved up a division in the level of play, and that the plaintiff "goes all out" when he plays.

**Position of the Parties**

**42**  Counsel for the plaintiff submits that the MVA caused the plaintiff's soft tissue injuries to his back and neck and, in addition, according to the unrefuted evidence of Dr. Beheshti caused, or in the alternative, exacerbated, the plaintiff's spondylolsis. As a result of the MVA, the plaintiff has experienced neck and back pain, as well as headaches and sleep loss.

**43**  Counsel for the plaintiff contends that, while his neck pain was resolved within five months and his back pain has improved, he has not made a full recovery and still experiences pain when he plays soccer or when he studies for extended periods.

**44**  The plaintiff, therefore, seeks non-pecuniary damages in the range of $40,000; future care costs in the amount of $5,000; damages for loss of earning capacity in the amount of $30,000; and $831.80 in special costs.

**45**  Counsel for the defendant acknowledges that the plaintiff experienced mild soft tissue injuries as a result of the MVA but submits that the MVA caused the plaintiff little pain and had only a minor impact on his life. Counsel submits that his involvement in competitive soccer; his continued achievement in his university program; and his active lifestyle are evidence of the limited effect of the MVA on his level of functioning.

**46**  She notes the plaintiff admitted that his neck pain was resolved within 2 to 3 months and that his headaches were minor and not a significant problem. With respect to his back pain evidence, counsel contends that Dr. Beheshti's evidence should be given little weight in circumstances where she did not see the plaintiff until eight months after the MVA and did not report any abnormal findings in her physical examination of the plaintiff.

**47**  Accordingly, the defendant submits that the proper range for non-pecuniary damages is $10,000 - $16,000 and that no award for loss of earning capacity or future care costs is justified. Special costs are agreed.

**Liability**

**48**  As noted above, the defendant's liability for the MVA is admitted.

**Causation**

**49**  The plaintiff must establish on the balance of probabilities that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be proven 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=); *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=).

**50**  The primary test for causation asks: but-for the defendant's ***negligence*** would the plaintiff have suffered the injury. The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at paras. 21-23.

**51**  Applying these principles, I find the plaintiff's injuries from the MVA to be as follows.

**Neck**

**52**  It is not disputed that the MVA caused a soft tissue injury to the plaintiff's neck and that he experienced neck pain as a result. I accept the plaintiff's evidence at trial that the intermittent neck pain lasted 2 to 3 months. I find that that pain was most pronounced immediately after the MVA and that, with the assistance of exercise and chiropractic treatments, it was fully healed within three months of the MVA.

**Back**

**53**  With respect to the plaintiff's claim of soft tissue injury to his back, I observe that the plaintiff's claim is supported by the evidence of Dr. Beheshti. Although Dr. Beheshti did not examine the plaintiff until eight months after the accident, her diagnosis of a mild soft tissue injury is supported by the observations of the chiropractor, Dr. Hafizi, who was treating the plaintiff in the period immediately following the MVA.

**54**  There is also evidence that spondylolsis was a factor in causing the plaintiff's back pain. According to Dr. Beheshti's evidence, this condition can be genetic or can be caused by "any trauma" and that once a person has this condition it can be aggravated by physical activity.

**55**  I accept the evidence of Dr. Beheshti that the plaintiff has this condition. However, I am not persuaded on the evidence that the MVA caused the plaintiff's spondylolsis. In that regard, I note that, in her expert report, she did not state that the plaintiff's spondylolsis was caused by the MVA. In her testimony she stated that the condition may be caused by any trauma or may be genetic. With respect to the question of whether the MVA caused this condition, her evidence on this point, which arose in re-examination, was equivocal. That said, I am satisfied on the evidence that it is more probable than not that the plaintiff's condition was aggravated by the MVA and contributed to the pain experienced by the plaintiff.

**56**  With regard to the plaintiff's back pain, I accept the plaintiff's evidence that the pain was the worst during the month after the MVA. He testified that initially his back pain lasted one to two hours, three times a week and that, with chiropractic treatments and physiotherapy, the frequency of pain diminished significantly. Although the plaintiff testified that the intensity of the pain did not change, the plaintiff agreed in his evidence that he reported his pain at a level of 2 out of 10 in 2012. Further, the plaintiff testified that, with the exercises recommended by the kinesiologist were "extremely helpful" and that he subsequently experienced pain only about once a month - mainly when he "overplays" in soccer. Even though he is playing competitive soccer, the plaintiff testified that most of the time (17 games out of 20) he does not experience pain when he plays.

**57**  Based on the plaintiff's evidence as to the extent of his recovery, I conclude that while the plaintiff continues to experience occasional back pain when he plays soccer, the intensity of the pain has lessened considerably since the MVA.

**Headaches**

**58**  With respect to the plaintiff's complaint of headaches, I accept the testimony of the plaintiff that he experienced minor headaches in the back of his head for a "couple of months" following the MVA. I find it more likely than not that these headaches were the result of the MVA.

**59**  While the plaintiff testified that the headaches continued into 2011, I accept the evidence of Dr. Beheshti that the 2011 headaches were migraines and, therefore, of a different nature than the headaches in the period immediately following the MVA. The evidence does not establish that the migraines were causally related to the MVA.

**Non-Pecuniary Damages**

**60**  Non-pecuniary damages are awarded to compensate a 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 will provide guidance but the case must be determined 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=).

**61**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common facts 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 arguable 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=)).

**62**  Within this context, the court has emphasized that the assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience, *Dilello v. Montgomery,* [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=). The court has also emphasized that care should be taken where 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, *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.) and *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=).

**63**  In this case, counsel for the plaintiff submits that an award of $40,000 is justified based upon the plaintiff's injuries and the case law: *Datoc v. Raj*, [*2013 BCSC 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1XB-00000-00&context=); *Hunter v. Yuan*, [*2010 BCSC 1526*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B32V-00000-00&context=); *Bjarnason v. Parks*, [*2009 BCSC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B104-00000-00&context=); *Chan v. Lee*, [*2008 BCSC 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DS-00000-00&context=); and *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=).

**64**  Counsel for the defendant submits the appropriate range for non-pecuniary damages is $10,000 to $16,000 and she refers to: *Liu v. Thaker*, [*2012 BCSC 612*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3G5-00000-00&context=); *Dajri v. Regimbald,* [*2006 BCSC 834*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1F8-00000-00&context=); *Ram v. Rai*, [*2012 BCSC 1718*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2MT-00000-00&context=); and *Johnson v. Keats*, [*2012 BCSC 751*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3T1-00000-00&context=).

**65**  I consider that the cases referred to by counsel for the plaintiff, while helpful, generally involved injuries which were somewhat more serious. For example, in *Chan* the plaintiff had psychological as well as physical symptoms; in *Hunter,* the plaintiff was unable to carry out household chores for four years after the accident; in *Haines,* the plaintiff had difficulty doing his former recreational activities for a significant period of time and found certain parts of his present job difficult to do; in *Bjarnason* the plaintiff could not participate in recreational activities for a number of months and had a recurrence of intense pain two years after the accident; and in *Datoc,* the plaintiff had neck pain and headaches, as well as back pain, for approximately one year.

**66**  That said, the cases referred to by counsel for the defendant involved injuries which generally resolved within a shorter period than in the plaintiff's case. While the plaintiff's neck pain and headaches resolved within three months, he had significant back pain for at least one year, with occasional back pain after that time. Although the plaintiff's reports of pain were largely subjective and the MVA was relatively minor, I am satisfied on the evidence of the plaintiff that he experienced pain and discomfort as a result of the MVA. In that regard, I note that the plaintiff was diligent in taking steps to recover from his injuries, including the exercises recommended by the professionals assisting in his recovery.

**67**  In assessing the impact of the injuries on the plaintiff's enjoyment of life, I have considered the plaintiff's candid admission that the injuries from the MVA did not affect the amount of time he played soccer and that he was able to excel in a more competitive league after the MVA. That said, it is also evident from the plaintiff that he paid a price for playing hard. I accept the plaintiff's evidence that playing competitive soccer contributed to his pain. While the plaintiff was able to continue with the sporting activity he loved after the MVA, he is entitled to be compensated for the pain which he experienced as a result of the MVA.

**68**  I conclude that a fair and reasonable award for the plaintiff's pain and suffering and his loss of enjoyment of life is $25,000.

**Loss of Earning Capacity**

**69**  Damages for loss of earning capacity may be awarded where there is a substantial possibility that the plaintiff's earning capacity has been impaired by his injuries. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident, *Gregory v. Insurance 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=).

**70**  There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach", from *Pallos v. Insurance Corporation of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.), and the "capital asset approach" in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (C.A.).

**71**  In this case the plaintiff claims a loss of future earning capacity on the capital asset approach on the criteria set out in *Brown*:

1. whether the plaintiff has been rendered less capable overall of earning income from all types of employment;
2. whether the plaintiff is less marketable or attractive as a potential employee;
3. whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
4. whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

**72**  Counsel for the plaintiff submits that even though the plaintiff expects he will find work in his chosen field, he will have a harder time than those in his cohort who are free of pain and do not require accommodation in terms of stretching breaks. She also submits that there will be some physical jobs that he simply cannot take on.

**73**  In my view, the evidence does not support the plaintiff's claim that he is less capable of earning an income; that he is less marketable; that he is less able to take advantage of job opportunities; or that he is less valuable to himself as a person capable of earning an income in a competitive labour market, as a result of his injuries from the MVA.

**74**  The plaintiff has been successful in his software engineering program and has secured a coop placement with a leading software company. There is no evidence that he was unable to do the work he was assigned at Blackberry due to the injuries caused by the MVA. While he has expressed a concern that he may not be able to work the 10 hours a day expected by some employers, there is no evidence, other than his own expression of concern, that he will be incapable of performing work at the level of 10 hours a day if that were required. Further, I do not accept that the occasional need to break for a stretch would render him less attractive or marketable with prospective employers.

**75**  While counsel for the plaintiff contends that there will be some, more physical jobs that the plaintiff cannot take on, I find it unlikely that he will seek jobs involving physical labour, given his university training. On the basis of the reasoning 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=), I question whether such jobs are realistic occupations for consideration of the plaintiff's earning capacity.

**76**  However, even if the plaintiff were to pursue jobs with physical demands, there is no medical evidence that he is restricted from working in occupations which have such requirements. I note that Dr. Beheshti's prognosis of the plaintiff's recovery was positive and the plaintiff has continued to be involved in physically demanding sports activities since the MVA.

**77**  The cases upon which the plaintiff relies, in my view, are distinguishable. In *Sinnot v. Boggs*, [*2007 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=), there was medical evidence that the plaintiff grade 11 student would have difficulty with more strenuous and physically demanding work. As she was young and without a settled line of work, the court found that she faced limitations on her ability to work competitively in jobs that were previously open to her. In *Haines,* the 22 year old plaintiff, who had no settled career, was awarded damages for loss of earning capacity where his ability to work competitively in heavy labouring jobs was impaired - which work was among the type of work he had been performing. In *Mar v. Young*, [*2009 BCSC 1251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62DV-00000-00&context=), there was medical evidence and evidence of co-workers to support the conclusion that the plaintiff was unable able to work long hours as a result of the accident.

**78**  In contrast to such cases, I am unable to conclude that there is a real and substantial possibility that the plaintiff's earning capacity has been impaired as a result of injuries from the MVA. The plaintiff has demonstrated the intelligence, drive and ability to succeed in his chosen field. I, therefore, decline to award damages for loss of earning capacity.

**Costs of Future Care**

**79**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based upon what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical well-being: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.); *Williams v. Low*, [*2000 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X038-00000-00&context=); *Spehar v. Beazley*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=); and *Gignac v. Rozylo*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=).

**80**  The plaintiff claims future care costs for exercise and physiotherapy needed to minimize pain symptoms related to the MVA. Counsel for the plaintiff submits that there is medical justification for the costs of physiotherapy and kinesiology treatment from Dr. Beheshti.

**81**  Counsel for the defendant disagrees that future care costs are justified on the basis that the plaintiff's spondylolsis was not caused by the MVA.

**82**  I agree with the defendant that the evidence does not establish that the plaintiff's spondylolsis was caused by the MVA. However, as noted above, I have found that the MVA aggravated the plaintiff's condition and contributed to his pain.

**83**  To the extent that the plaintiff has residual pain resulting from the MVA, I consider that the costs of gym fees, physiotherapy, and kinesiology for a further period are reasonable and are medically supported by Dr. Beheshti.

**84**  I award the plaintiff $1,500 for future care costs for gym fees, physiotherapy and kinesiology.

**Special Damages**

**85**  The parties are agreed that the plaintiff should be reimbursed $831.80 for out of pocket expenses he incurred as a result of the MVA. I, therefore, award this amount of special damages.

**Conclusion**

**86**  In summary, the total amount of damages assessed are as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $25,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future care costs | $1,500 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | $831.80 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $27,331.80 |  |

**87**  The parties may make submissions as to costs, if they are unable to agree.

W.J. HARRIS J.

**End of Document**

[***Mulligan v. Stephenson, [2013] B.C.J. No. 1685***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B269-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K.N. Affleck J.

Heard: March 6 and May 21, 2013.

Judgment: August 1, 2013.

Docket: S121713

Registry: Vancouver

**[2013] B.C.J. No. 1685** | 2013 BCSC 1384 | 6 C.B.R. (6th) 95 | 2013 CarswellBC 2349 | 231 A.C.W.S. (3d) 948

Between Thomas Mulligan, Plaintiff, and Geoffrey Bushby Stephenson, Greyfriars Realty International Ltd., and Greyfriars Mortgage Investment Corp., Defendants

(38 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Res judicata — Estoppel — Estoppel by record (res judicata) — Cause of action — Issue estoppel — Res judicata as a bar to subsequent proceedings — Estoppel raised by pleadings — Application by the defendants to strike out notice of civil claim dismissed — Plaintiff awarded costs — Proposed amendments pleaded causes of action and constituent elements known to the law therefore defendants' argument no reasonable cause of action failed — Defendants argument that current claims barred by cause of action estoppel, issue estoppel, or were otherwise abuse of process of court also failed — Application for order nisi of foreclosure only dealt with mortgage — Plaintiff's current claims related to listing agreement, facts, and law which were not before previous court, which also had no jurisdiction to address listing agreement — Supreme Court Civil Rules, Rules 9-5, 9-5(1)(a), 9-5(1)(b), 9-5(1)(d).**

**Real property law — Proceedings — Practice and procedure — Pleadings — Application by the defendants to strike out notice of civil claim dismissed — Plaintiff awarded costs — Proposed amendments pleaded causes of action and constituent elements known to the law therefore defendants' argument no reasonable cause of action failed — Defendants argument that current claims barred by cause of action estoppel, issue estoppel, or were otherwise abuse of process of court also failed — Application for order nisi of foreclosure only dealt with mortgage — Plaintiff's current claims related to listing agreement, facts, and law which were not before previous court, which also had no jurisdiction to address listing agreement — Supreme Court Civil Rules, Rules 9-5, 9-5(1)(a), 9-5(1)(b), 9-5(1)(d).**

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| Application by defendants to strike out notice of civil claim on the basis that it did not disclose a reasonable cause of action, was unnecessary, scandalous, frivolous, or vexatious, or was otherwise an abuse of process of the court. The defendants submitted that the allegations of the plaintiff were an attempt to relitigate matters already decided and therefore the plaintiff's claims were res judicata, subject to the doctrines of issue estoppel and cause of action estoppel, and were an improper collateral attack on an order nisi of foreclosure pronounced in earlier proceedings involving the same parties. The defendant Stephenson was the managing broker and sole director of the defendant Greyfriars Realty and the sole director of the defendant Greyfriars Mortgage. The plaintiff was a real estate agent. The plaintiff borrowed money from Greyfriars Mortage to pay out other mortgages on his home. He then experienced difficulty making monthly payments and asked to renegotiate the interest. He alleged that the defendants told him not to worry about renegotiating and they would assist in the sale of the home. The home did not sell and the plaintiff alleged that the defendants actively discouraged the sale then assured him no steps would be taken to foreclose on the home. Ultimately, however, foreclosure proceedings commenced and an order nisi of foreclosure was made. The plaintiff acknowledged that some limited allegations should be removed and submitted a proposed amended notice of civil claim. The plaintiff submitted that the pleading was now aimed only at claims which sounded in contract, tort, and breach of fiduciary duty which were not previously adjudicated and focused on the rights and obligation found in the listing agreement on which no court had yet adjudicated.  HELD: Application dismissed.  The plaintiff was awarded costs on Scale B. The proposed amended notice of civil claim, standing alone, pleaded causes of action known to the law of British Columbia. These were allegations of fraud, breach of fiduciary duty, and breach of contract, and the plaintiff pleaded the constituent elements of those causes of action. Thus, the pleading disclosed a reasonable cause of action. Cause of action estoppel required a final decision and that the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action had the parties exercised reasonable diligence. Similarly, issue estoppel barred the re-litigation of all questions that could have been raised in a previous proceeding but were not. The doctrine of abuse of process engaged the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. The proposed amended notice of civil claim did not run afoul of any of the doctrines invoked by the defendants. The questions that arose from the listing agreement which the plaintiff now sought to litigate could not be addressed by the master who heard the application for the foreclosure order. This was not simply because the master had no jurisdiction to address that issue but also because those questions were not before the court. The only issues before the court related to the mortgage not the listing agreement. The plaintiff now pleaded issues of fact and law which were distinct from those which were before the court in the foreclosure proceeding. Those issues ought not to be choked off before they could be ventilated. It would be unfair for the court to shut its face to the plaintiff's amended notice of civil claim when on the hearing of the application for the order nisi he was told that the type of claims he was attempting, however inarticulately, to bring to the attention of the master had "nothing to do" with the court. |

**Statutes, Regulations and Rules Cited:**

Interest Act (Canada), [*R.S.C. 1985, c. I-15*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9W1-JP4G-603B-00000-00&context=),

Real Estate Services Act, *SBC 2004, c. 42*,

Supreme Court Civil Rules, Rule 9-5, Rule 9-5(1)(a), Rule 9-5(1)(b), Rule 9-5(1)(d), Rule 19(24)(d)

**Counsel**

Counsel for the Plaintiff: A.N. MacKay, J.R. Lithwick.

Counsel for the Defendants: W.G. MacLeod, C. Gilmour.

**Reasons for Judgment**

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

**1**   The defendants apply, pursuant to R. 9-5, to strike out the notice of civil claim on the basis that it does not disclose a reasonable cause of action, is unnecessary, scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the court. The central submission of the defendants is that the allegations of the plaintiff are an attempt to relitigate matters already decided and therefore the plaintiff's claims are *res judicata*, are subject to the doctrines of issue estoppel and cause of action estoppel, and are an improper collateral attack on an order *nisi* of foreclosure pronounced in earlier proceedings involving the same parties or their privies.

**2**  The plaintiff acknowledges that the notice of civil claim "should be amended to remove some limited allegations which were properly the subject matter of the foreclosure proceeding" and seeks leave to amend the notice of civil claim if it is not struck. The plaintiff has provided the court with a draft amended notice of civil claim. I approach the defendants' application as if leave to amend had been granted.

**3**  The plaintiff submits that the proposed amended notice of civil claim is not subject to the criticisms the defendants make on this application and the plaintiff's pleading is now aimed only at claims which sound in contract, tort and breach of fiduciary duty which were not previously adjudicated in the foreclosure proceedings nor could they have been adjudicated.

**The Allegations in the Proposed Amended Notice of Civil Claim**

**4**  The amended notice of civil claim makes allegations which for the purpose of the defendants' application pursuant to R. 9-5(1)(a) must be treated as if they had been proven.

**5**  The defendant Greyfriars Realty International Ltd. ("Greyfriars Realty") was at the material time engaged in the business of selling real property and the defendant Geoffrey Stephenson ("Stephenson") was its managing broker and sole director. The defendant Greyfriars Mortgage Investment Corp. ("Greyfriars Mortgage") loans money on the security of mortgages with Stephenson as its sole director.

**6**  The plaintiff had a real estate licence for many years and he and Stephenson met through their work.

**7**  In about 2001 the plaintiff made an assignment in bankruptcy. In 2004 he purchased a home in White Rock. He borrowed money from a non-party to these proceedings and the loan was secured by a first mortgage on the home. At the suggestion of Stephenson, the plaintiff later borrowed further money from Greyfriars Mortgage, also secured by mortgages against the home and with priorities ranking behind the existing first mortgage.

**8**  In 2007, Stephenson encouraged the plaintiff to borrow $480,000 from Greyfriars Mortgage to pay out all of the existing mortgages. The loan was secured by a new first mortgage on the home. The new loan had an interest rate calculated at 14.56% in accordance with the *Interest Act (Canada)*, R.S.C., 1985, c. I-15, and required monthly repayments of principal and interest of $5,413.61.

**9**  By December 2007, the plaintiff was experiencing difficulty making the monthly payments and asked the defendants to renegotiate the rate of interest on the loan. In response it is alleged the defendants orally represented to the plaintiff that:

1. The Plaintiff need not worry about renegotiating the interest rate on the Mortgage;
2. If the Plaintiff entered into a Multiple Listing Agreement with the Defendants Stephenson and Greyfriars Realty, Greyfriars Mortgage would not require the Plaintiff to make his monthly Mortgage payments;
3. The Defendants would deduct any Mortgage payments owing as a result of the Plaintiff's non-payment from the equity of the Family Home once it was sold;
4. The Defendants Stephenson and Greyfriars Realty would not charge the Plaintiff their full commission rate if they obtained the listing to sell the Family Home; and
5. The Defendants would act in the Plaintiff's best interests.

**10**  The plaintiff alleges the representations were made fraudulently with the intention that he would rely on them.

**11**  In January of 2009, in reliance on the representations, the plaintiff ceased making monthly repayments on the mortgage to Greyfriars Mortgage and in February 2009, entered into a multiple listing agreement with Stephenson and Greyfriars Realty for the sale of the home for $535,000.

**12**  The plaintiff alleges that through his dealings with Stephenson and Greyfriars Realty they acquired fiduciary, contractual, and common law duties to him, including duties to:

1. act solely in the Plaintiff's best interests at all material times and in accordance with their duties of trust, confidence and utmost good faith;
2. avoid a conflict of interest between the Plaintiff's interests and the Defendants' interest and disclose to the Plaintiff the existence of any such conflict should one arise;
3. exercise reasonable care and skill when acting in the Plaintiff's best interests;
4. disclose in a timely manner to the Plaintiff all material facts affecting the transaction or the Plaintiff's interests known to them;
5. assist the Plaintiff in negotiating favourable terms and conditions with a buyer;
6. protect the Plaintiff's confidences and ensure that confidential information about the Plaintiff's affairs and finances were not disclosed to others and certainly not to those adverse in interest to the Plaintiff; and
7. receive confidential information from the Plaintiff knowing the limited purpose for which it was communicated.

**13**  The home did not sell and the plaintiff alleges Stephenson and Greyfriars Realty actively discouraged prospective purchasers and avoided showing the home to them, and further were "selective" in providing information to the plaintiff about efforts to sell the home.

**14**  Notwithstanding the alleged representations, on April 2, 2009 Greyfriars Mortgage wrote to the plaintiff demanding payment of the balance of the mortgage debt which was then $429,189.34. When the plaintiff spoke to the defendants about this demand, he was assured that none of the defendants had "any intention of taking steps to foreclose on the Family Home".

**15**  The plaintiff alleges this further representation was false and on April 17, 2009, Greyfriars Mortgage commenced foreclosure proceedings in respect of the home. On May 26, 2009, an order *nisi* of foreclosure was made. The plaintiff resisted the order *nisi*, appearing in person in chambers to do so, and attempted to bring to the attention of the master in chambers his view that the foreclosure proceedings were improper. It appears the learned master was convinced that there was little if any equity in the home and granted immediate conduct of sale to Greyfriars Mortgage.

**16**  The plaintiff alleges in the proposed amended notice of civil claim that the affidavit of Stephenson, filed in support of the application for the order *nisi*, did not disclose the representations made by the defendants. Nor did it disclose:

...that throughout the foreclosure proceeding and the listing period of the Family Home the Defendant Stephenson acted as the agent of the Plaintiff pursuant to the Multiple Listing Agreement when at the same time he was the president and director of Greyfriars Mortgage who, unbeknownst to the Plaintiff, had initiated the foreclosure proceeding.

[Emphasis in original.]

**17**  In reliance on the order granting conduct of sale, Greyfriars Mortgage selected Greyfriars Realty as its agent to effect a sale. The plaintiff alleges that:

By no later than May 26, 2009, the Defendants Greyfriars Realty and Stephenson were acting for the Plaintiff pursuant to the Multiple Listing Agreement and simultaneously acting for the Mortgagee Greyfriars Realty pursuant to the Order of the Court.

**18**  On those facts the plaintiff alleges Stephenson and Greyfriars Realty:

1. failed to act in the Plaintiff's best interests;
2. failed to exercise due care and skill while acting for the Plaintiff;
3. acted simultaneously for the Plaintiff and the Defendant Greyfriars Mortgage contrary to their fiduciary duties to the Plaintiff;
4. failed to take reasonable steps to avoid conflicts of interest and disclose the existence of the same to the Plaintiff;
5. misrepresented material facts to the Plaintiff;
6. failed to disclose material information to the Plaintiff including but not limited to the existence of a conflict of interest by the Defendants, that the Defendant Greyfriars Mortgage was going to initiate foreclosure proceedings against the Plaintiff and other material information relating to the Plaintiff's affairs;
7. shared confidences relating to the Plaintiff and his financial position without regard to the distinct roles and interests that each of the parties had with the Plaintiff;
8. actively discouraged prospective purchasers from making offers on the Family Home on the basis that purchasers should wait until the Defendant Greyfriars Mortgage obtained the right to sell the home in foreclosure proceedings at a time where the Plaintiff was not expecting foreclosure proceedings to ensue because of misrepresentation made by the Defendants;
9. breached sections of the *Real Estate Services Act*, *SBC 2004, c. 42*;
10. further particulars as shall be established at trial.

[Emphasis in original.]

**19**  Greyfriars Mortgage is alleged to have:

1. failed to disclose material facts to the British Columbia Supreme Court during the foreclosure proceeding;
2. shared confidences relating to the Plaintiff and his financial position without regard to the distinct roles and interests that each of the parties had with the Plaintiff;
3. failed to take reasonable steps to avoid conflicts of interest and disclose the existence of the same to the Plaintiff;
4. knowingly assisting in the breaches of fiduciary duty of the Defendants Stephenson and Greyfriars Realty including but not limited to:
5. filing in the foreclosure proceeding information that was confidential to the Plaintiff and obtained by the Defendants Stephenson and Greyfriars Realty as a result of the Agency Agreement between the Plaintiff and those Defendants; and
6. participating in the conflict of interest of the Defendants Stephenson and Greyfriars Realty by selecting those Defendants to sell the Family Home despite the knowledge of the Agency Agreement between the Plaintiff and the Defendants Stephenson and Greyfriars Realty.
7. misrepresented material facts to the Plaintiff, including the representation that the demand letters he received were mere formalities and - that the Defendants had no intention of taking steps to foreclose on the Family Home; and

[Emphasis in original.]

**20**  In their response to civil claim, the defendants make various denials and raise other matters in defence of the plaintiff's claims. On an application relying on R. 9-5(1)(a) to strike a notice of civil claim for failure to plead a viable cause of action, the merits of the claim or defence are not in issue. The task of the court is to determine if the impugned pleading, on its face and assuming the facts alleged are true, has any prospect of success.

**21**  The defendants' position is that the proposed amended notice of civil claim is certain to fail because the allegations are substantially the same as those made, or which could have been made, in the foreclosure proceedings. The defendants submit the plaintiff was obliged to bring his entire case forward to resist the granting of an order *nisi* of foreclosure. It is argued the plaintiff had an obligation to advance all defences to the foreclosure proceeding in that proceeding, and cannot in the present proceeding raise matters that were advanced, or that could have been advanced, in the foreclosure proceedings. To do so is said to be an impermissible collateral attack on the order *nisi* of foreclosure which is presumed to be valid unless successfully appealed or otherwise set aside.

**22**  In my view, the proposed amended notice of civil claim, standing alone, pleads causes of action known to the law of British Columbia. The plaintiff makes allegations of fraud, breach of fiduciary duty and breach of contract, and pleads the constituent elements of those causes of action. If the defendants' application to strike out the plaintiff's pleading is to succeed they must rely on R. 9-5(1)(b) or (d) and it is therefore necessary to consider facts extraneous to the pleading itself. The facts to consider are those related to the listing agreement, but to do so requires a review of at least some of the evidence concerning the foreclosure proceedings to determine if the plaintiff is now attempting to relitigate issues that properly arose or should have arisen at the time of the granting of the order *nisi*.

**23**  To put the point somewhat differently, although I am persuaded the plaintiff's pleading, as a pleading, has no defect of the type R. 9-5(1)(a) is intended to address, that is not the end of the matter. The defendants also rely on R. 9-5(1)(b) and (d), and, if in the circumstances of this case, the proposed amended notice of civil claim ought to be characterised as a vexatious pleading, or otherwise an abuse of the process of the court, because the effect is to challenge the foreclosure order, it must be struck.

**24**  The defendants submit that this Court ought not to entertain an action which relies on facts which are necessarily inconsistent with facts which were finally determined in other proceedings before the court. The defendants' submission is that the decision in the foreclosure proceeding to grant an order *nisi* required a finding by the court that the mortgage of the plaintiff's real property to Greyfriars Mortgage was valid, that it was in default and that the debt secured by the mortgage was properly due and owing. The defendants submit the proposed amended notice of civil claim challenges those findings, and for this Court to grant the relief sought in the amended notice of civil claim would be clearly inconsistent with the prior determination of this Court in the foreclosure proceeding. The defendants argue the issues the plaintiff wishes to litigate have already been decided and cannot be reopened by means of the present proceedings.

**25**  The defendants rely on *Ba-Oose Inc. v. HSBC Bank of Canada*, [*2011 BCCA 511*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22SW-00000-00&context=), in which the court heard an appeal from an order, [*[2011] B.C.J. No. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2M3-00000-00&context=), striking claims and dismissing an action. The plaintiffs were mortgagors against whose property an order *nisi* of foreclosure had been made. In a later action by the plaintiff/mortgagors the judge at first instance on the application of the defendants pursuant to R. 9-5(1) held that the plaintiffs were attempting to relitigate issues already decided against them in foreclosure proceedings and that to do so was an abuse of process. Mr. Justice Groberman, speaking for the Court of Appeal, observed that:

22 Once an order *nisi* is pronounced, it is not open to a mortgagor to challenge the validity of the mortgage by way of a separate action. Because the validity and enforceability of the mortgage are prerequisites to the granting of an order *nisi*, the facts necessary to determine that the mortgage is enforceable become *res judicata*.

23 In the case before us, most of the plaintiffs' claims go directly to the question of whether the mortgage was valid and enforceable according to its terms. If the plaintiffs wished to argue that the mortgage was unconscionable or entered into in an unlawful manner, their opportunity to do so was in defence of the application for an order *nisi* of foreclosure. They could not consent to the granting of the order *nisi* and then commence a separate action to challenge the validity of the mortgage. The order *nisi*, either expressly or by implication, affirmed the legality and enforceability of the mortgage.

**26**  The defendants also rely on *Danyluk v. Ainsworth Technologies Inc.*, [*2001 SCC 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48G-00000-00&context=) at paras. 53 - 60, in which Binnie J. for the Court, under the heading "Issue Estoppel: Applying the Tests", set out three sub-headings as follows:

1. That the Same Question Has Been Decided
2. That the Judicial Decision Which Is Said to Create the Estoppel Was Final
3. That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies

**27**  Under heading (c), Binnie J. wrote:

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin*, *supra*, [*[2000] O.J. No. 4338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SGB1-F873-B312-00000-00&context=); *Minott v. O'Shanter Development Co.* [*(1999), 42 O.R. (3d) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1RT-00000-00&context=) (C.A.), per Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* [*(1988), 22 B.C.L.R. (2d) 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22C1-00000-00&context=) (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see *Holmested and Watson*, *supra*, at 21 s. 24, and G. D. Watson, "*Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality*" (1990), 69 Can. Bar Rev. 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

The defendants submit the concepts of privity and mutuality have been satisfied in the case at bar because Stephenson, as a director of both Greyfriars Mortgage and Greyfriars Realty was privy to both the foreclosure proceedings and to the present action.

**28**  Further, it is the position of the defendants that, in the words of McIntyre J. in *R. v. Wilson*, [*[1983] 2 S.C.R. 594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M29X-00000-00&context=) at 599:

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

**29**  In addition the defendants submit the relevant facts on which the plaintiff now seeks to rely in the present action were known to him at the time of the application for the order *nisi* of foreclosure. As I have mentioned above, the plaintiff resisted the application for the order *nisi* of foreclosure and attempted to bring to the attention of the master in chambers some of the difficulties he argued the mortgagee ought to face on the application. The transcript of the hearing in chambers which led to the order *nisi* contains the following passage:

THE RESPONDENT MULLIGAN: Well, okay, I have the -- the affidavit here that I was dealing with Jeff -- there's a lot of conflicts of interest. That's why the lawyer's not here -- well, he's in the hallway, so he's kind of still here. But what the -- the realtor and the -- and the bank are the same person. Okay? And I knew that going in. And me and Jeff were talking back in January and I said, "Why don't we renegotiate the mortgage (indiscernible) do it?" And he said, "Don't worry about it." He said, "Don't worry about it (indiscernible) five-thirty-five, get out of thing," or whatever, because I -- I said, "Well, it's at 5400 a month, let's get it down to current rates." And he -- he says -- he didn't seem to have a comment to say to that. We deal with the same bank and I'm sure they would've had no problem doing that because I keep on making the payments.

These submissions of the plaintiff to the master are said to reveal the plaintiff's knowledge of the defences he could have raised to the foreclosure proceedings.

**30**  On those facts, the defendants submit the proposed amended notice of civil claim should be characterised as vexatious because the defendants are to be vexed again by the same issues that were conclusively decided in their favour, and is an abuse of process because the proposed pleading is a collateral attack on the order *nisi*, and therefore offends R. 9-5(1)(b) and (d).

**31**  The plaintiff responds to the application by submitting that he accepts the validity of the foreclosure proceedings and says that the proposed amended notice of civil claim is carefully focussed on the rights and obligations found in the listing agreement on which no court has yet adjudicated. The plaintiff points to the following exchange with the master who heard the foreclosure application:

THE RESPONDENT MULLIGAN: Can I say one other thing?

THE COURT: Yeah.

THE RESPONDENT MULLIGAN: I thought there were no offers -- it says -- I didn't know that I had offers on the place, but it's still listed in my name and Jeff's still working for me as my realtor and he -- he owns the mortgage, too. But it says in the statement there's two offers. I just got that -- which I never seen before. What's that all about? That's against the law. (Indiscernible) you know, it says right on -- on the back page of one of those things there.

THE COURT: It's not against the law, sir.

THE RESPONDENT MULLIGAN: Yeah, and -- and the real estate thing, if he represents me that's his own --

THE COURT: Well, report him to the Real Estate Board.

THE RESPONDENT MULLIGAN: I'm going to.

THE COURT: That's got nothing to do with me. So you can have your order. One month redemption period, conduct of sale effective two weeks hence.

**32**  The plaintiff submits that passage indicates the plaintiff was complaining to the court about the defendants' ***negligence***, breach of fiduciary duty and misrepresentation in relation to the listing agreement.

**33**  The essence of the position of the plaintiff in the proposed pleading and on this application, as I understand it, is that by virtue of the listing agreement the defendant Stephenson and Greyfriars Realty owed fiduciary duties to the plaintiff which they breached. Further, the plaintiff argues that Greyfriars Mortgage knew of the listing agreement but nevertheless participated in making representations to the plaintiff regarding the listing agreement including representations that if the plaintiff ceased to make mortgage payments and the property was listed for sale with Stephenson and Greyfriars Realty, Greyfriars Mortgage would not initiate foreclosure proceedings. Contrary to those representations, and unknown to the plaintiff, the defendants were taking steps to commence foreclosure proceedings in which there would be an application for immediate conduct of sale thereby obviating the listing agreement.

**34**  In *Rivet v. British Columbia*, 2007 BCSC. 731, Madam Justice Arnold-Bailey provided a helpful recitation of the doctrines of *res judicata*, cause of action estoppel, issue estoppel and abuse of process on which I cannot improve. At paragraphs 76 through 88 it reads:

*Res Judicata*

[76] Developments in the law have broadened the categories of *res judicata* to include several species. Most notably, courts have recognized cause of action estoppel and issue estoppel. There is also the related, but different, concept of abuse of process. In the case at bar, the defendants rely primarily on the doctrine of abuse of process.

[77] In ***Danyluk v. Ainsworth Technologies Inc.***, [*[2001] 2 S.C.R. 460*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48G-00000-00&context=), Binnie J. described *res judicata* at paras.18 and 20 as follows:

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry...

The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v.The Queen* [*(1894), 22 S.C.R. 553*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3N1-JWXF-24JF-00000-00&context=), at p. 558; *Angle v. Minister of National Revenue*, [*[1975] 2 S.C.R. 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0CD-00000-00&context=), at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel)...

[78] At para. 24 Binnie J. continued with a definition of issue estoppel:

Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [*[1924] 4 D.L.R. 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-DXWW-2288-00000-00&context=), at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[Binnie J.'s emphasis]

*Action Estoppel*

[79] The elements of cause of action estoppel, which are not in dispute, were set out neatly by Hewak C.J.Q.B. in ***Bjarnarson v. Manitoba*** [*(1987), 21 C.P.C. (2d) 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DG1-JJK6-S3K7-00000-00&context=) (Man. Q.B.) at 304, aff'd [*(1987), 21 C.P.C. (2d) 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DG1-JJK6-S3K7-00000-00&context=) (C.A.) at 312. Relying on the Supreme Court of Canada's decision in ***Grandview v. Doering***, [*[1976] 2 S.C.R. 621*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24N1-00000-00&context=), Hewak C.J.Q.B. identified four criteria that must be present before the doctrine of cause of action estoppel would apply:

1. There must be a final decision of a court of competent jurisdiction in the prior action;
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (*mutuality*);
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

*Issue Estoppel*

**80**  The elements of issue estoppel were set out concisely by the Supreme Court of Canada in ***Angle v. M.N.R.***, [*[1975] 2 S.C.R. 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0CD-00000-00&context=) at pp. 255-6, in which Dickson J. held that issue estoppel will apply in the second proceeding if in the previous proceeding:

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

**81**  In ***R. v. Duhamel*** [*(1982), 33 A.R. 271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92X1-FFFC-B243-00000-00&context=) (C.A.) at 277-78, aff'd [*(1984), 57 A.R. 204*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234C-00000-00&context=) (S.C.C.), Moir J.A. stated the following about issue estoppel:

Thus where a second cause of action is different but involves issues of fact or law which were decided as an essential and fundamental step in the logic of the prior decision, then the issue estoppel is said to arise.

**82**  Donald J. Lange, in ***The Doctrine of Res Judicata in Canada***, 2nd ed. (Markham: LexisNexis Canada Inc., 2004), states the following at p. 32:

For the purposes of a separate and distinct cause of action, issue estoppel is treated in much the same way as cause of action estoppel. In cause of action estoppel, when the issue is decided, that cause merges in the decision and can not be revived in a second action because it is gone. In issue estoppel, when the issue is decided, that issue merges, so to speak, in the decision and cannot be revived in a second action, even based on a separate and distinct cause of action, because it is gone.

[83] Issue estoppel bars the re-litigation of all questions that could have been raised in a previous proceeding but were not. This doctrine prevents a party from re-litigating matters by simply relying upon a different theory of liability or placing a different "spin" on the same set of facts. As set out by our Court of Appeal in ***Morgan Power v. Flanders Installations*** [*(1972), 27 D.L.R. (3d) 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-6275-00000-00&context=), quoting ***Hoystead v. Commissioner of Taxation***, [*[1926] A.C. 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4VP-00000-00&context=) at pp. 165-6:

[...] Parties are not permitted to being fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances... If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted.

*Abuse of Process*

**84**  The defendants' primary argument is that the plaintiff's claims regarding the alleged ***negligence*** of the Ministry, which he submits materially contributed to the accident, and its failure to collect and preserve evidence, which caused him economic harm, are abuses of process within the meaning of Rule 19(24)(d).

**85**  The doctrine of abuse of process is distinct from that of *res judicata*. Arbour J. discusses the doctrine's animating principles at paras. 37 to 55 of ***Toronto (City) v. C.U.P.E., Local 79***, [*[2003] 3 S.C.R. 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=). She observes (at para. 37) that the doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. Arbour J. then adopts the following dicta from Goudge J.A. in ***Canam Enterprises Inc. v. Coles*** [*(2000), 51 O.R. (3d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B529-00000-00&context=) (C.A.):

The doctrine of abuse of process is...a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel...

One circumstance in which abuse of process has been found is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

**86**  Arbour J. then states (at para. 37):

Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

**87**  At para. 38, Arbour J. makes it clear that the policy grounds animating the doctrine of abuse of process are the same as the essential policy supporting issue estoppel, namely: encouraging an end to litigation, preserving the court's as well as litigants' resources, upholding the integrity of the legal system in order to avoid inconsistent results, and protecting the principle of finality so crucial to the proper administration of justice.

**88**  In ***Oakley v. Harbour Air Ltd***, [*[1990] B.C.J. 1833*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2DB-00000-00&context=) (S.C.) (QL), Prowse J. (as she then was) said with reference to Rule 19(24)(d):

[...] The principle governing the concept of abuse of process is that the parties have a right to have an end to litigation. For this reason, all parties have a duty to bring forth their whole case during the litigation so that the matter can be fully heard. It is only if special circumstances exist (for example that a party could not with reasonable diligence have produced the evidence earlier) that a party will be allowed to litigate a matter that should have been litigated during earlier proceedings.

[Emphasis in original.]

**35**  The doctrines described by Arnold-Bailey J, as they apply to the matter before me, are each intended to prevent litigants from attempting to revisit discreet issues or causes of action which have been finally determined between the parties, or those privy to them, and to prevent the abuse of the court's process by a challenge to an order of the court by means apart from an appeal or other form of review provided by law. In my view the proposed amended notice of civil claim does not run afoul of any of the doctrines invoked by the defendants. The questions that arose from the listing agreement which the plaintiff now seeks to litigate could not be addressed by the master who heard the application for the foreclosure order. This is not simply because the master had no jurisdiction to address the causes of action which the plaintiff asserts arise from the listing agreement, but also because questions concerning the listing agreement were not inherent in the foreclosure proceeding which relied on contractual principles not engaged by the listing agreement and therefore those questions were not before the court, nor could they have been before the court on that proceeding. The issues before the court in the foreclosure proceeding were the validity of the mortgage, whether it was in default, the length of the redemption period, and whether the mortgagee should have conduct of sale in preference to the plaintiff. None relate to the listing agreement so as to preclude the plaintiff from now seeking to litigate them relying on the notice of civil claim which I am asked to strike.

**36**  The amended notice of civil claim ought not to be struck on any of the bases the defendants propose unless it is clear that the plaintiff seeks to revive issues that have been finally decided against the plaintiff in proceedings involving the same defendants or their privies. In my opinion the plaintiff now pleads issues of fact and law which are distinct from those which were before the court in the foreclosure proceeding and that those issues ought not to be choked off before they can be ventilated.

**37**  I wish to add that it would be unfair for this Court to shut its face to the plaintiff's amended notice of civil claim when on the hearing of the application of Greyfriars Mortgage for an order *nisi* of foreclosure he was told that the type of claims he was attempting, however inarticulately, to bring to the attention of the master had "nothing to do" with the Court.

**38**  The application is dismissed with costs on Scale B.

K.N. AFFLECK J.

**End of Document**

[***Mynott v. British Columbia (Ministry of Transportation), [2011] B.C.J. No. 336***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1B0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Cranbrook, British Columbia

T.M. McEwan J.

Heard: June 15-18 and 21, 2010.

Judgment: March 2, 2011.

Docket: 18601

Registry: Cranbrook

**[2011] B.C.J. No. 336** | [*2011 BCSC 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PK-00000-00&context=) | [*81 C.C.L.T. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PK-00000-00&context=) | [*[2011] 7 W.W.R. 747*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PK-00000-00&context=) | [*2011 CarswellBC 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PK-00000-00&context=) | [*18 B.C.L.R. (5th) 386*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G1PK-00000-00&context=)

Between Scott Mynott and Caroline Mynott, Plaintiffs, and Minister of Transportation of British Columbia and Her Majesty the Queen in Right of the Province of British Columbia, Defendants

(67 paras.)

**Case Summary**

**Government law — Crown — Actions by and against Crown — Nuisance by Crown — Crown lands and property — Action by two homeowners against the defendant British Columbia Ministry of Transportation for damages for nuisance for permitting improper and indecent activities to occur on a right-of-way that was near plaintiffs' home allowed in part — Defendant failed to take reasonable steps to effectively abate the nuisance — Damages would be determined after the defendant was given an opportunity to resolve the nuisance.**

**Tort law — Nuisance — Liability — Particular nuisance — Emissions and contamination — Noise — Injury to property — Remedies — Abatement — Action by two homeowners against the defendant British Columbia Ministry of Transportation for damages for nuisance for permitting improper and indecent activities to occur on a right-of-way that was near plaintiffs' home allowed in part — Defendant failed to take reasonable steps to effectively abate the nuisance — Damages would be determined after the defendant was given an opportunity to resolve the nuisance.**

**Tort law — Torts by the Crown — Action against the Crown — Action by two homeowners against the defendant British Columbia Ministry of Transportation for damages for nuisance for permitting improper and indecent activities to occur on a right-of-way that was near plaintiffs' home allowed in part — Defendant failed to take reasonable steps to effectively abate the nuisance — Damages would be determined after the defendant was given an opportunity to resolve the nuisance.**

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| Action by Scott and Caroline Mynott against the defendant British Columbia Ministry of Transportation for damages for nuisance. The plaintiffs owned a home that was accessible by a right-of-way that was owned by the Province. The right-of-way was impassable to vehicular traffic beyond the plaintiffs' home. Since 2002 the number of people who used the right-of-way during July and August increased substantially. Most of the users were students who were imported from Quebec to pick the cherry crop in the area. The users congregated in the area of the right-of-way when they finished work for the day. The plaintiffs complained to the Ministry about the students' obnoxious conduct, which included noise and indecent activities and trespassing on the plaintiffs' property. Other problems resulted from insufficient sanitary facilities. The Ministry submitted that it was not responsible for the behaviour on the right-of-way after it did all that it was reasonably obliged to do in mitigation. It also told the plaintiffs to look to law enforcement for relief, but, at the same time it informed them that law enforcement could not help them because police lacked the resources to deal with this situation. The plaintiffs would therefore have to learn to live with the situation.  HELD: Action allowed in part.  The Ministry permitted a nuisance to emanate from premises that it controlled and it had a duty to effectively abate that nuisance. It failed to take reasonable steps to do so. Its submission that the Court should assess lump sum damages for past and future harm to the plaintiffs was inappropriate. The Court would not implicate itself in the Ministry's neglect of duty by effectively licensing it. The proper course was to adjourn this matter to await the Ministry's abatement efforts during the next summer season. If it was successful it would be possible to estimate the plaintiffs' damages on a one-time basis. If an effective remedy was not implemented the question of damages would have to be revisited. |

**Statutes, Regulations and Rules Cited:**

Crown Proceeding Act, *RSBC 1996, CHAPTER 89*,

Liquor Act, [*R.S.Y. 2002, c. 140*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-S261-K054-G4XH-00000-00&context=),

**Counsel**

Counsel for the Plaintiffs: R. Buddenhagen.

Counsel for the Defendants: I. Wiebe.

**Reasons for Judgment**

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| **T.M. McEWAN J.** |

**I**

**1**  The plaintiffs own a home on Goat Canyon Road in Erickson, British Columbia, an unincorporated area which borders on Creston. Their property overlooks a stretch of the Goat River that has been a popular recreation site for decades. At one time Goat Canyon Road continued past the plaintiffs' property to a bridge that crossed the river. That bridge no longer exists but the Minister of Transportation retains the old right-of-way down to the Goat River foreshore, where it abuts Crown land not specifically vested in the Ministry.

**2**  Goat Canyon Road is no longer improved beyond the plaintiffs' access to their property. It has become overgrown and impassable to vehicular traffic and concrete barriers have been erected across it. Since the removal of the bridge, members of the public gain access to the river on foot. The area is a beautiful stretch of water that drops through a series of pools between steep rock cliffs.

**3**  The Mynotts are long time residents of the Creston area who were fully aware of the public use of the right-of-way when they purchased their property in 1989. There was no issue about this until about 2002. Before then, the number of people who used the right-of-way was small, and whatever noise or nuisance they created was transient and tolerable. This has changed, and now every year in the months of July and August crowds congregate on the small beach area at the foot of the right-of-way locally known as "the Point".

**4**  This has come about as a result of a change in the economic activity in the Creston Valley. The area is agricultural and has, for many years, produced tree fruit on a large scale. In the late 1990s it became obvious that certain trends in the industry made the traditional apple crop far less profitable than cherries and the Creston orchardists adapted, although it took several years. The crop became commercially productive in around 2002.

**5**  Harvesting the cherries requires a large number of labourers for a short season in mid-summer. This need came to be met by the seasonal influx of some 300 pickers, the majority of whom are students from Quebec. Donald Low, the president of the Cherry Growers' Association in the Creston Valley testified that it has become something of a rite-of-passage for the students from Quebec as well as an opportunity for well-paid summer work.

**6**  The cherry season in the Creston Valley begins in July and is over before the end of August. Some of the pickers start in the Okanagan, where the season is earlier, and later move on to Creston. Although the work can be arduous it must typically be carried out between the hours of 5 a.m. and 11 to 11:30 a.m. Once the days warm up and the internal temperature of the cherries reaches 80F they do not pack well. This leaves Creston with an itinerant population of hundreds of university age cherry pickers with their summer afternoons off. As many as 150 - 180 of them congregate at "the Point" on any given day, along with some local traffic. A party atmosphere prevails.

**7**  Ever since the influx of these workers, the Mynotts' summers have, from their perspective, been a plague of distressing nuisances. They complain of vehicles parked along the road above their house, which makes the road nearly impassable and occasionally blocks their access entirely. They complain of noise and foul language down at the beach. They have witnessed (and videotaped) episodes of public drinking and public nudity and indecency, including explicit sexual activity. They have gathered evidence suggesting drug use.

**8**  Some of the users of the Point find it easier to trespass on the Mynotts' property than to use the path on the right-of-way. There have been isolated episodes of truly disturbing and invasive behaviour. On occasion, the Mynotts have come home to young people in their yard and lounging about on the deck of their house.

**9**  The right-of-way is completely unimproved. The users urinate and defecate in the woods and in the water near the Mynotts' well. Although they cannot prove that their water has actually been affected, they have turned to bottled water after what they have observed. They have captured several incidents of this kind of behaviour on DVD.

**10**  There is no consistent or no effective clean up, with the consequence that there is often a great deal of litter, including liquor bottles, beer cans, and various other kinds of refuse strewn all over the area.

**11**  The users of the site often light campfires which can be hazardous in dry weather. On one occasion Mr. Mynott had to extinguish a fire that had been left unattended on the right-of-way. On another, the Mynotts recorded DVD images of water bombers extinguishing a fire in the canyon below their house. The evidence does not *prove* how the fire started, but the most obvious inference is that some of the people on the point, including those filmed leaving the scene, were responsible. It was a clear beautiful day, and the fire was certainly not the consequence of a lightning strike.

**12**  The plaintiffs have repeatedly reported these observations to the authorities, including the police. The efforts of the government and others to mitigate have included the placement of a portable toilet at the site, the placement of a dumpster at the end of the road and the placement of signs to regulate parking. In addition there have been occasional cleanup crews organized by the Cherry Growers' Association.

**13**  The users of the point have shown a marked disregard for these measures. The parking signs have been uprooted, and the portable toilet was upended. The dumpster simply appears to have added a new locus for obnoxious smells and litter without mitigating the mess on the beach. There is some evidence that a few locals even began to use the dumpster as a convenience, unassociated with any activity at the river.

**14**  The defendant does not deny that since 2002 what it terms "inappropriate behaviour" at the Point has increased significantly. Its position, apart from intimating that the plaintiffs may be hyper-sensitive, is that it has done all that it can be expected to do in the circumstances. It describes its efforts as:

"work[ing] ... with other local stake-holders, such as the Cherry Growers' Association the Regional District and the RCMP, formulated and implemented plans to address the plaintiffs' concerns ..."

**15**  The specific initiatives the defendant has undertaken are iterated in its materials as follows:

1. parking restrictions on Goat Canyon Road were increased, and additional signage was installed (Exhibit 4);
2. guard rails were installed near the Plaintiff's driveway;
3. cement barriers were placed at the end of the Road, near the start of the Right of way;
4. a garbage dumpster was installed at the end of Goat Canyon Road;
5. a porta-pottie was installed for several years near the end of Goat Canyon Road;
6. cherry pickers and members of the Cherry Growers' Association engaged in garbage collection;
7. a Code of Conduct (recorded on pocket-sized cards and sometimes in employment contracts) and rules regarding civil behaviour were instituted for the pickers; and
8. cars were ticketed or towed, or owners were asked to move them from restricted areas.

**16**  What the defendant describes as "working with local stakeholders ...", has come to look like the run-around to the plaintiffs, as some of the correspondence illustrates:

1. From the Minister, January 13, 2006:

Thank you for your recent letter and attachments regarding your concerns about the misuse of Goat Canyon Road right-of-way- access to Goat River and the impact it's having on residents of the road. I realize that improper use by some individuals of this right-of-way and the surrounding area is disturbing, and I appreciate you taking to forward me your background material.

I understand ministry staff have discussed this matter with you at some length over the past year or more and have worked hard to try to resolve the situation. However, the Goat Canyon Road and right-of-way provides necessary public access to a very popular section of the Goat River. As such, following a thorough review, ministry staff had to decline your request to purchase and close the right-of-way at the end of the road.

However, ministry staff recognize there are land-use issues associated with the access and, to ensure safe unencumbered access, have installed "No Parking" signs to restrict parking along one side of the road and within the cul-de-sac area. In addition, to address public concerns about enforcement, health and land use, issues outside my ministry's jurisdiction, ministry staff were instrumental in convincing the Regional District of Central Kootenay (RDCK) to assume a lead role in resolving this community land-use issue.

Ministry staff will continue discussions with local agencies to facilitate a long-term solution for housing for fruit pickers and dealing with health issues. We will also talk to the local RCMP to ensure appropriate enforcement of highway signs, and the RDCK regarding land-use issues.

I would encourage you to continue to work with the RDCK to resolve your concerns. Jacques Dupas, my ministry's West Kootenay District Highways Manager, would also be pleased to assist you wherever possible. Mr. Dupas can be reached at 250 356-6529 or by e-mail at Jacques.Dupas@gov.bc.ca.

1. From the Ministry of Community Services, November 2, 2006:

Your letter of October 6, 2006, addressed to the Honourable Ida Chong, Minister of Community Services, regarding concerns about garbage and inappropriate behaviour being exhibited by people in your neighbourhood, has been referred to me for a reply on her behalf.

While the issue of nudity and the consumption of alcohol in public is an issue for the RCMP, the Regional District of Central Kootenay (Regional District) has the ability to regulate nuisances, disturbances and unsightly premises.

Since this is a local matter within the jurisdiction of the Regional District, I can only encourage you to continue to work with the Regional District to address your concerns. While I understand that you have written to your director, John Kettle, as well as the Regional District Board, you could also submit a request to the corporate officer asking for an opportunity to present your concerns directly to the Regional District Board at its next meeting.

If you have other questions in regard to this matter, please do not hesitate to contact me.

1. From the Regional District of Central Kootenay, December 12, 2006:

This will acknowledge receipt of your letter, received on October 16, 2006, which was presented to the Board at their meeting held November 25, 2006. Although the Board sympathizes with your predicament, the Regional District has no jurisdiction over roads and public lands, other than those lands in which the District holds some type of legal interest, which I understand is not the case in this situation.

Unfortunately there is nothing that District can do other than to suggest that you contact the Ministry of Transportation, the Ministry with jurisdictional authority in this situation and, failing receiving a resolve to your concerns from the Ministry, advancing your concerns to your local MLA.

Please feel free to contact the undersigned should you require assistance in locating contact information for either the Ministry or your MLA. Best wishes in finding a resolve to this issue.

**17**  The Cherry Growers' Association has attempted to mitigate the harm caused by its seasonal workers. Its website includes, among the attractions of working in Creston, specific mention of the recreation at the Point. Donald Low outlined the steps his organization has taken to abate the behaviour that has distressed the plaintiffs. The Association has printed up cards setting out rules of conduct at the Point, and distributes them to all the seasonal workers. The Association has paid people and enlisted some volunteers to clean-up the beach area. It has compensated the plaintiffs on one occasion for work they have done. Mr. Low also organized the placement of a garbage bin at the top of the site.

**18**  The defendant's position is that beyond these measures, and those it has taken, the plaintiffs' complaints are matters for law enforcement, in the hands of the Creston RCMP.

**19**  Curiously, having taken that position, the defendant then proceeded to explain at length that the plaintiffs could not expect more than they have been getting from the RCMP. Although the police are not parties, the defendant led extensive evidence to establish that the police response could not be improved without trespassing on the government's right to make "policy" decisions in that regard. The Court heard a series of police witnesses and an expert, one Dr. Bryan Kinney, who opined that the only truly effective way to abate the activities complained of by the plaintiffs, apart from the creation of a park, would be to form a dedicated police force to address the criminal and anti-social behaviour associated with the right-of-way.

**20**  The police witnesses explained the resource limitations on the Creston Detachment of the RCMP, and suggested that it was not possible to patrol the right-of-way effectively without distorting other priorities throughout the area served by the detachment. Patrol officers are discouraged from going down to the Point for fear of injury.

**21**  In summary, the position of the defendant is that it is not responsible for the behaviour on the right-of-way, having done all it is reasonably obliged to do in mitigation. It asserts that any further complaints are matters of law enforcement, but that the police cannot be obliged to do more than they have already done. To the extent that the plaintiffs continue to experience nuisances from the users of the Point, including nuisances caused by unlawful and even criminal behaviour, the defendant's position is they will just have to learn to live with it.

**II**

**22**  Having heard the evidence and viewed the activities the plaintiffs have captured on video, I have no hesitation in saying that the plaintiffs are subjected every summer to several weeks of ongoing obnoxious behaviour emanating from the right-of-way.

**23**  I do not start from the premise that the plaintiffs are entitled to completely undisturbed enjoyment of their property. They purchased it knowing that it was next to a statutory right of way that had long been used as a swimming hole by local residents. They could not be heard to complain if, over the years, such usage had increased somewhat, and with it, incidents of occasionally annoying behaviour.

**24**  I also do not accept all of the evidence tendered by the plaintiffs. They have recorded some activity, particularly of a sexual nature, that takes place at a distance, and can only be discerned by the use of zoom lenses. I do not fault them for presenting this material, but some of it is remote and requires too much effort to constitute an immediate disturbance.

**25**  Discounting, at one end, the sort of activity that might ordinarily be expected, and at the other, the sort which requires extraordinary effort to detect, what remains is still the equivalent of a six week unsupervised party involving up to 200 people on premises without plumbing. The plaintiffs are confronted with daily examples of combinations of public drinking, littering, drug use, indecency, mischief and unlawful disturbances, and the hazard posed by open fires in a forested area. This lawless atmosphere is exemplified in the wilful damage to the parking signs, and to the temporary toilet that was placed on the site.

**26**  The plaintiffs ground their claim that the defendant is liable to them in nuisance on a series of cases involving commercial premises. In *Johnson v. Clinton*, [*[1943] 4 D.L.R. 572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC81-JSXV-G42W-00000-00&context=), a municipality in Ontario operated a town hall where dances were held. For some years the plaintiffs lived next to the hall and put up with the occasional disturbances which might be expected of the use of such a facility. In 1939 things changed and the disturbances became intolerable:

**3** In or about the year 1939 the situation changed and because of loud, vulgar and profane language, the deposit of empty or broken bottles at the rear of the plaintiff's residence and in the lane adjoining the same, the relieving of calls of nature by those attending social functions at the town hall and by other disturbances the peaceful enjoyment of the plaintiff's premises became no longer possible.

**4** In December 1942 this conduct on the part of persons attending functions at the town hall became so unbearable that the plaintiff moved the Court for "an Order restraining the Defendant, and each of its agents, lessees, servants, officers and workmen from maintaining or continuing to maintain a public nuisance in or about the Town Hall in the Town of Clinton, and for an Order restraining the Defendant, and each of its agents, lessees, servants, officers and workmen from otherwise interfering with the enjoyment by the Plaintiff of his household premises adjoining the said Town Hall in the Town of Clinton and for such further order and direction as to the Court may seem fit or proper."

**27**  The Court made the following observations:

**6** I find as a fact that during the years 1940, 1941 and 1942 there was much disturbance in or about the premises of the plaintiff by patrons of the town hall. In the years 1941 and 1942 there were 57 and 79 dances respectively held in the town hall; that the plaintiff was disturbed in his premises by profane language and that the electric light bulb over his door was broken by missiles thrown at it in the hands of some of these patrons. I find as a fact that empty or broken bottles were thrown into an area immediately to the rear of the plaintiff's apartment and in the land adjoining; that some of the people who congregated for these functions used the lane as a urinal. I find further that the plaintiff complained on many occasions to the police and to some of the town officials; and that he wrote the Board of Health in an effort to have the nuisances abated. I find as a fact that one David Elliott, a police officer, in the year 1941 had a gate put across the entrance of the lane which was closed during the night. I find that this gate was effective for the purpose of keeping the patrons of the town hall from committing nuisances in the lane. I find that this gate was taken down on the order of some town official and a small barrel or keg put in its place bearing a sign to which no attention was paid and the conduct complained of continued.

**7** Since the undertaking by the town before Mr. Justice Kelly the nuisance has been for all practical purposes abated.

**8** I am respectfully of opinion that the plaintiff is entitled to damages for nuisances committed in or about his premises during the years 1941 and part of 1942. See *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880; [1940] 3 All E.R. 349.

**9** In an article in the Fortnightly Law journal, vol. 13, June 15th, 1943 at page 24, an article from the New Zealand Law Journal, 1943, after commenting on the O'Callaghan case, says:

"It follows from their Lordships' judgments in the O'Callaghan case that a plaintiff in order to succeed, must establish that the defendant either knew or ought to have known of the existence of the nuisance. Having established this, the plaintiff must prove that the defendant suffered the nuisance to continue without taking reasonably prompt and efficient means for its abatement. Until it is proved that the defendant knew or ought to have known of the existence of the nuisance, he cannot be held liable for the acts of a trespasser who created it. Again, the occupier of the land is liable for a nuisance to the extent that he can reasonably abate it, even though he has neither created it, nor received any benefit from it. It is enough, said Lord Porter, if he permitted it to continue after he knew, or ought to have known, of its existence. To this extent, but to no greater extent, he must be proved to have adopted the act of the creator of the nuisance. Finally, it must be established that the defendant, having knowledge, could have prevented the danger if he had acted reasonably."

**10** See Rainham Chemical Works Limited vs. Belvedere Fish Guano Company Limited, [1991] 2 A.C. 465; Code v. Jones and Town of Perth, [*54 O.L.R. p. 425*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-DXWW-2249-00000-00&context=).

**28**  In the context of the present proceedings, it is interesting to note that the plaintiff in *Johnson* tried to get the police and local officials to intervene, and that their passive efforts, like the posting of signs, had no useful effect. Ultimately, a preventative undertaking to the court, in lieu of an injunction, effectively shut down the nuisance and the court assessed damages to the plaintiff for the time that the nuisance continued.

**29**  In *Newell v. Izzard*, [*[1944] 3 D.L.R. 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KWB1-JCJ5-2190-00000-00&context=) an injunction issued and damages were awarded in a case where a roller skating facility was established in a residential neighbourhood. The nature of the nuisance was akin to that in the present case.

**3** The Rollerdrome, as its name would indicate, is used for skating on roller skates operating on a hardwood floor. There are also dances at times and there is something going on practically every night except Sunday. The occupation starts about 7 p.m. and lasts until 11 or 11.15 p.m., though some of the habitues evidently leave a little earlier. Last year it was operated from the first of May but closed down for two weeks. The plaintiff says that there is a very decided roar from the roller skating. He is a commercial traveller and does considerable work in the way of correspondence and calculation in his home at night. The noise, he says, affects him while he is working. He finds he can not concentrate and has either to leave his work until the next day or leave it until they are gone for the night. That is the condition in the winter with storm windows on. In the summer he says it is just impossible to use the living room for ordinary purposes. During that season there is a great deal of noise from motor cars, blowing of horns, and generally it is seldom that he can get to bed and to sleep before 12.30 p.m. The plaintiff also refers to cases of drunkenness and indecency into the details of which I need not enter. His property is trespassed upon and often used as a toilet. The language used by some of the patrons of the rink is filthy in the extreme. On cross-examination tending to show that the only ground for complaint was in the summer time, plaintiff instanced a disturbance only three days before. This sort of thing he claimed happens frequently.

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**16** This case does not depend upon noise alone but upon all the other incidents which have been related in the plaintiff's case. Four years ago or less there was a quiet residential neighbourhood, occupied by 125 or 130 people of the same social class, people who had and desired to have peaceful homes in a quiet neighbourhood. Then came the advent of the defendant with her Rollerdrome, followed by a condition which one witness describes as "hell", and of which many residents complain. "What was there but the Rollerdrome to accomplish this change? What brought crowds, cars, obscenity and sexual misconduct to this peaceful place? There is only one answer. Now the attraction of a crowd is not necessarily a nuisance but when any place of resort attracts people who behave in a disorderly fashion and invade the privacy of a plaintiff, it depends upon consideration of the facts whether or not there is a nuisance.

**17** Now take the obscene instances which the evidence discloses: The vile language used; the insults to dwellers in the vicinity; the breaking down of shrubbery; the trespass by cars upon the plaintiff's lot. I am satisfied that in this quiet locality none of these things would have occurred but for the maintenance of the Rollerdrome. Those who operate it say they know nothing of the occurrences complained of. It is evident that they kept themselves inside so as to be able to cope with any outbreak which might occur; indeed, it seems all through their testimony that there was something to apprehend.

**30**  The plaintiffs referred to a third, more recent case, *Horse & Carriage Inn Ltd. v. Baron*, [*[1975] B.C.J. No. 1120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G271-00000-00&context=). There, the use of a restaurant changed over time:

**11** When the parties discussed the nature of the business that would be conducted on the premises in December of 1972, it was agreed that it would be the same as that which existed at the plaintiffs Alberni St. restaurant. This was described as primarily an eating establishment where liquor was sold as part of the business but not as the major item. There was also music, whose volume was at a sufficiently low level so as to allow normal conversation and there was a type of clientele that was moderate in its behaviour. It is likely that if this type of a business had been carried on at the "Three Kings Head Inn" on Yew St. the parties would have probably settled their differences. However, what did take place as it was described to me was something entirely different.

**12** It seems that because of its particular location on Yew St., the business attracted a younger clientele who were not so much concerned about the quality of the food that the plaintiff had to offer as they were the strength of the decibel level of the music and the freedom to consume alcohol without being required to purchase any quantity of food. The plaintiff decided to cater to this demand and installed amplifiers for the music so that the sound was of such a volume that no conversation could take place inside, even at the level of shouting. In the summertime this was particularly irritating to the surrounding neighbours because no heating or airconditioning was installed and the doors of the premises had to be left open. The sound then spilled out into the local community. The sound-proofing done by the plaintiff was of insufficient quality to have any appreciable effect on reducing the irritation of this kind of noise to the defendant who lived immediately above.

**13** In addition, at one time, the plaintiff had a policy of allowing patrons to purchase a cheese plate at a cost of some 25[cents] to $1. They could then remain the whole night without buying any more food and drink as much liquor as they were able.

**14** This strategy was successful and young people flocked to the plaintiff's establishment. Unhappily, it also attracted some undesirable customers and these were the cause of many of the problems. In order to control them the plaintiff, rather than changing its method of doing business, employed "Bouncers". Despite this the situation deteriorated and the evidence showed that customers were vomiting in the street in and around the building, engaging in fist fights, throwing beer bottles against cars and buildings, urinating in the streets and adjoining alleyways, exposing themselves, using coarse and obscene language, openly smoking marijuana both inside and outside the building, and throwing chairs at one another. At one time a "motor cycle gang" came and attempted to rape one of the waitresses before the police finally intervened. On another occasion there was a knifing in one of the washrooms. Besides this, the police attended from time to time in response to complaints both from the neighhbours and from the management.

**31**  Bouck, J. cited both *Johnson* and *Newell* in concluding that the plaintiffs had an actionable nuisance and assessed damages:

... The type of business carried on by the plaintiff on the premises interfered with the defendant's comfort and enjoyment of his apartment. The noise as described, was a substantial interference with the defendant's right to moderate quiet. The other objectionable conduct of the patrons of the plaintiff amounted to a nuisance. It was a probable consequence of the plaintiff's business practice and should have been foreseen by it. The plaintiff could have prevented the noise and the conduct of the patrons if it had acted reasonably. It did not. Therefore it is as answerable as if this was its actual objective: *R. v. Moore* (1832), 3 B. & Ad. 184, 110 E.R. 68; *Newell v. Izzard*, [*[1944] 3 D.L.R. 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KWB1-JCJ5-2190-00000-00&context=), [*17 M.P.R. 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KWB1-JCJ5-2190-00000-00&context=); *Johnson v. Clinton*, [*[1943] 4 D.L.R. 572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC81-JSXV-G42W-00000-00&context=), [*[1943] O.W.N. 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC81-JSXV-G42W-00000-00&context=). I assess the defendant's damages for the nuisance caused to him by the plaintiff at $2,500.

**48** The defendant is also entitled to an injunction restraining the plaintiff from carrying on the nuisance and counsel may speak to the form of this order if they cannot agree.

**32**  By the standards applied in these cases, the plaintiffs submit that the defendant has clearly permitted a nuisance to emanate from lands it owns and controls, to the detriment of the plaintiffs. Here, as in those cases, the nuisance has overwhelmed the ability of the police to respond within the limits imposed by their budgets and priorities.

**III**

**33**  The defendant began its legal submissions at first principles. Thus it offered a definition of the tort of private nuisance:

"an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land... where, in light of all the surrounding circumstances, this injury or interference is held to be unreasonable": *St Pierre et al. v. Minister of Transport and Communications*, [*[1987] 1 S.C.R. 906*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23DG-00000-00&context=) at 914-915, adopting the definition from Street, *The Law of Torts,* 6th ed. (London: Butterworths, 1975) at 219.

**34**  The defendant submitted that the test for nuisance is set out in *Royal Anne Hotel Co. Ltd. v. Ashcroft*, [*[1979] 2 W.W.R. 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BY-00000-00&context=) at p. 266:

The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiffs' land and is that interference unreasonable? Where ... actual physical damage occurs, it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where the interference results in lesser or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes.

[emphasis added]

**35**  The defendant submits that in *Royal Anne* the court went on to say that not every smell or sound "will entitle the indignant plaintiff to recover" but that the invasion must be "substantial and serious". This notion was restated in *Schenck v. The Queen* [*(1981), 131 D.L.R. (3d) 310*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DXWW-22F7-00000-00&context=) at p. 319 (affirmed by the S.C.C. at [*[1987] 2 S.C.R. 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23FG-00000-00&context=)):

Certainly, not every invasion of a person's interest in the use and enjoyment of his land is actionable. The principle of "give and take, live and let live" is fundamental to the adjustment of claims in the law of nuisance.

[emphasis added]

**36**  The defendant submits that these observations illustrate that the law of nuisance inherently involves balancing of competing interests - the interests of a landowner to use property as it sees fit and the interest of others to use their land without unreasonable interference.

**37**  The cases advanced by the plaintiffs demonstrate that, in commercial contexts, the courts will take steps to see that serious nuisances are estopped or prevented. The plaintiffs suggest that the duty cast upon the defendant is, likewise, to put an end to the obnoxious activities taking place on the right-of-way. In each of the cases cited the effective remedy was not some "middle ground" but relief that put an end to the nuisance, combined with damages.

**38**  The defendant claims a distinction, however, as government. It submits that "having regard to its own constraints" it has discharged its duty to take reasonable steps, and that its election not to alienate or close the right of way but to maintain it to ensure the public access to the water is a non justiciable "policy" decision.

**39**  The defendant submits that the question of whether it has any responsibility must be addressed in light of "the difficulty with controlling the actions of others where the owner does not occupy the property". It cites *Hall v. Beckenham Corp.,* [1949] 1 K.B. 716. There, a local authority was in control of a "recreation ground" where hobbyists flying model airplanes were annoying adjacent neighbours. The authority successfully resisted an action against it in nuisance, on the grounds that, because it was not the occupier of the premises, but merely its custodian or trustee on behalf of the public, there could be no liability. The Court observed, at p. 728:

I think that the corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their by-laws. They cannot put themselves in the position of judges of whether a person may be causing a nuisance to someone outside the park. Their proper attitude to such a complaint is to say that the complainer must take action against the person who is said to be committing the nuisance.

If the habit of flying these model aeroplanes is becoming a nuisance, the corporation may, and I am told that they have in fact done so, propose a new by-law; but that is a matter with which I have no concern at the moment. It seems to me that, as things are, anyone who wishes can go into this ground and fly his aeroplane subject to being proceeded against by a person aggrieved if in fact he commits a nuisance. I think that the corporation cannot be sued for this matter, and that the action against them is ill founded. I therefore decide the preliminary point in their favour.

**40**  The defendant submits on this analogy that if a person using public land is breaking the law, the question becomes a matter of law enforcement, ineffectual as that may be.

**IV**

**41**  I think this analogy is inapt. The point of *Hall v. Beckenham* is that members of the public were at odds over the use of public space in a context where there was no breach of any statute or by-law. In the absence of such authority the corporation could not be enlisted by one side, or liable to the other, for a private nuisance.

**42**  A case that I think more instructive is *Page Motors Ltd. v. Epsom and Ewell Borough Council* (1981), 80 LGR 337 (C.A.). There, a motor vehicle repair business whose workshop was located on lands leased from The Borough Council was plagued by nuisances from an adjacent property owned by the Council, but occupied by itinerants described as "gypsies". *Page Motors* suffered business losses as a result of the itinerant's behaviour. The Borough Council obtained a possession order but for various reasons did not enforce it. The problem went on for five years.

**43**  The Borough Council defended on the basis that the delay in remedying the situation was not unreasonable. It also asserted that in failing to abate the nuisance it had acted within its discretion. The Court of Appeal, per Ackner, L.J. noted;

In my judgment the learned judge was entitled to conclude that until 1977 it was the political will that was lacking and that among all the factors which influences the appellant, the predicament of the respondent did not rank very high, for indeed it was not until the writ was issued that it ever entered the minds of the appellant's officers that the respondent might have financial claims against the Council. The evidence was overwhelming. Five years to find the solution was an excessive period.

**44**  Fox, L.J. made the following observations:

The central facts with which we are concerned are the following:

1. The plaintiff entered into occupation of its site in late 1973;
2. From then until late 1978, the neighbouring site, belonging to the council, had been 17 and 74 gypsy caravans and their occupants upon it;
3. The council did not grant the gypsies any licence to occupy the land;
4. The gypsies behaved as alleged in paragraph 8 of the statement of claim (which is set out in the judgment of Mr. Justice Balcombe at 78 Local Government Reports at pages 509 and 510);
5. As a result of harassment by the gypsies, customers refused to bring their cars to the plaintiff's premises for servicing, suppliers refused to deliver goods and the plaintiff's staff were in fear of having to enter and leave the plaintiff's premises;
6. The only satisfactory remedy for the plaintiff was the removal of the gypsy encampment;
7. The council twice obtained orders for possession but did not enforce them.

In general A is under no duty of controlling B to prevent his doing forseeable damage to C. There can, however, exist relationships between A and B which can impose such a duty. The relationship between adjoining landowners as regards nuisance is, I think, such a case. I agree with the judge that *Sedleigh-Denfield v. O'Callaghan* [1940] AC, 880 decides (a) Where a nuisance is due to the act of a trespasser or stranger, the occupier of the land is liable if he continues the nuisance; (b) An occupier continues a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end though with ample time to do so.

We were referred to the decision of the House of Lords in *Dorset Yacht Company Ltd. v. Home Office*, [1970] AC 1004, [1970] 2 All ER 294. That case, however, while it recognises the general proposition that a person is under no obligation to control the acts of another to prevent him from harming a third person, does not affect the prior decision of the House of Lords in the *Sedleigh-Denfield* case.

Mr. Shiemann, on behalf of the council, contends that accepting that *Sedleigh-Denfield* establishes that a land-owner may be liable for nuisance caused by a trespasser, the facts of the present case take it outside the *Sedleigh-Denfield* principle. It is said that *Sedleigh-Denfield* was concerned with the state of the land; what is complained of in the present case is the activity of the trespassers rather than the condition of the land.

There are, I think, two questions here. First, did the activities of the gypsies constitute a nuisance? Secondly, if the activities did constitute a nuisance, is there any relevant distinction between a nuisance caused by an interference by the trespasser with the state of the defendant's property and a nuisance caused by the activities of the trespasser?

As to the first of those questions, it seems to me that the activities of the gypsies did constitute a nuisance in law. Their acts were a wrongful interference with the plaintiff's enjoyment of its land by the use of the council's land. Apart from the plaintiff's premises (which were in the northern part of the Nonsuch Estate) and the premises of one other firm (which were in the southern part of the estate and are not of consequence in relation to the present case) the whole of the estate was owned by the council. What the gypsies did, they did on and by the actual use of the council's land, whether it was blocking the estate roads, or using these roads dangerously or burning rubbish or threatening persons on the estate roads or firing guns or throwing missiles. The activities themselves were plainly a serious interference with the plaintiff's enjoyment of its land. They constituted a nuisance.

Is there then in law any distinction of the kind posed in the second question? I do not think so. I see no difference in principle between allowing a trespasser to alter the condition of your land so that it floods your neighbour's land and allowing a trespasser so to use your land that he prevents or inhibits lawful access to your neighbour's land.

In my opinion, therefore, the present case falls within the *Sedleigh-Denfield* principle.

Mr. Schiemann, however, advances another contention. He says that the position of a local authority is essentially different from that of a private landowner. He says, in effect, that a local authority may in the exercise of its statutory powers be liable where a private landowner would not, and that it has a correlative immunity from attack for breach of duty so long as the council is acting intra vires. We were referred to *Anns v. Merton London Borough*, [1970] AC 728, [1977] 2 All ER 492, at 755, were Lord Wilberforce said in relation to a claim against the Merton Council: "A plaintiff complaining of ***negligence*** must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this he should, in principle, be able to sue".

And in *Doset Yacht Company Ltd. v. Home Office*, [1970] AC 1004, [1970] 2 All ER 294, Lord Diplock said: "It is not the function of the court, for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits upon the department's or authority's discretion. Only if it did not, would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiff's right in civil law".

Both of those cases, however, were concerned with the exercise by the authority or the department of statutory powers. The present is not such a case. The council were not under a statutory duty to provide sites for the gypsies or to consider whether to provide sites. Under section 24 of the Caravan Sites Act 1960 the council had a purely permissive power to provide sites for any persons. But I do not think that that power is material here; the council did not exercise or purport to exercise it. The council are sued as landowners.

That brings me to the question whether, upon the basis that there was a nuisance, the council continued that nuisance. The council continued the nuisance if, with knowledge of the existence of the nuisance, it did not take reasonable steps to bring it to an end with ample time to do so. That the council was aware of the existence of the nuisance, there is no doubt. The problem is whether the council took reasonable steps to bring it to an end. The plaintiff's case is that the council had the resources to obtain and enforce an order against the gypsies for possession of the property at a very early date in 1974, and that one need look no further. I accept that the council did have such resources, but I think it is necessary to look more widely at the circumstances of the case to determine the extent of the council's duty. In the Privy Council cause of *Goldman v. Hargrave*, [1967] 1 AC 645, [1966] 2 All ER 989, the origin of the nuisance was an Act of God - a tree struck by lightning caught fire. Lord Wilberforce, giving the advice of the Board, said at page 663: "One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it and the ability to abate it... the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances".

[emphasis added]

**45**  In the present case the position in which the defendant finds itself is similar. The defendant is aware of the nuisance to the Mynotts, and of a large number of breaches of criminal and regulatory laws enabled by use of the right of way, including public mischief, public indecency, causing of disturbances, and *Liquor Act*, drug, environmental, and fisheries offences. Notwithstanding, the defendant claims the right, as government, to limit itself to efforts it knows to be ineffectual, to declare them "reasonable", and to permit the right of way to constitute a zone of lawless conduct. It flatly submits that it is a valid exercise of public policy to allow public access to water on government held rights-of-way and to then take no interest when there is wholesale abuse of the privilege.

**46**  This was the explicit effect of the evidence of David Fisher, the official who drafted the Ministry's policy. The policy itself is succinct:

Existing rights of way that provide public access to water are to be retained for public use.

PURPOSE:

It is the goal of the ministry to ensure that public access to water is preserved and dealt with consistently across the province. To that end, rights of way under the ministry's jurisdiction which provide public access to water are to be retained and managed with both present and future public use in mind. Any development of specific sites should be carried out in collaboration with interested members of the public and with relevant local governments.

SCOPE

This policy applies to all existing rights of way that access the boundary of a body of water. Dedication of new rights of way is a requirement of subdivision and is enforced by the Provincial Approving Officer.

**47**  Mr. Fisher indicated that the policy applied to all rights-of-way without regard to the amount of public use.

**48**  In this case the defendant has, in accordance with the policy, refused to sell the right-of-way to the plaintiffs. In contrast to its passive position respecting the nuisances created by the users of the Point, the defendant reacted swiftly and decisively when the plaintiffs constructed gates across the right-of-way. The defendant forced the plaintiffs to remove them.

**49**  The defendant's policy defence further turns on the notion, expressed 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 para. 16, that, despite the enactment of the *Crown Proceeding Act*:

... the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. [emphasis added]

**50**  The defendant submits that this includes claims in nuisance as well as ***negligence***, given the broad language in which *Just* is expressed, at para. 18:

[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. However, the implementation of those decision may well be subject to claims in tort. [emphasis added]

**51**  The defendant summarizes the public policy defence as arising in two possible legislative scenarios, following the observations of McLachlin, J. in *Swinamer v. Nova Scotia (Attorney General)*, [*[1994] 1 S.C.R. 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CG-00000-00&context=) at para. 4:

1. if a statute confers powers to interfere with the rights of individuals, then no action will lie unless the public authority was negligent in doing what was authorized; however,
2. if a statute confers power but leaves the exercise of those powers to the discretion of the public authority, then the authority has the option of whether or not to act. But if it chooses to exercise those powers, a private law duty of care arises.

**52**  The defendant submits that the application of the policy defence is "particularly apt when the nuisance complained of is not the fault of the landowner but is the result of the actions of 'trespassers or strangers'." It concedes a duty to take reasonable steps, but claims the right, on policy grounds, to define "reasonable steps" as the demonstrably ineffectual steps already taken. It maintains that *de facto* any decision which involves the expenditure of funds is a "policy decision".

**53**  The defendant further advances a form of *in terrorem* argument that, given the number of such rights-of-way in the Province, any articulation of a duty could have far reaching consequences.

**V**

**54**  When one examines the policy rationale, it is clear that the decision to retain public rights-of-way that provide access to water, does not involve a power directly conferred by statute. In line with the observations of Fox, L.J. in *Page Motors* (see para. 44 above) I think it doubtful that the defendant's permissive approach to rights-of-way is, properly speaking, an exercise of government power at all. From the Mynotts' perspective the defendant is simply a landowner that allows a large unsupervised six week party to continue on its property every summer.

**55**  However the defendant wishes to characterize its decision, it cannot have it both ways. It cannot extol the virtues of a policy of public access, while branding those who accept the invitation implicit in the policy "trespassers or strangers" depending on the requirements of argument.

**56**  In light of the policy, the defendant can only be saying that the public use of rights-of-way accords with its objectives. That does not make public users "trespassers" unless the authority under which they attend is revoked. Where the behaviour of invitees amounts to nuisance a duty is cast upon the landowner to control that behaviour or to put an end to it.

**57**  If the defendant is not prepared to treat public users of the right-of-way as trespassers, except rhetorically, the reasonable thing to do in the circumstances is obvious. It is the solution the municipal corporation offered in *Johnson v. Clinton:*  supervision. The installation of adequate sanitary facilities together with a supervisory presence at the site capable of preventing mischief and reporting unlawful behaviour for the six to eight weeks of the cherry picking season would almost certainly put an end to the issues the plaintiffs have brought before the Court.

**58**  This is not a case where the court is faced with government activity in the public interest that *inevitably* results in disruption to private interests. In the recent case, *Susan Heyes Inc. (Hazel & Co.) v. South Coast B.C. Transportation Authority*, [*2011 BCCA 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G346-00000-00&context=), the Court of Appeal considered the inevitable nuisance to some members of the public occasioned by the construction of a mass-transit facility. There, the trial judge, [*[2009] B.C.J. No. 1046*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G9-00000-00&context=), had found that a method of construction that would have avoided nuisance to the plaintiff business should have been undertaken. In rejecting that reasoning the Court of Appeal, per Neilson, J.A., found that that finding simply transferred, rather than abated, the nuisance:

[142] ... the Canada Line could not be built without significant disturbance to many citizens' use and enjoyment of their property. The impact of construction would be greater at Broadway if the bored tunnel method was used, and more significant in Cambie Village with cut and cover construction.

[143] It is impossible to now conduct a speculative and nuanced assessment of the four nuisance factors and determine whether the nature, severity, and duration of harm arising from bored tunnel construction would have actually created a nuisance in other locations. Nevertheless, at the time the appellants had to decide which proposal to accept, I am persuaded it is fair to say the nuisance-causing potential of both construction methods was comparable.

[144] The trial judge rejected the defence of statutory authority because he found the option of bored tunnel would have avoided nuisance to Hazel & Co. That finding, however, had the effect of simply transferring the nuisance-causing potential to other parties at other locations. In my view, in the circumstances of this case an option that only relocates the disturbance is not a non-nuisance alternative, and should not operate to defeat the defence of statutory authority.

[145] While s. 4(1)(e) of the *GVTAA* left the construction method for the Canada Line to TransLink's discretion, that discretion could not be exercised without significant disruption to many citizens' use and enjoyment of their property, regardless of the construction method chosen. TransLink's choice to proceed with the SNC-Lavalin/Serco proposal and cut and cover construction did not transform the RAVxpress option into a non-nuisance alternative simply because it would not have disturbed Hazel & Co. In effect, s. 4(1)(e) of the *GVTAA* provided statutory authority for the inevitable nuisance that would arise in the course of building rapid transit in this heavily-populated urban area.

[146] I accordingly conclude the appellants have satisfied the burden on them to establish the defence of statutory authority. Section 4(1)(e) of the *GVTAA* provided statutory authority to build the Canada Line. Nuisance was an inevitable result of exercising that authority because there was no practically feasible alternative to the SNC-Lavalin/Serco proposal, which included cut and cover construction, and, in any event, because there was no construction method that provided a non-nuisance alternative in building the Canada Line.

**59**  *Heyes* illustrates the principle that a government-authorized undertaking in the public interest, will not be vulnerable to claims in nuisance if nuisance is the inevitable result of exercising its authority. This essentially accords with the circumstances referred to in *Swinamer* at para. 4(a) (see para. 51 above). Although the policy is not a statutory power, it appears at times that the defendant's position is that it has chosen not to act, obviating a private law duty of care (see *Swinamer* para. 4(b) (para. 51 above). Elsewhere, however, the defendant has conceded a duty but suggests it has met its responsibilities in the actions taken to date.

**60**  That would only be persuasive if what has been done exhausts the reasonable alternatives. In *Heyes* it was clear that there was no way to effect the public purpose of installing a mass transit service without significant inconvenience to someone. It is implicit in *Heyes* however, that the availability of a non-nuisance-causing alternative - other factors being equal - might well have led to a different outcome. There is clearly a duty to abate nuisances that are not the *inevitable* result of government policy.

**61**  The overriding public policy consideration motivating the defendant is the conservation of government resources: it does not want to spend money. This is manifest not only in its answer to the plaintiffs' claim on its face - an assertion that there is no duty on the government to control "trespassers" and a suggestion that the plaintiffs look to law enforcement - but even more obvious in its highly developed defence at the second line - that the Mynotts cannot expect help from law enforcement, because the police lack the resources. *Catch-22* comes irresistibly to mind.

**62**  It is utterly foreseeable that in one place or another, the implications of the government policy on access to public water might attract a pattern of use that requires more than benign neglect. That is all that has happened in Creston. The presence of the itinerant workers has led to obnoxious and illegal behaviour which is a nuisance to the Mynotts. There can be no immunity for "policy making" that amounts to setting a chain of events in motion and completely ignoring the predictable consequences. The standard of what is reasonable is objective. It cannot be altered by the circular notion that government spending is policy, so under-pending is "reasonable", because spending decisions are policy.

**VI**

**63**  Courts do not enjoin or mandate government action. In our theory of government it is not necessary. Governments are expected to act in accordance with what the Court declares the law to be. I do not hesitate to say that the defendant has permitted a nuisance to emanate from premises it controls and that it has a duty to effectively abate that nuisance. It has, to date, failed to take reasonable steps to do so.

**64**  The defendant has expressed a reluctance to act positively, even in the face of this outcome, and has submitted that, in the event of such a declaration, the Court should simply assess damages in a lump sum allowing for past and future harm to the Mynotts. This is clearly inappropriate. The Court should not be invited to implicate itself in the defendant's neglect of duty by effectively licensing it.

**65**  The proper course, in my view, is to adjourn this matter to await the defendant's abatement during the next summer season. If an effective end has been put to the activities, it will then be possible to estimate the Mynotts' damages on a one-time basis. I emphasize that it is completely up to the defendant to work out the means by which a remedy is effected.

**66**  If an effective remedy has not been implemented, the question of damages will have to be revisited in light of those circumstances. The matter is put over for this purpose to September 19, 2011, at Cranbrook, to fix a date for continuation.

**67**  The plaintiffs are entitled to special costs throughout to date.

T.M. McEWAN J.

**End of Document**

[***Radysh v. Foley, [2001] B.C.J. No. 828***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X35H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Quesnel, British Columbia

Chamberlist J.

Heard: April 3 and 4, 2001.

Judgment: April 23, 2001.

Quesnel Registry No. 9052

**[2001] B.C.J. No. 828** | 2001 BCSC 591 | 104 A.C.W.S. (3d) 1057

Between John Thomas Radysh, plaintiff, and Gerald David Foley, defendant

(67 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, evidence and burden of proof — Damages — Torts affecting the person — Assault — Aggravation — Aggravated damages, assault and battery.**

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| Action by Radysh for damages arising out of a motor vehicle collision and subsequent assault and battery by Foley. Foley was driving his truck on a blind curve of a country road when he encountered Radysh and his son driving their motorcycles in the other direction. Foley believed that the Radyshes were driving in the lane for oncoming traffic. He angrily turned his truck around and caught up to the Radyshes, then pulled in front of the elder Radysh, on the lead motorcycle with his daughter as passenger. Foley slammed on his brakes and prevented Radysh from taking evasive action by passing. Radysh's motorcycle went down and he slid along the roadway, suffering injuries to his shoulder, arm, face and ankle. Foley's truck ran over the motorcycle, which was 18 days old and had cost $7,035. Radysh's helmet and motorcycle jacket were destroyed. He checked his daughter then had words with Foley, who struck him in the face. Radysh had a broken cheek, a persistent shoulder disability and a chipped tooth, but the prognosis was for full recovery. Radysh was 40 at the time of the accident. He worked on a fuel delivery truck.  HELD: Action allowed.  Radysh was entitled to damages totalling $31,768. Foley was wrong in resorting to self help and in attacking Radysh. It was impossible to determine which of Radysh's facial injuries, if any, were caused by the battery. However, the attack was without provocation and was humiliating or embarrassing such that aggravated damages of $2,000 were justified. Radysh was also entitled to a five-month gym membership and part of his firewood costs, the repair cost of his motorcycle, replacement of his clothing, $1,182 for loss of his income and $177 for rehabilitative treatment. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, s. 144(1)(b).

**Counsel**

B.K.P. Chudiak, for the plaintiff. D. Randall, for the defendant.

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| **CHAMBERLIST J.** |

**1**   On May 3, 1998, John Thomas Radysh, presently aged 43 and aged 40 at the date of the incident, was riding a 1998 Kawasaki motorcycle with his daughter Lisa as his passenger. His son Jonathan was riding on another motorcycle. The two motorcycles were being driven on Olson Road, a gravel highway to the north of Quesnel, British Columbia. The plaintiff and his son had been riding their motorcycles at the Mitchell Ranch, which is approximately 3 to 4 kilometers away from their home. They had arrived at the Mitchell Ranch at approximately 10:00 a.m. and had spent the day riding the motorcycles. They were returning home at between 6:00 and 6:30 p.m.

**2**  As they entered into what might be called a blind-corner, with Jonathan in the lead, a pickup truck driven by the defendant, Gerald David Foley, was also approaching the corner from the opposite direction. It was necessary for both Jonathan Radysh and Gerald Foley to take evasive action with both Jonathan and Gerald Foley moving their vehicles to their right sides. Both motorcyclists passed the truck but it appears that Mr. Foley, in taking his evasive action, went off the highway into the ditch. There was some controversy as to whether the pickup truck in fact left the travelled portion of the highway, but, for the purposes of this decision, it is not material.

**3**  Nevertheless, it is quite clear that Gerald Foley, although heading towards Cinema, British Columbia to obtain cigarettes, decided 20 seconds after this encounter with the Radysh family to turn around and follow the two motorcyclists. By driving at speeds up to some 75 m.p.h., Gerald Foley was able to catch up to the motorcyclists fairly quickly. He overtook Jonathan Radysh, who was now riding behind his father, and thereafter overtook the plaintiff John Thomas Radysh.

**4**  Gerald Foley claims that he passed both motorcyclists safely and remained in the centre or left of centre of the roadway when he was struck from behind by the motorcycle being driven by John Thomas Radysh, with Lisa Radysh as his passenger. Gerald Foley says that as a result of being struck from behind, the motorcyclist lost control with the motorcycle tipping over with both the plaintiff and his daughter being thrown from the motorcycle.

**5**  The plaintiff's position is that after Mr. Foley passed him Mr. Foley moved his truck in front of the Radysh motorcycle and then hit his brakes. Mr. Radysh testified that he attempted to stop by first using his back brake but he was unable to slow down fast enough and was quickly catching up to the truck. He then swerved to the left to pass the pickup but as he did so he says Mr. Foley moved his truck to the left in the direction where Mr. Radysh was moving with his motorcycle and in the result cutting Mr. Radysh off. At that point, Radysh attempted to use his front brake as well as his back brake. The motorcycle went down. Mr. Radysh was able to push himself away from the motorcycle but the motorcycle continued forward passed him as he was sliding on the ground. Mr. Radysh testified that he could hear his motorcycle getting run over. He testified that his foot was being dragged under his bike but he managed to roll away. When Mr. Radysh came to a stop, he testified he was in the far left shoulder of the road with his motorcycle ahead of him some 10 to 15 feet and that the pickup had come to a stop some 20 to 30 feet ahead of his motorcycle.

**6**  Following the accident, the plaintiff sat up, removed his glasses and helmet and noted his daughter Lisa in a ditch on the left-hand side of the road behind him some distance. He then walked over to where she was and told her to sit still. In the meantime, Mr. Foley and his son Brian Foley stepped out of the pickup.

**7**  Words were exchanged between them and ultimately Mr. Foley struck the plaintiff on the left side of the plaintiff's face at or near his temple area.

**8**  A short time later, Cst. Poulin, of the R.C.M.P., attended as did an ambulance. Mr. Radysh and his daughter were transported to the Quesnel hospital. Cst. Poulin investigated at the scene and as a result of those investigations Mr. Radysh was charged with two counts under the Motor Vehicle Act for having an unlicenced motorcycle on the highway and for not having a driver's licence. At the time Mr. Radysh had a learner's drivers licence but he was driving contrary to the conditions contained therein namely not being supervised by the holder of a proper licence and having a passenger on his motorcycle.

**9**  Gerald Foley was charged under s. 144 (1)(b) of the Motor Vehicle Act, that he did drive a motor vehicle on a highway without reasonable consideration for other persons using the highway. No dispute was filed with respect to that traffic violation report.

**10**  Against this background, I am first required to determine liability for the accident, and secondly, whether or not there is any defence to the plaintiff's claim for damages arising out of the assault and battery alleged against the defendant arising out of the altercation that occurred after Mr. Foley got out of his pickup and approached the plaintiff.

**11**  Mr. Foley maintains that when he turned his truck around to follow the Radysh family on their motorcycles he was calm and only wanted to talk to the motorcyclists about their failure to maintain their motorcycles to their side of the roadway. He testified as to safely passing both motorcyclists and it was whilst he was passing the lead motorcycle being driven by the plaintiff, that the plaintiff ran into him from behind while Mr. Foley was still in or about the middle of the highway. He testified to looking over his shoulder to ensure that he was passing safely. He maintains that at no time was he mad or upset.

**12**  Mr. Foley's self-description of his demeanour is inconsistent with the testimony of other witnesses including his son Brian who was called as a defence witness. Brian Foley, under cross-examination, agreed that he could tell his father was upset when he first had to swerve to avoid any contact with the motorcyclists.

**13**  Cst. Poulin testified that even by the time he arrived at the scene, approximately 8:05 p.m., Mr. Foley was still in an agitated state. He described Mr. Foley as being mad. He described having first interviewed Mr. Foley and then attempting to speak to Mr. Radysh. Cst. Poulin described the difficulty he had getting a story from Mr. Radysh as Mr. Foley kept stepping in between them. He described Mr. Foley as being in a rage. He said that Mr. Foley, although speaking calmly, was gritting his teeth.

**14**  In the end result, Cst. Poulin, from his examination of the accident scene, was unable to confirm either story. He examined the Foley pickup truck but could not confirm if the motorcycle had come in contact with the rear bumper but speculated from his review of the rear bumper and his review of the motorcycle that the motorcycle had fallen on its left side and the right hand side handle grips had come into contact with the rear bumper.

**15**  John Radysh described looking at the defendant as he observed him coming towards him after getting out of his truck. He described the defendant as having clenched fists. He described Mr. Foley as looking like someone looking for a fight. He testified to Mr. Foley saying to him, as he approached him on the roadway:

You guys should learn to stay on your side of the damned road.

After words were exchanged, he described trying to avoid Mr. Foley but that Mr. Foley would not leave him alone. He asked Mr. Foley his name. The information was declined. The two of them started circling one another and then, according to Mr. Radysh, the defendant asked him twice:

Do you want a go?

**16**  Mr. Radysh described Gerald Foley as circling him with his clenched fists. He then described Mr. Foley tackling him and throwing him to the ground. He described getting Mr. Foley in a type of bear-hug so as to prevent Mr. Foley from punching him. He then let him go, but thereafter, he rolled over to get up but upon standing up Radysh turned to Foley and asked:

What kind of hillbilly are you - you run me down and then pick a fight with me?

He then turned towards his daughter, and without warning, Mr. Foley punched him.

**17**  To a great extent Gerald Foley's description of what occurred after he got out of the truck is quite similar, although I found it to be biased towards his position of not being angry. He testified that upon getting out of the pickup truck words were exchanged and then he says Mr. Radysh chose to grab onto him and that he grabbed him back and sat him on the road; told him he was making a mistake, and then let him get up. He denies hitting Mr. Radysh at that time but does admit hitting him once when Mr. Radysh's daughter showed up and used profound language towards him. He testified that he punched Radysh because he was frustrated and aggravated by what had happened and the profound language Mr. Radysh's daughter was using towards him. He testified that the police arrived not long after that.

**18**  Jonathan Radysh testified on behalf of the plaintiff. He is presently 17 years of age and was 14 years old the date of the accident. His evidence with respect to what happened between his father's motorcycle and the Foley truck was neutral as the amount of dust left by the Foley truck as it passed him made observation by him difficult. He testified that he saw a brake light in the dust and because of its height and size related it to the truck rather than to his dad's motorcycle. He did however stop his motorcycle and walked up the road to see what had happened.

**19**  He saw Gerald Foley get out of his vehicle and approach his father. He described Mr. Foley as having his hands clenched at his side. After words were exchanged, he testified that Mr. Foley said words to the effect:

Let's fight, cock sucker.

He described Foley grabbing his dad and wrestling him to the ground.

**20**  He heard these words from Mr. Foley:

Will you learn to ride on the right hand side of the road.

**21**  He then described looking back at Mr. Foley after he heard a whack from Gerald Foley having hit his father.

**22**  An appropriate analysis of the evidence in this case must begin with the consideration of the words of O'Halloran, J. in FARYNA v. CHORNY, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) at p. 357 Mr. Justice O'Halloran said this:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. . . .

**23**  Applying those helpful comments to the evidence before me, I have concluded that after forming the opinion that the lead motorcyclist was not maintaining his motorcycle on the right hand side of the highway resulting in Mr. Foley having to take evasive action which ultimately may have put him in the ditch, Mr. Foley determined to catch up with the motorcyclists, stop them and in one way or another, express his displeasure at the way he perceived them driving. I find that he was upset and angry when he turned his truck around and gave chase to the motorcyclists.

**24**  I find that Mr. Foley passed the two motorcyclist and after passing the lead motorcycle driven by Mr. Radysh with Lisa Radysh as his passenger, turned in front of them without giving due consideration to their ability to safely slow their motorcycles or alternatively avoid his vehicle. I find that he did interfere with an evasive passing action made by Mr. Radysh solely for the purpose of avoiding any collision and that Mr. Foley's driving contributed to and was in fact the sole cause of Mr. Radysh becoming unable to control his motorcycle and the resultant damage occasioned to the motorcycle and Mr. Radysh when Mr. Radysh was unable to control the motorcycle.

**25**  Where the evidence of Mr. Radysh differs from that of Mr. Foley, I accept the version tendered by Mr. Radysh.

**26**  Mr. Brian Foley gave evidence on behalf of the defence. I found his evidence to be materially different from the evidence of not only Mr. Radysh but also of Mr. Foley, his father. Relative to what happened at the scene of the incident I found Brian Foley's evidence to be unreliable because of what I might call "lack of observation" while his father was passing the motorcyclists. I also find his evidence unreliable because of his attention being directed at the scene to assisting Lisa Radysh and also because he left the scene on two occasions. Where his evidence differs materially from the evidence of Jonathan Radysh and John Radysh I prefer the evidence of Jonathan and John Radysh.

**27**  The same conclusion applies to the claim of assault and battery. I find that at no time did Mr. Radysh ever become the aggressor towards Mr. Foley. I find Mr. Foley to have assaulted Mr. Radysh without provocation and certainly not in the context of a voluntary assumption of risk by Mr. Radysh, ie. a consensual fight. I reject any inference of a consensual fight having occurred between the plaintiff and the defendant. I find the defendant to be liable to the plaintiff for assault and battery as alleged in the statement of claim.

ASSESSMENT OF DAMAGES

**28**  As a result of this incident, the plaintiff suffered personal injuries and damage to his property. With respect to his personal injuries, the plaintiff was initially treated at emergency at G.R. Baker Hospital in Quesnel on May 3, 1998, at approximately 11:00 p.m. He was subsequently seen by his family doctor, Dr. M.B. Walker, the following day.

**29**  The crew report of the ambulance attendant indicates that the plaintiff was alert and oriented when they attended. The report noted complaints relating to the left side of his head and an abrasion to the plaintiff's arm. Under additional comments is the reference:

Patient's left side of head sore from being punched by Mr. Foley. Patient was hit once on side of head by Mr. Foley.

**30**  The G.R. Baker Memorial Hospital emergency accident form records complaints relating to his elbow, contusion on his cheek, pelvis, swollen ankle, abrasions on his left forearm. He also suffered a chipped tooth. Following the attendance at the hospital, the plaintiff was discharged.

**31**  On returning home he blew his nose. Rather than the air escaping from his body it built up under his cheek and his wife brought him back to the hospital for further attention. Following x-rays being taken it was determined that the plaintiff had also suffered a non-displaced crack fracture of his cheek bone below his eye socket.

**32**  Following seeing his family doctor on May 4, 1998, he was seen again on May 11, 1998. At that time minimal bruising below his left eye was noted with Mr. Radysh indicating to his family doctor that his face felt better but still had partial numbness of the upper left teeth from the midline to halfway down his jaw. He also complained of tenderness in the area of the fracture of the cheek bone. It was noted that the abrasion on the left elbow was healing.

**33**  He was seen again on May 21, 1998, by Dr. Walker. Clinical notes indicate that the cheek bone fracture was improving and although four teeth were still tender when the plaintiff bites, the teeth were stable. It was also noted that the abrasion on the arm and the elbow were improving as were the ankle. At this time it was noted that the plaintiff's shoulder was painful but that the plaintiff had full range of motion.

**34**  Mr. Radysh was next seen on June 3, 1998, one month after the accident. Dr. Walker noted complaints of left temporal headaches and pain in the plaintiff's left neck and mid-point of neck. According to his note he was told by Mr. Radysh that these pains had begun since the incident of May 3rd. Dr. Walker noted full range of motion again but tenderness over the left neck mid-portion. His note indicates a recommendation to Mr. Radysh to continue stretching exercises.

**35**  The next notation in Dr. Walker's clinical notes is that of January 20, 1999, where there appears to have been complaints by Mr. Radysh relating to his left shoulder and complaints that the pain last "hours at times". On March 8, 1999, Dr. Walker noted that the plaintiff's shoulder is "much improved".

**36**  There appears to be a reference to exercises and physiotherapy and a note that Mr. Radysh is reluctant to have subacromial steroid treatment.

**37**  On January 6, 2000, Dr. Walker reports in his clinical notes as follows:

Injuries from roadside assault in May 1998 all appear to have settled. Patient a bit perplexed by mention of subacromial bursitis left shoulder on the report [referring to a report provided by Dr. Walker November 15, 1999 to his legal counsel]. Was under the impression that he had a torn muscle. Mentions today that the pain occurred at near 80 degrees abduction and further elevation associated with a clicking and ending of the pain. Certainly today's movements are full and powerful without pain. I believe that the report is correct and he did have a subacromial bursitis which has settled since about March of 1999. No mention in the notes of a tear, either biceps or rotator cuff. Patient more satisfied after explanation.

**38**  In accordance with the recommendation of his treating physician, the plaintiff attended physiotherapy on four occasions in October 2000. He also followed the home exercises recommended by the physiotherapist, but, in October 2000, because the physiotherapy did not appear to be assisting, enrolled at Gold's Gym in Quesnel where he embarked on a more rigorous exercise regime. That regime has apparently been successful. Mr. Radysh signed a two year contract and seeks reimbursement of all monies due under that contract. I will deal with that issue under the heading of special damages.

**39**  In addition to the injuries noted in Dr. Walker's clinical records, Mr. Radysh testified to also suffering from headaches, ringing ears, dizziness, nausea, scratches on his legs and blurry vision. He admitted that he only had a stiff neck for a few days following the accident and that the headaches, which he noticed immediately after being punched, have subsided to him having no headaches since the fall of 2000. He also testified to damage to his motorcycle helmet on the left side visor to such an extent that the helmet was unsafe to use. Relative to the magnitude of the headaches, Mr. Radysh testified that he took Tylenol 3 for the purpose of getting to sleep. His blurry vision lasted for a few weeks.

**40**  Photographs of the road rash injuries sustained to his left arm were put into evidence. The impact of his arm with the road surface resulted in the leather jacket he was wearing being destroyed and it is obvious from the photographs that there would have been considerable pain associated with the road rash.

**41**  Mrs. Radysh testified that her husband was only allowed to go home because she was capable of changing his dressing on his arm every 12 hours.

**42**  The broken cheek bone was described by Mr. Radysh as more annoying than painful; it feeling more like having plugged sinuses. Mr. Radysh testified to still having no feeling on the right temple area where he said he sustained the punch from Mr. Foley. The nausea lasted approximately one week and his toothaches, as indicated by Dr. Walker's reports, lasted approximately three to four months. Mr. Radysh has not had his chipped tooth repaired nor does he see that being done in the near future. He testified that his stiff neck, which lasted for a few weeks, made it difficult for him to sleep.

**43**  The injury to his arm, consisting of the road rash and sore elbow, lasted for approximately three to four months, although the colour of the skin in the road rash area remained beet red for approximately a year, and then eventually clearing up. Mr. Radysh indicated that his elbow is no longer a problem. His ankle sprain had effectively resolved itself after one and a half weeks, although it affected him for a longer period while he was climbing up the ladder on the fuel truck he drives for his employer. He testified that the problem with his ankle lasted for approximately three months. He did not require crutches and aside from the two weeks he did not work, it does not appear to have interfered with his ability to work, or enjoyment of life, other than for inconvenience.

**44**  The more lasting injury appears to be his left shoulder injury. He first felt pain in the area of his shoulder the night of May 3rd. He was unable to raise up his arm very high past the horizontal level. He testified hearing it click into place. He described the pain as being intense to begin with. When he returned to work after two weeks he found he had to compensate by using his right arm to pull himself up when climbing the ladder on his fuel truck.

**45**  He testified that it interfered with his leisure time sports including canoeing and playing ball with his children. He confirmed that the day after the accident his doctor suggested physiotherapy and that he went several times. During physiotherapy he was given home exercises to do which he adhered to. He testified that after attending physiotherapy the first time after the accident he began to feel better but in the fall when he thought he would be able to bring in firewood his shoulder started bothering him again. Similarly, he had thought that he would be in a position to commence renovations on his house in the fall of 1999 but was unable to complete this task. The renovations had been planned by Mr. and Mrs. Radysh for some time. While they had hired a contractor to do the framing, they had contemplated doing the insulation, drywalling, trim and floor finishings themselves. However, after determining to start with the bathroom it became obvious after putting up between two to three sheets of drywall that he could not do the work because of his continuing shoulder pain.

**46**  As a result Mr. Radysh, as indicated by Dr. Walker's records, again went to see his doctor in January of 2000 where again physiotherapy was recommended and Mr. Radysh again attended at physiotherapy. He found as before that the physiotherapy helped in the short term but then as he started to become more active the pain would return and he found himself becoming frustrated. He testified that the physiotherapist suggested that he start going to the gym and the physiotherapist demonstrated exercises that would help. He subsequently joined Gold's gym on the 24th of October 2000 which date corresponds with the second to last physiotherapy treatment received by Mr. Radysh.

**47**  At the present time, Mr. Radysh testified that his shoulder now seems to be doing better and that the exercises at the gym have built up muscles in his joint. He presently attends the gym three times per week. He has not been cutting firewood since starting the gym.

**48**  In addition to the physical injuries sustained, Mr. Radysh also testified to nightmares he has suffered as a result of the accident. These have consisted of being run down, run over and being unable to help himself. At first the nightmares were experienced every night but their occurrence has been reduced over the last number of years. The plaintiff also testified to becoming anxious when he would see the defendant on the road. He testified that his relationship with family members, especially his son Jonathan, who was present during the altercation with Mr. Foley, became strained in that Jonathan became more distant and did not talk to Mr. Radysh for some time.

**49**  As a result of the accident, Mr. Radysh testified that he has not fished or hunted since the accident and as a result of the injuries the house renovations were postponed for a year.

**50**  Approximately three months after the accident Mr. Radysh purchased a Kawasaki 800 street bike. He was able to ride it in the summer of 1998 practising figure 8's in his yard preparing for his motorcycle licence. He obtained his motorcycle licence that year. Further, under cross-examination, he agreed that he did not see his family doctor between June 3, 1998 and January 20, 1999, when he attended and complained of his shoulder bothering him. He also confirmed that in March of 1999 his shoulder was much improved as reported by Dr. Walker, but that it was not until January 6, 2000, that he again went to see his doctor with shoulder complaints. He testified that he did not go to see the doctor despite having continuing pain in his shoulder because he felt it would go away through the exercise regimen he was following.

**51**  As indicated, the treating physician believes there will be a full recovery to the physical damages sustained by Mr. Radysh arising out of the incident of May 3, 1998. I have considered the submissions of the plaintiff that I should also include a provision for aggravated or punitive damages given the circumstances of what I have referred to as road rage. In addition to non-pecuniary damages the plaintiff seeks aggravated and punitive damages. Plaintiff's counsel provided me with authorities showing a range of awards for injuries similar to those suffered by the plaintiff at between $15,000.00 and $25,000.00.

**52**  It is my view that given the circumstances of what occurred on May 3, 1998, that the aggravating factors of this incident including, as I have indicated, the intimidation of the plaintiff, both mentally and physically, by the defendant in the presence of the plaintiff's children must be addressed.

**53**  In Norberg v. Wynrib [*(1992), 68 B.C.L.R. (2d) 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=) (S.C.C.), La Forest, J., said at p. 54 of that decision:

Aggravated damages may be awarded if the battery had occurred in humiliating or undignified circumstances. These damages are not awarded in addition to general damages. Rather, general damages are assessed "taken into account any aggravating features of the case and to that extent increasing the amount awarded" . . . These must be distinguished from punitive or exemplary damages. The latter are awarded to punish the defendant and to make an example of him or her in order to deter others from committing the same tort . . .

**54**  In the circumstances, I am satisfied relative to at least the circumstances of the battery, that they were of such a humiliating or embarrassing nature as to justify an award for aggravated damages. While the plaintiff's son may have been responsible for the rage that I find consumed Mr. Foley, the separation of time and distance does not make that a mitigating factor. Mr. Foley could have continued on his way and that would have been the end of the episode unless he had determined to report what he considered to be the failure of the motorcyclist to confine themselves to their side of the highway to the proper authorities. Rather than do that he took the law into his own hands and not only endangered the lives of Mr. Radysh and his daughter but was determined to take out his anger on Mr. Radysh physically.

**55**  In the circumstances I award the plaintiff the sum of $23,000.00 general damages, which includes a sum of $2,000.00 for the aggravating features of this case. Having considered the aggravating features and awarded compensation based on that I decline to award punitive damages.

SPECIAL DAMAGES

**56**  The plaintiff and the defendant have agreed on special damages of $938.50 representing damage to the plaintiff's clothing. The plaintiff shall have judgment in that amount for those items damaged as a result of the incident. In addition, they have agreed to out-of-pocket expenses for drugs and physiotherapy in the amount of $176.52. The plaintiff shall have judgment for those items in that amount as well.

**57**  In addition to those amounts, the plaintiff, because of his inability to cut firewood in the year 1998, was forced to expend monies for firewood. There were no receipts provided at trial and the estimates for the firewood ranged between $500.00 by Mrs. Radysh and $900.00 to $1,000.00 by Mr. Radysh. In the circumstances, I award $500.00 to compensate for the firewood purchased as a result of Mr. Radysh being unable to chop wood due to his shoulder problem.

**58**  The parties have been unable to agree with respect to the proprietariness of the plaintiff's claim for his membership in Gold's Gym. The up-front cost of the two year membership contract was $95.23, representing a membership fee of $79.00, card fee of $10.00 and GST of $6.23, followed by monthly payments of $39.58 per month.

**59**  No evidence was led as to why a two year contract was entered into or the necessity for a two year contract being entered into. I do however accept that the exercise regime being followed by Mr. Radysh at the gym has been positive in results. Without evidence of justification for a two year contract however, the defendant should not be asked to shoulder this expense. I will however allow a portion of the Gold's Gym expense because of its positive results to date, but without any indication as to its necessity into the future, I only allow compensation up to the March 1st of the membership fee. As a result, under this head of special damage, the plaintiff will be entitled to reimbursement for the initial costs of $95.23 and 5 months at $39.58 per month, for a total of $293.13.

**60**  In addition, the plaintiff and defendant have been unable to agree on the amount of compensation to be paid to the plaintiff for the loss of his Kawasaki motorcycle. The motorcycle was purchased from Interior Motorcycles Ltd. on April 15, 1998, for $7,034.93. As a result it was only some 18 days old when the accident occurred and according to the plaintiff may have only had some 300 kilometers on it. The repair estimate provided by Extreme Action Sports is $5,678.37. While I can appreciate the plaintiff desiring to be compensated for the full replacement cost of the motorcycle, the fact remains that it was not a brand new motorcycle at the time of the accident. I believe I can take judicial notice of the fact that a new motor vehicle once driven off the dealer lot will lose considerable value. I find that the plaintiff should only be compensated for the cost of repairs, as estimated by Extreme Action Sports, being $5,678.37.

**61**  The parties have been able to agree on the plaintiff's net wage loss claim of $1,181.50.

SUMMARY

**62**  The plaintiff is awarded the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary Damages | $ 23,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Income | 1,181.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages consisting of |  |  |
|  | Clothing and Helmet | 938.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Physiotherapy and Pharmaceutical | 176.52 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Damage to motorcycle | 5,678.37 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Gold's Gym | 293.13 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of Firewood | 500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $ 31,768.02 |  |

**63**  The plaintiff shall also recover prejudgment interest on the applicable items and costs on Scale 3.

**64**  During closing submissions counsel for the defendant requested that I, if possible, apportion the damages suffered by the plaintiff as a result of the assault and battery and the damages arising out of the driving of the defendant.

**65**  I have considered this request and I have concluded that I cannot logically differentiate the reasons for the pain and suffering and loss of enjoyment of life. I find that I cannot even find that the plaintiff's broken cheek bone was caused by the punch. During submissions it was stated that Jonathan Radysh had heard a crack when the punch was administered to his father by Mr. Foley, but my notes indicate that he said he heard a "whack". No expert evidence was led to indicate the probability of the broken cheek bone being caused by the punch.

**66**  In addition the plaintiff testified that the helmet he was wearing was a full face motocross helmet with a chin guard. The helmet was not usable after the accident. There is no evidence that it is more probable that the punch rather than the impact of the helmet with a hard surface caused the fracture of the cheek bone.

**67**  In the circumstances, all that I am able to say is that the aggravating factor within the general damage award which I have valued at $2,000.00 is directly attributable to the assault and battery by Mr. Foley on the plaintiff.

CHAMBERLIST J.

**End of Document**

[***Steward v. Berezan, [2005] B.C.J. No. 2838***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S313-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Satanove J.

Heard: December 5 - 9, 2005.

Judgment: December 30, 2005.

New Westminster Registry No. S071314

**[2005] B.C.J. No. 2838** | 2005 BCSC 1812

Between Martin Clive Steward, plaintiff, and Ronald Glen Berezan et al, defendants

(49 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Rules of the road — More likely than not that the plaintiff had a green light and the defendant a red light when the parties collided at an intersection.**

**Damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Duration of loss — Extent of incapacity — Loss of earning capacity — Non-pecuniary damages, including pain and suffering — Plaintiff awarded $90,000 in non-pecuniary damages given duration of plaintiff's suffering from multiple injuries following motor vehicle accident.**

**Damages — Physical injuries — Arm injuries — Body injuries — Back — Neck — Plaintiff awarded $90,000 in non-pecuniary damages given duration of plaintiff's suffering from multiple injuries following motor vehicle accident — Plaintiff awarded $70,000 for past loss of income and $50,000 for loss of future income.**

|  |
| --- |
| Action commenced by Steward against Berezan at al. for damages for injuries sustained in a motor vehicle accident -- Liability turned on which of two drivers ran a red light at an intersection -- The defendant driver was uninjured in the accident, but the plaintiff suffered multiple injuries to the left side of his body -- Plaintiff maintained it took him approximately four years to substantially recover, and he still suffered from pain, headaches, numbness and tingling in his left arm, hands and fingers -- Plaintiff was a realtor and claimed loss of income due to his restricted ability to work after the accident, and loss of capacity to earn future income -- HELD: Judgment for the plaintiff in the total amount of $210,000 -- Court preferred plaintiff's evidence over that of the defendant as the plaintiff's evidence was in accord with the preponderance of third party evidence, and he appeared to be a more careful witness -- Taking into account evidence as a whole, plaintiff proved that it was more likely than not that he had the green light when entering the intersection and that the defendant was traveling through a red light -- Many of the plaintiff's injuries were not completely healed at the time of trial -- Accident exacerbated plaintiff's pre-existing lower back condition and caused him chronic pain -- Given duration of plaintiff's suffering from multiple injuries. Surgery undergone by the plaintiff, and residual problems plaintiff experienced with his back, neck and arm, non-pecuniary damages were awarded in the amount of $90,000 -- Plaintiff was awarded $70,000 for past loss of income and $50,000 for loss of future income. |

**Counsel**

Counsel for the Plaintiff: F. Andrew Schroeder and Janet E. Atkinson

Counsel for the Defendants: Daniel G. Addison

|  |
| --- |
| **SATANOVE J.** |

**1**   Liability for this motor vehicle accident turns on which of two drivers ran a red light through the intersection of 176th Street and 24th Avenue in Cloverdale, British Columbia. The defendant driver was not injured in the accident, but the plaintiff suffered multiple injuries to the left side of his body. He maintains that it took him approximately four years to substantially recover, and that he stills suffers from neck pain, headaches, numbness and tingling in his left arm, hands and fingers. The plaintiff is a realtor and he claims a loss of income due to his restricted ability to work after the accident, and a loss of capacity to earn income in the future. The parties agree on special damages of $7,528.18.

LIABILITY

**2**  The plaintiff testified that on March 26, 2001 he was travelling west on 24th Avenue in his 1990 Pontiac Bonneville on his way to White Rock. As he approached the intersection with 176th Street (or Highway 15), the light was red. He came to a complete stop at the stop line for ten to fifteen seconds. The light turned green and he looked quickly to the left, then right, then proceeded into the intersection. His car was hit near the front wheel on the driver's side, spun right, hit the curb, and ended up facing north on 176th Street. He caught a glimpse of something in his peripheral vision but did not really see the car that hit him.

**3**  The defendant testified that he was heading north on 176th Street. As he neared the 24th Avenue intersection, he was in the left lane. Approximately 200 to 300 meters from the intersection, he moved into the right lane to pass an elderly couple who had been travelling ahead of him in the left lane. The defendant's light at the intersection was green and remained green when he entered the intersection. Out of the corner of his eye he saw a vehicle coming towards him, tried to avoid it, but was hit and the momentum took him careening through a fence on the west side of 176th Street.

**4**  I prefer the evidence of the plaintiff over that of the defendant because the plaintiff's evidence was in accord with the preponderance of third party evidence, and he appeared to be a more careful witness.

**5**  There were four lay witnesses to the accident. One of them has passed away in the interim and I did not admit into evidence his statements to ICBC because they did not meet the threshold of reliability. Of the three remaining witnesses, only Ms. Crowder actually saw the colour of the lights on 24th Avenue at the time of the crash. She was travelling east on 24th Avenue and when she was three to four car lengths from the intersection she noted that the light was green. The plaintiff's car was heading in her direction when he was hit by the defendant's vehicle. Ms. Crowder slowed down, re-checked the light, which was still green, and proceeded through the intersection.

**6**  Mr. McDonnell was driving north on 176th Street. He did not see the colour of the lights at the time of impact, or the accident itself, because he had already turned right onto 24th Avenue. When he turned right the light on 176th Street was green, but when he heard the impact 5 - 8 second later, he couldn't say what was the colour of the light. He emphasized he was going slowly around the turn because he was looking for properties for sale in the area.

**7**  Mr. Nicoli was driving his fully loaded semi-truck and two trailers south on 176th Street up the hill to 24th Avenue. The warning lights before the intersection started flashing so he slowed down to five or ten kilometres per hour, waiting for the light to change to red and back to green again. About twenty seconds later, he saw the defendant's van careening towards him. In his experience, warning lights last approximately fifteen to twenty seconds. Mr. Nicoli did not see the colour of the lights at the intersection at the time of the accident, and his testimony wasn't entirely consistent with his earlier statement to ICBC. On cross-examination it became evident that he had revisited the scene a week before trial and was reconstructing how far he was from the intersection when he saw the flashing lights. Therefore I give his evidence less weight, other than to confirm that there were warning lights on 176th Street and that they were flashing for some time prior to the accident.

**8**  The defendant testified that he knew there were warning lights about two hundred to three hundred meters from the intersection of 176th Street and 24th Avenue, but that they were not flashing as he passed them. Given the fact that he was also passing the elderly couple at this point, it is unlikely that he noticed whether they were flashing. Furthermore, it became apparent that the reason that the defendant said his light was green at the intersection was because he believed there had been no flashing warning lights, not because he had an independent recollection of the colour of the light when he entered the intersection. In addition, it was apparent from his testimony that he was in a rush that day because he had to go back and forth twice between his home and an insurance office because he had forgotten the necessary papers on his first trip.

**9**  There was other evidence indicating that the defendant was in a rush. Mr. Godfrey, professional engineer, opined in his report of analysis, reconstruction and simulation of the accident that the defendant's speed at impact was likely about 75 kilometres per hour. He further opined that this was a speed that was not consistent with the vehicle approaching the intersection at the speed limit (70 kilometres per hour) and decelerating either under light braking or coasting with no power input. He opined that the likely speed of the plaintiff at impact was in the order of ten to twenty kilometres per hour, which was a speed consistent with an acceleration from the stop line at the east side of 176th Street for west bound traffic on 24th Avenue. Mr. Godfrey was not cross-examined on his expert report, and there was no expert testimony to the contrary.

**10**  Taking all of the above evidence as a whole, I find that the plaintiff has proven on a balance of probabilities that it was more likely than not that he had the green light when entering the intersection and that the defendant was travelling through a red light. Thus liability falls wholly on the defendant.

INJURIES

**11**  It is common ground that the plaintiff suffered serious injuries to his neck, shoulders, hip, ribs, abdomen and lower back in the accident. The injuries to his ribs and abdomen healed within a year of the accident, but he was left with subsequent weakness and deconditioning in the abdominal region. The evidence was less clear with respect to when, if ever, the neck, shoulder and lower back injuries healed.

**12**  Taking both the plaintiff's evidence and the evidence of the medical witnesses as a whole, I find that some of these injuries were still not completely resolved at the time of trial. The plaintiff suffered the most from his shoulder injury during the three years after the accident. In the fall of 2003, Dr. Smit, Orthopaedic Surgeon, performed surgery that consisted of arthroscopic evaluation of the shoulder, debridement of the labrun and bicep anchor, bursectomy and acromioplasty. The plaintiff took several months to recover from the surgery but by the spring of 2004 his shoulder was 85 to 90 percent better.

**13**  There was some dispute on the medical evidence as to the extent and duration of the plaintiff's lower back injury caused by the accident.

**14**  Dr. Roberts, General Physician, reported tenderness in the plaintiff's paravertebral muscles in April 2001. Records from the physiotherapist during that period indicated treatment for paralumbar muscular pain, in particular around the lower sacro-iliac joint. A year later, in April 2002, the plaintiff was still presenting to the physiotherapist with lower back pain referring into the left lower extremity and groin.

**15**  In May 2002, films of the lumbar spine showed mild disc narrowing at L4 - L5 - S1 with minimal osteophyte formation. Dr. Smyth, in October 2002, reported his view that the plaintiff had mild sciatica with referred pain that was possibly the result of an indolent lumbar disk protrusion. The C.T. Scan taken in the same month showed multi-level moderate facet osteoarthritis in the lower lumbar spine but no signs of disk herniation or spinal stenosis.

**16**  Both Dr. Aitkens, Orthopaedic Surgeon, and Dr. Hershler, Physiatrist, reported that the plaintiff's lower back pain had returned to the level it had always been prior to the accident. This was based on the history of a pre-existing back injury sustained by the plaintiff, which had been asymptomatic at the time of the accident.

**17**  Dr. Leith, the Orthopaedic Surgeon called by the defendant's, did not comment on the cause of the plaintiff's lower back symptoms.

**18**  Dr. Johnston, Neurologist, agreed that the plaintiff had symptoms suggestive of mild left sided sciatica, but he could not pinpoint specific nerve compression. In his opinion, the mild disc bulging was likely not relevant. Dr. Johnson opined that the plaintiff clearly had significant musculo-ligamentous dysfunction in his lower back, resulting in chronic pain in that region. He pointed out that in the past the plaintiff had suffered mild intermittent lower back pain from time to time since a significant injury at the age of 26. However, the C.T. scans did not show a significant progression of degeneration and Dr. Johnston believed the back pain had been exacerbated by the accident.

**19**  I was most impressed with Dr. Johnston as an expert witness. His superior qualifications, the thoughtfulness and sound basis for his opinions, both written and oral, and the quiet, confident manner in which he testified, persuaded me to accept his opinions over all the other experts, including that of Dr. Leith.

**20**  I accept Dr. Johnston's opinion that the accident exacerbated the pre-existing condition of the plaintiff's lower back and now causes him chronic pain.

**21**  More importantly, I accept Dr. Johnston's opinion with respect to the causation of the plaintiff's ongoing neck pain, headaches, painful nerve sensations down his left arm, and tingling in his fingers. These symptoms have persisted until the present and their prognosis is uncertain. These were the most hotly contested injuries, with each expert providing different opinions.

**22**  Dr. Roberts opined that the plaintiff had suffered significant cervical spine injury in the accident with involvement of the C5 cervical disk. In December 2002 Dr. Smit thought that the plaintiff might possibly have a C5 nerve root impingement. In September 2003 and February 2005, x-rays of the cervical spine showed degenerative changes. An MRI of the cervical spine in June 2005 showed C4 - C5 and C5 - C6 spondolosis with neural foraminal narrowing, but no signs of disk herniation or significant canal stenosis.

**23**  Dr. Aitkens concluded that the plaintiff had suffered an overload strain to the muscles of the base and nape of the neck from the accident.

**24**  Dr. Leith opined that the majority of the residual symptoms affecting the plaintiff were related to his cervical spine. In his opinion, it was likely that the plaintiff had degenerative changes involving his facet joints with possible nerve root impingement. He could not conclude that the neck symptoms were due to the accident because he said they did not immediately present themselves following the accident, but rather manifested themselves three to four months later.

**25**  Dr. Johnston found that the plaintiff had suffered a traumatic injury to his radial nerve on the left arm, secondary to his upper arm, which likely occurred when the left side of the plaintiff's body struck the door in the accident. This was the cause of the painful sensations throughout the cutaneous nerve of the arm. The likelihood of complete recovery from this injury was small at this point and the plaintiff probably would be troubled by symptoms of pain in the left arm indefinitely.

**26**  Dr. Johnston also concluded that the plaintiff's persistent headaches were related to the accident. They resulted from paracervical spinal muscle spasm secondary to the trauma to the neck muscles that was sustained at impact. It was probable that he would have chronic neck pain and headaches. Unlike Dr. Leith, Dr. Johnston did not think cervical nerve root irritation was the cause of the pain radiating down the plaintiff's arm. He agreed there was a restriction of the cervical spine range of motion, but he could not reproduce the plaintiff's painful arm symptoms by head and neck manipulation, nor could he find the typical reduction or absence of reflexes that corresponded to the cervical nerve roots. Finally, he found a residual nodule in the plaintiff's triceps that corresponded perfectly with the course of the cutaneous nerve in the plaintiff's arm.

**27**  Dr. Johnston agreed with Dr. Leith that the plaintiff had degenerative cervical spine disease, but noted that the two C.T. scans of the cervical spine taken three years apart did not suggest any significant progression of the disease. He noted that degenerative cervical spine disease was common in middle aged adults and could be asymptomatic or symptomatic.

**28**  Dr. Johnston also opined that the force and nature of the accident was entirely capable of producing musculo-ligamentous injury to the plaintiff's neck and thus could cause chronic neck pain. The plaintiff's pre-accident condition may have been more prone to injury or possibly the accident exacerbated some pre-existing neck pain.

**29**  The medical records disclose that Dr. Roberts noted cervical injury on March 28, 2001, (two days after the accident), and that the plaintiff was complaining of neck pain on and off from then until 2005. The medical records also disclose that in March 1999 the plaintiff suffered a neck sprain from a ski accident and that he was suffering neck pain in May 2000. There is nothing to indicate, however, that the plaintiff suffered neck pain during the year and a half before the accident. The evidence established that the plaintiff was in good health at the time of the accident and not suffering any painful symptoms.

**30**  Having regard to the body of medical and lay evidence concerning the plaintiff's injuries, I find on a balance of probabilities that the plaintiff's ongoing lower back, neck and arm pain were all caused or materially contributed to by the accident. I find that the accident aggravated the plaintiff's pre-existing lower back condition, which is now chronic instead of occasional. He is entitled to damages that reflect that aggravation. I find that the neck pain was a typical thin skull, not crumbling skull, situation. The plaintiff's neck pain from the accident may have been greater due to his pre-existing condition, but there was insufficient evidence that his pre-existing condition was likely to precipitate similar losses if the accident hadn't occurred. I find that the plaintiff's arm pain is entirely due to the nerve damage he sustained in the accident.

NON-PECUNIARY DAMAGES

**31**  Prior to the accident, the plaintiff was an energetic, outgoing 50 year old real estate agent who enjoyed athletic activities such as skiing, dirt bike riding, water sports, working out, roller blading and hockey. He participated in these activities with his four grown children, but has not been able to enjoy them for the last four years or so. In the past, the plaintiff often used his carpentry and construction skills to perform renovations and maintenance around the home. After the accident he had to hire a handyman to help out with the yard work.

**32**  The plaintiff's wife testified that after the accident the plaintiff lost self-confidence and became short tempered, frustrated and less sexual. Fortunately, their relationship has improved during the last year. They appeared to have a strong marriage that has survived in the face of adversity, both related and unrelated to the accident, and I am confident things bode well for them in the future. Notwithstanding that the plaintiff's quality of life has improved vastly since the early days after the accident, I find he has been through a great deal of pain and suffering in the last four years. The plaintiff appeared a stoic witness, not prone to exaggeration or malingering, and I accept his evidence with respect to how his injuries affected him.

**33**  During the first three months after the accident the plaintiff could only sleep one to two hours at a time and relied on his wife to wash and dress him. His left shoulder was very painful and he had trouble taking deep breaths due to his rib injury. His left hip and back were sore. His neck seized up and he had continuous headaches.

**34**  After about three months, the pain in his ribs and abdomen started to subside. He tried to work but had trouble sitting or driving. He continued physiotherapy treatment and took Tylenol 3 as a pain killer.

**35**  By the end of 2001 his back was less painful, but he still had a number of problems with his shoulder and neck. In 2003, he underwent the shoulder surgery referred to earlier and after a painful recovery he resumed physiotherapy.

**36**  He made great strides in 2004 and by 2005 he was back working full time. Today his shoulder does not bother him much, but he still has numbness and a burning sensation down his left arm. His back is still sore and his neck is painful and restricted in its movement to the left, making it difficult to shoulder check while driving. His headaches still occur about once a week, but are less severe than they were.

**37**  I did not find either the defendants' or the plaintiff's authorities with respect to suggested ranges of compensation to be binding or even persuasive. Each award for non-pecuniary damages suffered by a plaintiff must be custom made to reflect that particular plaintiff's pain, suffering and loss of enjoyment of life.

**38**  In light of the duration of the plaintiff's suffering from his multiple injuries, the surgery undergone by the plaintiff, and the residual problems that the plaintiff experiences with his back, neck and arm, I am of the opinion that $90,000.00 is reasonable compensation for him.

LOSS OF INCOME IN THE PAST

**39**  There are a number of factors that make it difficult to assess the plaintiff's loss of income up to the date of trial. There is no doubt that he was unable to work for a number of months after the accident and that he was unable to work to his full capacity for two to three years after the accident. However, the conversion of that inability to work as a real estate agent into an income loss is not a precise calculation.

**40**  The plaintiff's history of earnings was less helpful then might usually be the case because, at the time of the accident, he was still encountering financial difficulties with the real estate franchise that he owned with his partner, Mr. Tarron. Secondly, the witnesses from the plaintiff's office all testified that the real estate market turned around in 2002 and became very active. This was supported by the pattern of their increased commissions.

**41**  The documents show that the plaintiff's net commission income rose significantly between 2000 and 2001, then dropped in 2002 and rose steadily again in 2003 through 2005. This pattern is consistent with the timing of the accident, a more active real estate market, and the plaintiff's increased capacity to work as he recovered from his injuries.

**42**  The defendants submitted that the plaintiff had always earned less than the other witness realtors and that that situation simply continued to the present. After his surgery, the plaintiff was much better and therefore should not be entitled to loss of income for 2004 and 2005. The plaintiff's capacity to work as a realtor was also affected by unrelated family problems and the time he spent managing a hotel.

**43**  I do not find that the defendants' submissions were supported by the evidence. From my review of the evidence, the plaintiff likely lost income from the time of the accident to the end of 2004. To be an effective realtor takes hard work, lots of energy, and good social skills. The plaintiff had these attributes before the accident and at one time was amongst the top twenty percent of realtors in the Province. After the accident his energy, patience and industriousness diminished due to his injuries and this must have had some impact on his opportunity to earn commissions. In my estimation, it is reasonable to find that the plaintiff has lost income in the sum of approximately $20,000.00 in each of the years 2001, 2002, and 2003 and approximately $10,000.00 in 2004, for a total past income loss of $70,000.00.

LOSS OF EARNING CAPACITY IN THE FUTURE

**44**  In my view, this was not a case where it would be appropriate to calculate potential loss of earnings for the plaintiff in the future. It appears that the plaintiff may earn as much in the future as he would have if not injured.

**45**  This does not mean, however, that the plaintiff is not entitled to compensation for the impairment of his earning capacity in other occupations that may now be closed to him. It is impossible to say at this juncture that the residual injuries to his back, neck and arm will not harm his income earning capacity over the rest of his working life. (Parypa v. Wickware [*(1999), 169 D.L.R. (4th) 661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=), [*1999 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=)).

**46**  The plaintiff seeks $50,000.00 for the loss of this capital asset, which I think is fair and reasonable compensation in the circumstances.

CONCLUSION

**47**  The defendants are fully liable to compensate the plaintiff for his injuries and the losses that he has suffered there from.

**48**  The defendants shall compensate the plaintiff as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $90,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past wage Loss: | $70,000.00 |  |

|  |  |
| --- | --- |
| Loss of capacity to earn income in the future: $50,000.00 |  |
| ----------- |  |
| TOTAL: $210,000.00 |  |

**49**  Subject to Rule 57(1), the plaintiff is entitled to his party/party costs at Scale 3.

SATANOVE J.

**End of Document**

[***Sturm v. Clarke, [2016] B.C.J. No. 2844***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MYB-0RF1-FCK4-G549-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack and New Westminster, British Columbia

R. Crawford J.

Heard: February 15-19 and 23-25, 2016.

Judgment: September 8, 2016.

Docket: S25050

Registry: Chilliwack

**[2016] B.C.J. No. 2844** | 2016 BCSC 1657

Between Rhonda Pearl Sturm, Plaintiff, and Carl Barry Clarke, Defendant

(296 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Whiplash — Arm injuries — Considerations impacting on award — Pre-existing injury — Mitigation — Action by Sturm for damages for personal injuries sustained in 2010 motor vehicle accident allowed — Sturm sustain mild to moderate whiplash injury resulting in chronic neck, back and shoulder pain that impacted her ability to work as administrator and her housekeeping and gardening activities — Impact of injuries on past work and future care costs not recoverable as neither proven — Sturm entitled to $70,000 for non-pecuniary damages, $100,000 for lost earning capacity, $30,000 for lost housekeeping ability and $15,000 for lost gardening ability, and special damages of $5,863 — Sturm mitigated, despite not undergoing all recommended treatments — Sturm credible in claiming she was pain-free prior to accident.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Loss of earning capacity — Loss of housekeeping ability — Special damages — Expenses and expenditures — Non-pecuniary loss — Action by Sturm for damages for personal injuries sustained in 2010 motor vehicle accident allowed — Sturm sustain mild to moderate whiplash injury resulting in chronic neck, back and shoulder pain that impacted her ability to work as administrator and her housekeeping and gardening activities — Impact of injuries on past work and future care costs not recoverable as neither proven — Sturm entitled to $70,000 for non-pecuniary damages, $100,000 for lost earning capacity, $30,000 for lost housekeeping ability and $15,000 for lost gardening ability, and special damages of $5,863 — Sturm mitigated, despite not undergoing all recommended treatments — Sturm credible in claiming she was pain-free prior to accident.**

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| Action by Sturm seeking damages for personal injuries sustained in a September 2010 motor vehicle accident for which Clarke was at fault. At the time of the accident. Sturm was 46 years old. She had several children one of whom was still at home. Prior to the accident, Sturm provided administrative services to her husband's company, working from home. She was active in volunteering and enjoyed walking and gardening. She had some pre-existing back, neck and shoulder pain from prior injuries and conditions that she had treated with massage. The accident involved the Clarke vehicle rear-ending Sturm's car as it waited at an intersection for a pedestrian to cross. Sturm's passengers, her son and an exchange student living with Sturm, were unhurt. Sturm immediately felt pain over her sternum and in her mid back upon impact. Her vehicle sustained $2,655 in damage and Clarke's car was written off in the accident. The death of Sturm's aunt prevented her from seeing her family doctor until six days later. She complained of neck, back, pelvic, thigh, arm and shoulder pain as well as numbness in her left hand and face. The doctor prescribed anti-inflammatories and painkillers and referred Sturm for physiotherapy. She attended different physiotherapists and achieved some relief from her leg, hip and low back pain. Sturm disagreed with a report from one of her therapists that she had advised him her symptoms did not affect her ability to work full time. She was referred to a neurologist for the numbness. An MRI of her spine, taken in February 2012, showed a disc protrusion. Massage therapy helped her with shoulder pain. At trial, Sturm claimed she had ongoing problems with neck, upper back and left shoulder pain, as well as facial and finger numbness. She coped with the pain by taking over-the-counter painkillers and stretching. Her ability to sit and work for long periods and to walk and perform housework was compromised. Her husband's company was experiencing problems, but she continued to provide it with services. She also worked as a hostess and sales administrator for a resort under development. Her volunteer work had been curtailed along with her participation in the many activities her children enjoyed. Her daughter confirmed changes had occurred to her mother's activities and personality post-accident. Her husband testified about the negative impact her condition had on her ability to work and consequently, their family business. A vocational evaluation was performed on Sturm, concluding that her competitiveness as an officer administrator was adversely effected by the accident. A medical examiner reported that Sturm remained limited in her ability to work due to pain and numbness.  HELD: Action allowed.  Sturm was awarded $220,863 in damages. Sturm suffered the injuries she complained of in the September 2010 accident with Clarke. Her injuries had become chronic. While she was not completely accurate in her reporting of work hours and there was some evidence to challenge her claim that she was unable to participate in recreational activities due to pain, Sturm was a credible witness on the central issue of being pain-free prior to the accident. She sustained mild to moderate whiplash injuries to her back, neck and left shoulder that caused some limitation in her functionality. She had adequately attempted to mitigate her losses, although she did not take all the medical advice she received, given that her problems were chronic and the efficacy of suggested treatments was not established. She was awarded $70,000 for non-pecuniary damages, $30,000 for lost housekeeping capacity for 10 years, $15,000 for lost gardening capacity for 15 years, $100,000 for lost earning capacity, and special damages of $5,863 for medical treatments she had undertaken. Sturm was denied an award for past income loss as the impact of her injuries on the work she performed for the family business and in her other position was not proven. An award for future care costs was not substantiated based on the evidence before the court about available treatments. |

**Counsel**

Counsel for the Plaintiff: D.C. Sliman and J. Gagnon.

Counsel for the Defendant: M. von Antal and A. Bevan.

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**Introduction**

**1**  Ms. Sturm was involved in a motor vehicle collision on September 14, 2010. At the time she was 46 years old. She is married and has several children, one of whom was still at home at the time of trial. She claims compensation for injuries sustained in the car accident, which she alleges caused chronic neck, back and left shoulder girdle pain, as well as left hand and facial numbness (she is left-hand dominate), as well as amounts for loss of housekeeping capacity, past and future loss of earning capacity, cost of future care, and special damages.

**2**  The defendant disputes these injuries, pointing to the plaintiff's pre-accident injuries and submitting they were active and recurring for a significant time prior to the accident. The defendant further says Ms. Sturm's pre-existing condition was aggravated by the motor vehicle accident on July 20, 2010, two months prior to the accident in question. They say the plaintiff's claim is limited because the accident only exacerbated her pre-existing injuries. Further, they argue that Ms. Sturm has failed to mitigate her damages, particularly since she has not undertaken any form of treatment since 2013, and has not followed the recommendations made by her own experts. That in turn reflects their argument that there should be little to no award for loss of housekeeping capacity, past or future earnings, and cost of care.

**The Evidence**

**3**  The parties' arguments are reflected in the evidence of the witnesses which I will now summarize.

**Ms. Rhonda Sturm**

***Pre-Accident Lifestyle***

**4**  Ms. Sturm graduated from high school in 1991, delaying her completion because she took a year of religious study and then taking medical lab assistant training in 1985. She also took a QuickBooks accounting course about 15 years ago. After lab training, she moved back to Abbotsford and worked for BC Biomedical Labs until 1993. There she worked in an office doing records, drawing blood and various other bodily tests, noting that she performed all office duties in a computerized lab. After her second child arrived she stayed at home.

**5**  Her husband was a banker and then moved into financial consulting and started a side business, Pan-a-Tec Management Consultants Ltd., at home. She worked for him on a limited basis as his office manager doing purchases, answering the telephone, sending faxes and emails, bookkeeping, letter writing, sending notices of meetings and invitations, typing and distributing minutes and completing property mortgage and sale documents. She also assisted with power point presentations. The ownership of Pan-a-Tec lies with her husband and herself and a family trust.

**6**  She said initially it was some two to three hours a day but by 1998 it was some six hours a day. She worked from home and was able to set her own hours.

**7**  At one stage they had four employees and three computer stations and she started doing payroll before hiring an employee to do the bookkeeping while she managed the sale files.

**8**  Ms. Sturm said the company purchased 50% of Tri-R Development, a land development company in 2005, and Pan-a-Tec provided real estate management, including rental properties of single condominium units. They also did business with large recreational vehicle retailers in terms of financing and resort developments and she helped with the presentations for the investors and bankers, and was the office assistant handling the phones, dealing with the paperwork and hiring staff. The paperwork included providing spreadsheets for the building contracts and furnishings for the units, as well as developing site plans. She also worked with sale agreements, financing proposals, and building deficiency lists.

**9**  In 2010, Ms. Sturm was working from her home and caring for her children, then aged approximately 19, 18, 14 and 12, and her pets and garden.

**10**  Before the accident she said she was very active with her children's sports. She said all the children played soccer and other sports including baseball, volleyball, rugby, bowling, tennis and all enjoyed hiking.

**11**  Beginning in 2004, she was also very involved with the Rotary Youth Exchange program. At the time of the accident she hosted 14 students over the years. She would also volunteer by organizing and catering events.

**12**  Her hobbies included walking, gardening, and painting. Her walks would be eight kilometres, over the nearby hills which had a number of nature trails. With respect to her gardening activities, she said in 2010 she renovated the backyard which had a stream and pond. She said her son, Dan, assisted in loading up one inch thick flagstones and loading and unloading the wheelbarrow and taking them to the back where she placed the stones. A picture taken in October 2010 shows the attractive backyard garden on the cliff below the Sturm's house. Her paintings were decorative and detailed.

***Pre-Accident Health***

**13**  In the 1980s sustained a neck injury from playing touch football which caused her soreness. In 1991 she had issues with her blood pressure as a result of her pregnancy. In 1997 she developed a sore upper back, neck and shoulder, reportedly from carrying her children, which required physiotherapy treatments. In 2003 she had a hysterectomy. After her hysterectomy she experienced wide spread joint and muscle pains, but testified her body "settled down" soon after. Specifically, she said that the joint pain lasted a number of months, was not treated, but went away and she did not recall any further recurrence.

**14**  She said in 2005 she had periods of facial numbness and double vision lasting three to four weeks. A CT scan was taken and she recalled her neck being a bit sore. She recalled her massage therapist touching a spot on her left shoulder that made her double vision worse and she said he found a knot in her muscles which was treated with massage therapy.

**15**  Mr. Walters' note of July 12, 2005, records she was feeling numbness and that an accident from playing football had resulted in "20 years of problems", which she testified was an incorrect notation. She said she had been very active after that accident.

**16**  She initially saw her massage therapist once a week and then every two weeks for over four years. She said her back was very tense and he would work on her back and hips. She said that continued to 2006 and that she did stretching exercises and it cleared up.

**17**  Ms. Sturm said after 2006 she had no more muscular or skeletal problems, unless she spent the day in her garden or too long on a hike, i.e., normal issues.

**18**  She acknowledged she had been in a prior motor vehicle accident on July 24, 2010. Her son, who then had his learner's license, rear-ended a motor vehicle at approximately 15 km/h. She said the impact was not severe and she was not hurt, able the following day to go to the Washington Music Festival, and camping with her daughter, Rebecca. However, she agreed in cross-examination that pictures of the vehicles showed severe damage.

**19**  She also agreed that in 2010 she suffered from a stubborn cough. She testified the incessant coughing gave her discomfort in her back and shoulder. She required two treatments with Mr. Walters in February and March of 2010, which resolved the issue.

**20**  She said that prior to the September 2010 accident she was in good health.

***Accident***

**21**  The accident occurred on the afternoon of September 14, 2010, at approximately 6:00 p.m. She was with her son and a Rotary Youth Exchange student she was hosting, driving to collect her son's baseball glove from the local diamond and then planning to drop him off at his football practice. She stopped her car for a pedestrian at a crosswalk and was rear-ended.

**22**  She described the impact as sudden and forceful. She said she had a lap and shoulder belt on and immediately felt pain over her sternum, and her mid back.

**23**  She turned her vehicle to the right around the intersection, and then checked on her son and their Rotary Youth Exchange student (who were not injured) and checked to see the people in the car behind.

**24**  She then spoke with the other driver, Mr. Clarke, who apologized.

**25**  An ambulance attended and provided assistance to Mr. Clarke's daughter who was shaken up.

**26**  Ms. Sturm said she had a sore neck and back but did not seek treatment or need to go to the hospital. She testified she told the ambulance driver of this pain.

**27**  A police officer attended and names and phone numbers were exchanged. Ms. Sturm then continued on.

**28**  There appears to have been relatively significant damage to both cars. Mr. Clarke's vehicle was written off and the plaintiff's 2006 Ford Fusion sustained $2,655 in damage.

**29**  When they arrived at the football field they found out her son's practice had been cancelled and they proceeded home.

**30**  Later that day she went to the Greyhound station to pick up her mother and aunt, who were planning to visit their sister at a nearby hospice. Sadly, the sister died before they got to the hospice and Ms. Sturm had to relay the sad news.

***Post-Accident Treatment and Recovery***

**31**  Because of in part the death of her aunt, six days after the accident the plaintiff went to see her family doctor, Dr. Grunow.

**32**  Dr. Grunow had taken over as her primary-care physician in March 2010 after her previous doctor moved from Abbotsford to Vancouver, though she had gone to him in February 2010 complaining of a bad cough. Dr. Grunow was her husband's doctor. She said she gave him a brief medical history, recalling she spoke about her experiences with childbirth, her caesarean section, her hysterectomy, and some past issues. She said she did not tell Dr. Grunow that she had chronic pain after the hysterectomy, or any previous chronic muscular skeletal pain, though his notes from a March 10, 2010 appointment report her as saying she had generalized musculoskeletal pain after her hysterectomy. She admitted she had mentioned previous muscular skeletal problems to her previous doctors had never had chronic pain pre-collision and had thus never told any doctor she did. She said she did tell him about pain in her feet, ankles and teeth.

**33**  With respect to the pain after the accident, she said at her first visit her neck, back, pelvis, thighs, arms and left shoulder were sore, her muscles were tender, and her hand and face showed signs of numbness.

**34**  She said the doctor checked her all over and prescribed anti-inflammatories and pain killers and a reference for physiotherapy.

**35**  She denied ever telling Dr. Grunow she was fit to return to work. For two months after the accident she could not work.

**36**  She went to the physiotherapist at the Fraser Valley Physiotherapy & Rehabilitation Centre four times but she said the treatments made her face numb on two occasions and she went back to the doctor. Because she felt she was not obtaining a positive result, she sought treatment at KiNRG Sports Therapy beginning October 8, 2010. She saw Ms Taman, kinesiologist, initially two times a week and then later once a week for a year. She said Ms. Taman used therapy similar to physio and massage but more active on the muscles and the tender points, while the physiotherapy was more electronic stimulation.

**37**  A undated note of Ms. Taman's said treatments were for back, neck and shoulder and partial numbness which reduced in a few weeks, and that she had reduced using pain killers, not using them on some days. Ms. Sturm agreed she did reduce the pain killers as they did help but they did not stop the pain and she used more pain killers but reduced them as needed.

**38**  She said that with treatment she made some initial recovery: she had no further pain in her quadriceps, hips and low back. Her lumbar complaints cleared up by November 2010. Her pelvic region and her thigh muscle complaints resolved by December 2010 However, her upper back, neck and left shoulder pain became chronic. She said the treatments would help for a week or so but the pain never went away, nor did the face numbness.

**39**  In the CL19 Medical Report prepared by Dr. Grunow on December 15, 2010, he records her remaking regarding her ability to work: "full time not affected". She said that was wrong, and asserted she told him she could not perform full time work or other activities, including gardening.

**40**  She said in December 2010 she told Dr. Grunow about her numb face and fingers and ongoing pain in her upper back and neck and he referred her to a neurologist, Dr. Nagaria.

**41**  Dr. Nagaria checked her initially in early 2011, and it appears he later prescribed medications in early 2012, but long after the accident. These medications were of some help and allowed her to work three to four hours a day, including one or two hours at her desk working at her own pace in short spells. However, she said the medications made her "foggy", forgetful and dysfunctional. She also said her depth perception was affected and she would walk into things. She told Dr. Nagaria of these side effects but new medications had the same effect on her. She began only use the prescription pain killers if in extreme pain, which occurred rarely. Where the pain was less severe she would use Aleve or Motrin.

**42**  Otherwise, Dr. Nagaria recommended an MRI be taken of her head, neck and back but there was an eight month wait for a brain MRI. She said she went to an Abbotsford MRI clinic at a cost of $1,500. The brain MRI of 9 September 2011 showed no significant abnormality, while an MRI of the cervical and thoracic spine taken 24 February 2012 showed a disc protrusion at C6-7 but no significant neural compromise.

**43**  She said Dr. Grunow went to Vancouver after about a year without notice to her and she saw Dr. Cambridge.

**44**  She said she only saw Dr. Cambridge on follow up or if it was necessary to see a doctor and that principally she saw Dr. Nagaria. She did not see either Dr. Grunow or Dr. Cambridge after February 2011, saying Dr. Nagaria was deferred to by the other doctors and reporting to them.

**45**  Dr. Grunow's medical records from February 24, 2011 note treatments for head pain and blood pressure issues. Ms. Sturm said the head pain came from the neck pain and they would occur if her back was sore and she moved. This also caused her blood pressure to rise. She made further visits on March 14 and 23, 2011, regarding her blood pressure, also giving reports of pain and difficulty breathing.

**46**  In September 2012 she had massage therapy on her right shoulder as her left shoulder was sore, so lifting more on her right side then injuring her right shoulder.

**47**  She said she got more massage from Mr. Walters in September 2012 for her right shoulder.

**48**  Her last physiotherapy session was approximately October 2012.

**49**  She attended her family doctor on September 14, 2015, regarding a skin cancer follow up and then on the October 19, 2015, for another matter. Though it was suggested to her that she had not attended a doctor regarding the motor vehicle accident since February 2011, Ms. Sturm suggested the records were incomplete, though she could not specify the times she attended or whether there were any notes in particular she considered incomplete. She also said the doctors said they could do nothing so there was no point attending to them.

**50**  Asked if anyone specified home care, she said she was doing stretching, low weight exercises, and yoga and that she had been told to keep up her physical activity or things would get worse. She said she was not going to a gym as they had a total gym in the house with mats, weights and a cycle, and an indoor swimming pool, so she could exercise in the pool. She can do her yoga at home and continues to stretch, do her yoga, use light weights and she walks 45 minutes a day on flat areas.

***Current Health***

**51**  She says she has ongoing problems with her neck, upper back, and left shoulder. She says her neck is always hurting to some degree and that moving her head back and forth can make it more severe. This neck pain goes up her neck and into the back of her head. She experiences these pains one to two times a week, though they are sometimes more frequent or she can go weeks without complaint. When she is in pain, she will lie down and take a four or five hour break from what she is doing.

**52**  She also has facial and finger numbness. She said the numbness is around her mouth but can go into her cheeks and eye lids. She said it is minor and not her chief complaint, but the more she moves the more she feels it. She agreed that it was similar to her pre-accident numbness, i.e., in the same area, and that she had double vision but in the 2005 period she did not have any finger numbness.

**53**  At the present time she said she was not on any prescriptions and simply took Aleve or Motrin, usually two times a day although Aleve was hard on her stomach, so on a bad day, she would take an extra Motrin. She buys these painkillers herself at an approximate cost of $25 per month.

**54**  She said that she manages her pain by stretching and taking pain killers.

***Post-Accident Lifestyle***

**55**  Ms. Sturm said she has ongoing pain which fluctuates day-to-day depending on what she does.

**56**  Her neck symptoms are triggered by moving her head, looking over her shoulder, sitting too long in uncomfortable chairs, or sitting at a desk. She has limited the activities which require her to perform these actions. Otherwise, she will take frequent breaks to walk, stretch, or rest.

**57**  Despite her efforts, she has flare-ups one to two times a week which require her to lie down for four to five hours.

**58**  With respect to her back, her pain is primarily in her mid and upper back. The pain is chronic and ranges from mild to excruciating.

**59**  Ms. Sturm testified she is limited by her injuries.

**60**  She says it can bring on tears if she goes for a walk for more than 45 minutes, or if she lifts something, like a jug of milk, which makes it difficult for her to do work at home, or to sit in an office and type. She says she is limited in doing housework - where previously she could vacuum the whole house, she can now only do one room at a time and then change jobs. She said she used to keep a neat house but cannot clean the full 6,000 sq. ft., and is otherwise limited to surface cleaning.

**61**  She says she can garden for as little as 15 minutes or as much as 60 minutes. Any more causes her symptoms to flare-up.

**62**  She says if the pain is severe she has to lie down and takes medication.

**63**  Her left shoulder injury sometimes gives her great difficulty, especially when she has to lift her arm repeatedly. While her range of motion can be good, repetitive tasks, such as vacuuming, brushing the dog, sweeping the floor, or doing dishes, cause pain to build in the crown of her shoulder, stiffens her arm, and causes her fingers to go numb.

**64**  She said that she had great difficulty sleeping and had to be exhausted to go to sleep at night. She said as soon as she gets into bed, she has immediate pain in her mid-back.

**65**  As to emotional issues she said she was not depressed, but she feels discouraged when she cannot do what she used to do for her family or when she has to cancel plans because of her symptoms.

**66**  With respect to her family's business, she said the development company and Pan-a-Tec now had issues and were "divorcing". She said the current project had trouble with government approvals and was falling behind financially. Credit lines were maxed out and they began selling personal items and borrowing from friends. Her husband had given a personal guarantee for the business' debt and could possibly go bankrupt. She was trying to help even if she was not reliable. She said her husband has now taken a job for another company so there is regular income. There is some tension because he is relied on to provide for them while she is unable to work.

**67**  Regarding her ability to work, she said that she does not know if she can work steadily for eight hours and she does not want to commit to something she cannot be relied on to do. She said she can work at home three to four hours a day but cannot be relied on to make deadlines.

**68**  She has, however, done some work since the accident. In 2014 she was working two or three hours a day doing proposals as the company was selling off assets. She helped with a few special events in the spring of 2015 and was there for major events and open houses. An employee left at the end of June and she then went to the open houses and special weekend events to be a greeter and she filled in for two months. Her responsibilities included entering client information and she reconfigured the computer information and provided weekly reports to the sales principal. She also assisted with advertising brochures, provided floor plans to interested people and answered the phone and referred them to salesman. Asked what she did when she was not at the development site in the summer of 2015, she said she could work from home.

**69**  She was working at the time of trial at Bridal Falls on weekends and evenings, working one or two hours a day.

**70**  Though work with Pan-a-Tec as fallen off since 2014, she testified she could not start a job elsewhere as she was still struggling, in a lot of pain, and was intermittently disabled. She had looked for an accommodating employer in the newspaper, but found nothing. She testified she could not upgrade her lab-tech qualification or return to that line of work because she could not draw blood or do an ECG without bending over. She was not interested in becoming a bookkeeper, identifying herself as good at it.

**71**  She said she still had one child (Michael) at home, the next youngest, Rebecca, having left in 2015.

**72**  With respect to her ability to contribute to her family since the accident, she was no longer able to participate with her children in sports, and was limited to driving them to these activities.

**73**  With respect to her ability to pursue her former pastimes, she can now only walk for short periods of time, perhaps 45 minutes. She has gained 35 pounds since the accident. She said her garden was now in disarray because she had trouble working on it. She said she cannot plant anything and the children are not there to help. Her lawn is now moss and weed and it breaks her heart to look at it. Since the accident, she has only done two small animal paintings.

**74**  She testified she has difficulty playing with her dog, though she was cross- examined on a video showing her playing in the snow with her Australian shepherd for approximately a minute, running, jumping and bending down to wrestle it. She did not guard her left hand. In response she identified this as a good day.

**75**  With respect to her volunteering for the Rotary Youth Exchange, she is limited to a purely advisory capacity. While she previously catered or volunteered at community events, and was a passionate cook, she is now limited to chopping vegetables. If she attends these events she cannot dance. People have stopped asking if she wants to be involved. She can no longer go on overseas trips with the program.

**76**  In July 2012, the family visited Spain. She said the trip from Vancouver to Madrid was very painful and because of the medications they rode the train rather than hire a car. There, she found she was limiting the girls in their activities and stayed often in the hotel.

**77**  With respect to her relationship with her husband she said that she is no longer the energetic, up-for-a challenge person, and by evening she is too tired. Her previous healthy sex life is now extremely moderated. She complained that it hurts to lie down and that sex is difficult as she is focused on her pain, killing any mood. She said it has frustrated her husband.

**Stephanie Sturm**

**78**  Stephanie is Ms. Sturm's daughter. She is age 25 and working in marketing and design. She lived in North Vancouver and was going to school in 2010, having attended school there between 2009 and 2012. Her two brothers and one sister were at home at the time.

**79**  After she graduated, she did freelance design work and worked for her father for a few weeks before moving to Chilliwack, where she currently lives. She visits her mother fairly frequently, her mother visits occasionally and she and her mother talk on the phone each day.

**80**  She recalled her mother being very active before 2009, going on long trail walks on the weekend, and playing soccer and volleyball, and road hockey with them. These tasks took up about two hours a day. She her mother would help with any project and took care of the whole house, including cooking. She was an excellent, enthusiastic multitasker.

**81**  She described how her mother enjoyed changing the back garden to a rock garden and redoing the front garden with bushes and plants. As well, she recalled the adjoining house having an empty lot which her mother cleaned out and placed natural ferns to make it something of a public park. Now, with respect to the backyard garden, the rocks and plants are in disrepair.

**82**  Around the time of the accident, she would visit occasionally depending on her workload.

**83**  Since the accident, she said her mother seems to have trouble with anything repetitive or heavy, such as a crockpot and the laundry. She recalled her mother not being able to lift one of the grandchildren and not being able to hold the dog. She said her mother loved to shop but could not do so now.

**84**  She noticed that her mother reschedules her appointments a lot. She says she has given up organizing long walks with her mother.

**85**  Asked about the trip to Spain in the summer of 2012, she said her mother's health was not good at the time. The five hour flight was too long and it made her mother very sore. She said her mother was alright sitting at dinners but could not handle driving a car (they took buses), keep up on walking tours or carry suitcases. When they walked they would take frequent breaks, though the weather was reasonable, the temperature in the 20s and 30s. She recalled a lemonade kiosk in central Grenada they frequented, so much the waiters remembered them, to allow her mother to rest. She recalled her seeming foggy as a result of her medications. She recalled her mother being upset during the trip.

**86**  She believes her mother feels shame and is disheartened about her gardening, lessened activity, and not being able to enjoy the grandchildren, and has become very emotional about her disabilities.

**Mr. Nordin**

**87**  Mr. Nordin provided a vocational evaluation of Ms. Sturm based on his interview with her on October 27, 2015, at which time she completed a vocational test battery of her academic potential, aptitudes, and interests. As well he read reports of Dr. MacInnes and Dr. Watt, Ms. Sturm's resume, and her school and tax records.

**88**  At paragraph 17 of Mr. Nordin's report, he records that Ms. Sturm reported to him that she had a tolerance of approximately half an hour for sitting then has to change her position. Mr. Nordin said that Ms. Sturm was saying she could sit for half an hour then stand, which was a change in position, and his impression was that prolonged sitting was a problem for her.

**89**  Accepting her ongoing left shoulder, neck, and mid back pain was aggravated by work on a computer and prolonged sitting, he was of the opinion that her competitiveness as an office administrator had been adversely effected by her 2010 car accident.

**90**  She further stated she has not and did not intend to do office work outside of her family business at the time of the accident.

**91**  At paragraph 59 of his report, he stated full time female accounting and related clerks averaged income of $46,430. He acknowledged she could be a help if she was working outside the company, as she could do company clerical bookkeeping.

**92**  With respect to Mrs. Sturm's list of interests, which did not include bookkeeping and clerical work, he said that it simply expressed her interests and not her work aptitudes.

**93**  He said the interview and testing took approximately four and a half hours, his interview lasting one and a quarter to one and a half hours, and the testing completed in one uninterrupted session. There was no atypical behaviour noted at that time and Mr. Nordin agreed if someone was in discomfort that they would take a break from the testing, as it otherwise would interfere with the test results.

**94**  He was not aware of any prior motor vehicle accidents or health issues, and he assumed she was 100% fit at the time of the accident.

**95**  With respect to Dr. Watt's report, he was not given the functional testing of Mr. Nguyen.

**96**  He had read Dr. Watt's report. Dr. Watt reports Ms. Sturm's physical activity status in accordance with the National Occupational Classification is estimated to be B3 (capable of sitting, standing and walking), L2 (capable of all limb coordination activities) and S2 (capable of light physical demand, up to 10 kg occasionally).

**97**  Dr. Watt also reports "It is my opinion she is fit to return to her job as an office administrator. This is a sedentary to light duties job and she has demonstrated on functional testing that she meets the physical demands of this position". Mr. Nordin said he had factored that into his assessment and he then said that he thought Dr. Watt had said she only capable of 50% of what she previously did and went on to say that with respect to the National Occupational Classification there are other categories, namely B1, which says a person can sit all day, and he inferred that she could not; B2, where one can sit or stand all day; or B3, which is a combination of sitting and standing. With respect to Dr. Watt's reference to "her job" his understanding was her job at the time of the accident was not full time, but agreed that was a bit of a contradiction.

**98**  Mr. Nordin had not asked Ms. Sturm if she had tried other aides, such as an ergonomic chair or keyboard. He agreed that there were a number of aides available and noted that a person at his office was using a sit-stand desk to help with a back problem, but that may not necessarily help with back pain.

**99**  Asked if Ms. Sturm could keep books for another company, Mr. Nordin said that would be different from working for her husband where her job was not in jeopardy, whereas an outside employer would want prompt service, and so the question would be her competitiveness.

**100**  Mr. Nordin affirmed his belief that she did not need retraining as she had the right set of skills for her present job.

**101**  Asked if Ms. Sturm could retrain or upgrade her lab technician position he said that was possible, but the issue really was being able to work four hours in a row, which he considered problematic. He agreed it was an area of interest for Ms. Sturm, she had previous qualifications, but the real issue was her ability to work and be an accountable employee at age 51.

**102**  He did not consider working at home to be a competitive job, which could only be assessed if she was working outside the home. Asked if he accounted for her working in an at-home position for 20 years, he said he did, and an outside employer would not be the same and if she had work restrictions, she would not be as competitive as other potential employees and therefore not as sought after.

**103**  He agreed he premised his opinion on the basis that Ms. Sturm had no prior medical issues and without the accident could have continued to do the same work.

**104**  He agreed that if she had prior injuries affecting her ability to work before the accident that would affect his opinion.

**Dr. MacInnes**

**105**  Dr. MacInnes has his medical degree and a specialty in anesthesiology. He has also taken training in pain medicine and is presently a consultant and anesthesiologist with the Fraser Health Authority.

**106**  He met Ms. Sturm on the October 29, 2015, conducting a physical exam over some 15 minutes. His report is dated November 3, 2015.

**107**  As he pointed out in his report, pain is subjective and there are no tests for pain.

**108**  Based on the information provided to him, which included that Ms. Sturm denied any previous motor vehicle accidents or any functional limitations prior to the accident of September 14, 2010, but did not include prior physiotherapy or family physician notes, he accepted there was a change from her previous busy work day, social life and personal life, to a limited work day with a little social and private life. He therefore accepted the cause of the injuries complained of to the neck, mid back, left shoulder, left hand and face, were caused by a whiplash injury in the car accident. With respect to the neurological symptoms in her face and left hand, he found those to be secondary to muscle tightness and spasm through the neck and facial regions. He considered it a chronic condition as an acute whiplash injury condition that persists for more than three months is termed chronic. He found there was mechanical spine pain; myofascial pain syndrome; left shoulder symptomology; neurological symptoms affecting left and face which he found likely caused by underlying musculoskeletal condition causing traction in the nerves providing sensation to the face and left hand. He detailed the current thinking regarding causation of sensitization which in essence is that there is a heightened response to pain caused by the body's response to a painful stimulus causing molecular changes (peripheral sensitization) and the body sensitivity to pain in the central nervous system is increased and relatively little stimulation can provide a strong response (central sensitization). Central sensitization is thus a phenomenon in chronic pain with the brain and its associated pain pathways responding in a heightened way to both painful and non-painful stimuli. He found Ms. Sturm exhibiting features of central sensitization and thus suffering greater amounts of functional loss and disability.

**109**  Regarding her impairment, Dr. MacInnes opined she is limited in her work because of her symptoms.

**110**  Dr. MacInnes agreed that he made this diagnosis unaware of generalized complaints of musculoskeletal pain after her hysterectomy in 2003 and that could be significant in the finding of chronic pain. He agreed that such complaints would have been important and could recur without a car accident.

**111**  Regarding her prognosis, he found it likely Ms. Sturm would continue to suffer from daily ongoing chronic pain.

**112**  In terms of treatment, active self-management was important. He also believed mindfulness, mediation training, cognitive behavioural therapy and acceptance based cognitive behavioural therapy could help reinforce positive behaviour. Regular fitness was also important. Otherwise, he suggested that pain medications would improve symptom management, but none would cure a chronic condition. He also recommended nerve blocks to see if any cervical or thoracic facet joints were significant pain generators for her mechanical spine symptoms.

**113**  As to the myofascial pain, a multimodal therapeutic regimen was recommended.

**Mr. Nguyen**

**114**  Mr. Nguyen is a kinesiologist and functional capacity evaluator who tests an individual's physical capacities. He passes on the results of his tests to doctors who analyses to data to give the functional evaluation of a patient.

**115**  On October 8, 2013, Ms. Sturm spent a day with Mr. Nguyen and Dr. Watt, a specialist in occupational health. She spent three and a half hours in the morning with Mr. Nguyen who put her through a functional capacity evaluation, and approximately two hours with Dr. Watt, of which some 20 minutes was a physical exam.

**116**  Mr. Nguyen tests for postural tolerance, gross mobility tolerance, reaching abilities, agility tolerances, manual dexterity, static strength, lifting materials, horizontal material handling, cardiovascular fitness, musculoskeletal evaluation and spinal function.

**117**  Mr. Nguyen was a straight forward witness. He explained he used the Matheson Functional Pain Scale which he believed was useful as generally a patient's description could be measured against functional testing to see the pain complained of was causing disability or difficulty with function. He found that Ms. Sturm's subjective reports appropriate to the Matheson scale and that her complaints of 3 to 4 on the scale were consistent. Her pain levels were mild at outset but worsened through the evaluation: her pain complaints regarding her neck, upper trapezius and mid-back were initially rated slightly disabling; at its highest point she was reporting at 4/10, with upper trapezius 3.75, left shoulder 4 and mid back 4.75.

**118**  From the outset she complained of numbness in the left arm, second and third digits, and her lower face.

**119**  On the Valpar 9 Scale measuring agility of a person's gross body movements Mrs. Sturm demonstrated ability to do the tests but not to industrial standard. In nine minutes stair climbing her heartrate rate increased to 134 bpm and she made numerous complaints of aching pain.

**120**  Her hand strength was acceptable as was her dexterity with weights with no more than 10 pounds, but soon deteriorated when raised to 20 pounds.

**121**  Her cardiovascular fitness capacity appeared normal although she made complaints of aching pain in the neck of the trapezius, left shoulder and mid back and numbness in her left hand though appearing to fluidly stride throughout the test.

**122**  Her cervical spine movements and flexion and extension were smooth and fluid though less than the population norm. The self-reporting based spinal function sort self-rated at light strength and better than sedentary.

**123**  As I read his testing, Mr. Nguyen found Ms. Sturm to give fair effort to the testing.

**Mr. Lowe**

**124**  Mr. Lowe is a licenced realtor and is a sale agent for developers in Vancouver and Kelowna. He was a business acquaintance of Mr. Sturm and he met Ms. Sturm at the sales centre of the Bridal Falls resort. He managed the Bridal Falls resort development sales in 2015 from March to October.

**125**  They had an onsite sales person and just as they were launching the 2015 marketing, he resigned. They needed someone on site to meet, greet and obtain data and match the interested buyer to the salesperson. Ms. Sturm had experience in these roles and she worked through the summer as a hostess and sales administrator.

**126**  As hostess, she needed to be at the sales centre and greet the visitors, provide refreshments, and a sales person would then tour the development with the customer. Mrs. Sturm would introduce the resort but not discuss the sales.

**127**  Ms. Sturm had other duties. The first was entering the customer's information into the database. She found the sales system several years old with much duplication and within days she had amalgamated the systems and had them functioning properly. This was detailed work and while others did some of the complex work, Ms. Sturm's work ensured email database could be efficiently accessed. He described her performance and work product as good and confident.

**128**  The second part of her position was to organize the contracts of sale. She organized the files and administered the new sales contracts on an ongoing basis. He said her experience working for Mr. Sturm showed and she did a good job.

**129**  The jobs required being able to sit, stand and walk and converse.

**130**  Mr. Lowe was usually on site one or two days a week, and then on the weekends for events including the grand opening.

**131**  He said Ms. Sturm was generally there daily. He did recall she had some back injury and he would get a call that she would not be there, but there was a caretaker on site with a good personality who was able to step in to do the "meet and greet". The caretaker's position had been arranged by the Sturms.

**132**  He said he believed she worked complete days and was generally there, but he did recall a couple of days that she did leave early. He said generally Ms. Sturm would work six or seven days a week. He described her hours as being generally 10:00AM to 5:00 or 6:00 PM, with a lunch whenever one could find time. He did not know if she left to do family errands.

**133**  He has four or five staff now working for him and if she applied on a project he would think she would be successful given her background. He pays inexperienced people $15 an hour and $20 an hour with experience. Asked what he knew of her injuries, he said all he knew was that she was in an accident.

**134**  He said in the ordinary course of marketing a development there is a build-up to the opening which requires working six to seven days a week and those persons then retain their positions. That can require eight to 12 hours a day and time can be taken off later. Reliability was important. With Bridal Falls, the build-up was already in progress and it was only two weeks before opening that Ms. Sturm came into assist.

**135**  He agreed Ms. Sturm never said she was looking for a job.

**136**  As to the Bridal Falls project, he noted it was now in the off season and he is discussing reengagement in the sales operation with Mr. Sturm. He was aware that the development had been delayed, and the hold up in sales had created a financial burden. There were some sales in the summer of 2015 but below bank expectations and they were seeking financing for 2016.

**Mr. Ronald Sturm**

**137**  Mr. Sturm is Ms. Sturm's husband. He has a background in science but went into financing.

**138**  After the September 14, 2010, accident he noticed a change from his vibrant, active, social and loving wife. She previously hiked, walked their dog, volunteered with the Rotary Youth Exchange coordinating the movement of students in and out of Chilliwack, painted, and gardened. She did the housework. She was very involved in their children's school work and activities.

**139**  Since the accident she was less active, less able to walk, less able to do the housework though there is only one child at home. She rarely volunteers with the Rotary Youth Exchange and can no longer go on the hiking, skiing, and other activities she helped the club organize. She has gained weight since the accident because of her inactivity. She has stopped painting and has trouble maintaining the garden she worked hard to build. He and his son have had to begin helping. She now has trouble sleeping, often awake at 3:00 a.m. with pain in her back or chest, whereas previously she slept like a log. While her energy varies day to day, days she pushes herself will be followed by days where she is less able to do anything. By his assessment, she was clearly suffering from the accident. He said that the doctors put her on medications and she became even more distant.

**140**  With respect to Ms. Sturm's pre-accident health, he recalled she had seen a physiotherapist for a pulled muscle in 2005 and 2006, but did not recall it being serious. He said that previously she might tell him things and he was not always sympathetic and that she was not one to run to a doctor. He did not recall her taking Robaxacet in 2005. He agreed she took medication from 2008 onward, but did not know what that medication was. He agreed there were pain killers in the house, and that she might take more than he would, but that she was not a "pill-popper". In re- examination he testified he did not recall Ms. Sturm using the pain killers or drugs before the accident. He was not aware that she was hypoglycemic but he said she had always had high blood pressure and he said she had put on some weight but she was 50.

**141**  He did not recall his wife being injured in the July 2010 car accident.

**142**  With respect to the post-accident care, he believed the doctors prescribed medications that did more damage than good, making Ms. Sturm lethargic, not sharp and a different personality.

**143**  He gave evidence as to his companies, including Pan-a-Tec, Tri-R Development, and Tri-R Holdings.

**144**  He said Ms. Sturm worked for Pan-a-Tec as a bookkeeper, doing the banking, checking rentals, assisting with preparing presentations for First Nations and government bodies, and other related work that she did from home without his supervision. He considered her a good administrator and bookkeeper. Initially she was on salary, but eventually the accountant advised, due to the shareholder loans, that payments should be made by way of dividends. With respect to the payments to his wife, he explained that she was no longer paid in 2010 because her salary was equivalent to her value to the company and the dividends related to the shareholdings.

**145**  As to her hours, he said they could be 10 hours or two hours but he believed on average it was about five to six hours, daily with the odd weekend for open houses or emergency closings or cleaning out rentals for new tenants.

**146**  She is less able to help with the family business and has trouble keeping up with those responsibilities.

**147**  He agreed there was a plan to hire an outside bookkeeper in or before 2009, but for Pan-a-Tec specifically the accident meant that a CGA was necessary, though he could not recall if the transition occurred before or after the accident.

**148**  He said Pan-a-Tec was now the major shareholder of Tri-R and that Tri-R is the operating company trying to develop the company assets. The Bridal Falls project had been seriously delayed by Hydro and the regional district and the delay had caused the financial problems now faced by Tri-R and his partners.

**149**  He said Ms. Sturm had worked with his partners doing the original books for Tri-R in their first project. She had designed all the suites and the finishing for the trades, helping both in costing and quality.

**150**  He said that Ms. Sturm had worked at Bridal Falls in 2015 when Mr. Whiting suddenly quit and he asked her to help as a salesperson from June through September. Although he was concerned about her health, he said Ms. Sturm came on board and though she did not complain and did the job she "paid for it". When she was not able to go, which would depend how tired she was that day, they would call the resort manager who could step in on short notice, and did so once or twice a week.

**151**  He said he was on site almost all the time and the office for sales was open 11:00 a.m. to 4:00 p.m. which were her hours. The work was busy but on-and-off and Ms. Sturm was not tied to a chair. He said on Saturdays there could be four or five customers and she could walk around the complex and the job worked out well.

**152**  He said Ms. Sturm also did the data entry and sorted out two to three years of information that Mr. Whiting had not organized.

**153**  Lunch could be any time Ms. Sturm wished.

**154**  He gave details as to the current financial condition of the company which had impacted their personal income from early 2014 to the extent of selling their assets and borrowing from friends and family. He acknowledged their heavy debt level which he is trying to deal with by working for another company in international land development.

**155**  He did not believe Ms. Sturm could work for the land development company due to the daily pressure. He also worked in Alberta for two months for a trucking company.

**156**  He said that the dispute in Tri-R was not healthy. As well the financial effect on his family was not good and there was probably little money left. The two elder children had been provided but he was concerned he could not assist the latter two financially.

**Ms. Rook**

**157**  Ms. Rook met Mrs. Sturm through the Rotary Youth Exchange and then administered the youth exchange plan together at district level. She said that Ms. Sturm before the accident was very involved and enjoyed the activities including the sports activities. After the accident of 2010, she found Ms. Sturm was less active and was only assisting on an administrative basis. When she would participate she would need to leave to have a rest. She is now assisting with paperwork and they do meet at Rotary events where she is able to socialize.

**Dr. Watt**

**158**  Dr. Watt is a specialist in occupational health and sports medicine.

**159**  In his field of occupational health he measures how a medical condition can affect a patients work, home life and recreation. He does work in this capacity for employers, the Worker's Compensation Board, and for private individuals.

**160**  He examined the plaintiff on October 8, 2013, and prepared a report on December 2, 2013.

**161**  To prepare his report, Dr. Watt had reference to Dr. Grunow's reports, though he stated he had difficulty reading them, though he believed he had read the report of general musculoskeletal problems since her hysterectomy. He was also provided Fraser Valley Physiotherapy reports for treatments beginning October 8, 2010, until October 27, 2012, and the 2011 consultation with Dr. Nagaria. He had not been given the physiotherapist's records and had only been provided other medical history documents close to trial.

**162**  Otherwise he relied on Ms. Sturm's self-reporting, which he assumed reliable. First, she told him she had no continuing medical issues at the time of the accident. Her current complaints were then headaches once a week lasting for four to six hours; neck and thoracic back pain on a constant basis requiring her to take pain killers; numbness around the mouth and face, left arm and left hand; sleep disturbance; high blood pressure; and an inability to multitask. She did not discuss her previous physiotherapy treatments, her history of pre-accident numbness, or her previous motor vehicle accident.

**163**  Based on Mr. Nguyen's testing, Dr. Watt found no restrictions for positional tolerances (sitting, standing, walking); agility tolerances (balancing, coordination); manual dexterity (handling, fingering, gripping, pinching); and cardiovascular fitness (average 50%).

**164**  He noted mild restrictions with neck and mid back range of motion, stretch and full body range of motion, agility tolerance, static strength lifting, dynamic lifting and carrying. However, there was no functional limitation in neck movement, shoulders, upper arms, elbows and forearms, wrists and hands or thoracic lumbar and sacral back. Palpation of her dorsal musculoligamentous supports was noted as unremarkable.

**165**  When asked if there is a difference in the range of motion assessments of Mr. Nguyen and him, he said Mr. Nguyen's are more precise and would measure precise amounts of restriction and only abduction was noted as mildly reduced. He agreed with the findings made by Mr. Nguyen of her smooth and fluid cervical spine motion and similar comments regarding thoracic spine with some guarding indicating self-protection, and fluid range of movement in the shoulder.

**166**  Her neurological examination was normal.

**167**  He identified posttraumatic myofascial pain syndrome, a regional soft tissue pain syndrome with associated trigger points (though he was surprised there was no soft tissue complain that day), and deconditioning syndrome i.e. reduction in functional capacity of the musculoskeletal and other body systems arising from inactivity.

**168**  He agreed he found no trigger points underlying a post traumatic myofascial complaint. When put to Dr. Watt that that was not consistent with his conclusions he said it was not necessary to find trigger points to find the soft-tissue pain syndrome as there were many other references in the documents provided to him.

**169**  With respect to the deconditioning that was based on the physical testing, Mrs. Sturm's modest performance capacity and her report that she gained 30 pounds reflected a lack of regular exercise of the past three years. Otherwise she was fit. He agreed there was no significant restriction in her physical movements.

**170**  It was his opinion that the motor vehicle accident of September 14, 2010, directly caused her impairments, her subsequent symptoms being consistent with the mechanism of injury and there being no pre-existing impairment of these areas. Dr. Watt found that Ms. Sturm's medical conditions were now chronic.

**171**  Considering her reports of the immediate onset of pain in neck and back which has been documented for three years, he opined that given the extensive passive modalities of treatment she was at maximum medical improvement with respect to neck and back pain.

**172**  He opined there been no active modality treatments, and recommended three to five sessions of intra-muscular stimulation or trigger point injections; a personal fitness trainer for progressive exercise program, yoga or plates, weight loss and management of her high blood pressure. She required more activity to ensure she did not lose further functionality. Even then, these would only provide some symptomatic relief; it is unlikely that they will result in improvement in her current level of function.

**173**  While he considered Mrs. Sturm fit to attend to work as an office administrator given its sedentary-to-light duties, which he felt she could meet the physical demands for, he felt her competitive employability in such positions had been mildly adversely affected by her disability. Accepting Ms. Sturm was working 15 to 20 hours a week, as well as her reporting she remained at some 50% of her pre- accident capability several years from the time of the accident, he did not believe that would change (though he did not know her pre-accident work or break schedules). She would thus require accommodation, supporting his opinion that her future employability had been significantly and adversely affected as a result of injuries in the car accident.

**174**  He agreed he had not viewed her work site.

**175**  In cross-examination, Dr. Watt agreed the report showed nothing disabling save sitting and left shoulder complaints after 75 minutes. Dr. Watt agreed that a person her age and occupation in that work environment could have pain after hours of work. He agreed Ms. Sturm had sat with him for 95 minutes and demonstrated no pain behaviour that day (and I note had been tested for some three-and-a-half hours earlier that day by Mr. Nguyen). No pain was reported from the earlier testing nor was there any call back reported.

**Defence witnesses**

**Ms. Smith**

**176**  Ms. Smith is an occupational therapist with a Bachelor of Science from McGill and has a speciality in functional capacity evaluation and interpretation of data. She is registered with the College of Occupational Therapists of British Columbia and the National Certification Board of Occupational Therapists (USA) and a member of the Canadian Association of Occupational Therapists. Her report, dated December 29, 2015, was in essence a critique of the vocational and functional evaluation of the plaintiff. She did not meet Ms. Sturm personally.

**177**  Her primary criticisms pointed out apparent differences in Ms. Sturm's actual activity and her reported pain. She also opined that some of the test results were inconsistent with the apparent findings of Mr. Nguyen.

**178**  Ms. Smith noted first that Ms. Sturm was stated to generally perceive her physical abilities/strength to be light to medium. Ms. Smith suggests the only statement to this effect is with respect to the perception of her spinal functions, which she said fell in the light strength range. She further opined, however, that Ms. Sturm underrated her abilities in several areas such as lifting, and that reported pain did not seem to affect Ms. Sturm's activities or her observed function.

**179**  With respect to the interpretation of test results, she took issue with Ms. Sturm not being able to perform repetitive tasks of reaching, stooping, kneeling or crouching, observing that while Ms. Sturm's pace was slow, no objective limitations for stooping, kneeling, or crouching were observed. As well she criticised the finding of moderate restrictions for reaching, for no limitations were identified for forward reaching or reaching below the waist and only the right arm was used with reaching above shoulder height, and thus there was not a clinical assessment of the left arm above shoulder reaching. With respect to the identified moderate restrictions for agility, Ms. Smith suggested this assessment was based on subjective reports of pain alone, and that the use of a stair rail when keeping up with fast paced repetitive stair climbing was not itself unusual and Ms. Smith did not think it indicative of a limitation.

**180**  Last, with respect to Ms. Sturm's future employability, Ms. Smith opined Ms. Sturm's observed and subjective complaints were not inconsistent with her ability to work as an office administrator in general capacity. She noted, as did Dr. Watt, she has the capacity to do her job as an office administrator (a sedentary-to- light duties job) and she has demonstrated on functional testing she has met the physical demands of the position.

**Dr. Grunow**

**181**  Dr. Grunow qualified in South Africa and has been a family doctor for some 18 years. He has been practising in BC since 2001.He treated Ms. Sturm in 2010 but had no independent recollection of Ms. Sturm save for his file notes, which began on March 10, 2010, and include a CL19 form sent to ICBC on December 15, 2010.

**182**  His initial notes reflect Ms. Sturm's office work, her historical issues with hypoglycemia, heart arrhythmia, and musculoskeletal problems since her hysterectomy; Raynaud's syndrome; and seizures. His notes indicate she had no acute concerns in their initial meetings.

**183**  He said he had not provided her any notes to stop work or obtain home assistance or suggest she in any way limit her recreational activities.

**184**  With respect to the CL19 form and his practice in completing them, he said the primary source of information is his patient. In the course of completing the form, which takes from 15 to 20 minutes and includes a neurological exam, he asks if a person can perform their duties and adds his own assessment. When completing the form, his practice is to ask his patient if they are able, and a "yes" is recorded as ability to work full-time. He had not suggested a graduated return to work as her health at that time appeared consistent with being able to do full time work based on the information she had provided.

**185**  Otherwise, the CL19 form noted slowed movement in all planes and tenderness "everywhere" but he also noted good range of movement. The reports of back and chest pain were related to movement. At a follow-up visit, Dr. Grunow specified cervical and thoracic rather than generalized areas as the form specifies the areas of interest, showing her pain response but not recording anything regarding her range of movement.

**186**  Mrs. Sturm attended Dr. Grunow with accident related symptoms until February 14, 2011, when her attendance on Dr. Nagaria was noted, with subsequent appointments addressing her blood pressure concerns leading to a cardiology assessment. She did not attend an appointment scheduled for March 30, 2011.

**187**  At no time did he prescribe medications for the accident.

**Ms. DeFazio**

**188**  Ms. DeFazio said she was in a car accident on July 20, 2010. She had stopped her vehicle, a 2004 Honda CRV, and was rear-ended. She described the impact as "pretty strong", her head going forward and backwards and there being damage to the truck. At the time she was confused and shocked. When she got out of the car she met a boy who was a learner driver with his mother, Ms. Sturm. Ms. Sturm appeared fine and there was no indication she was injured.

**189**  She sustained a facet joint injury at C6 - C7 and was off work for two weeks. She still suffers pain in her neck. Her daughter was with her and was also injured.

**190**  She was barely able to drive the vehicle home, which was close by. She said Ms. Sturm and her son drove the Ford vehicle away, but she did not recall who drove.

**Dr. Rickards**

**191**  Dr. Rickards is an orthopedic surgeon and member of the Royal College of Physicians and Surgeons of Canada. His specialty is the management of long-term pain and orthopedics, which he has practiced since 2014.

**192**  He had provided two reports the first dated November 13, 2015, and the second January 1, 2016.

**193**  In summary Mr. Rickard's opinion was that Ms. Sturm was suffering from musculoskeletal problems prior to the motor-vehicle accident. He diagnosed these problems as a degenerative disc disease, possibly caused by repetitive activities such as work around the home or gardening. He further opined that her pre-existing injury was neither rendered more symptomatic by the accident nor was the progression of the degenerative change accelerated by the accident. He did not deny her symptoms were aggravated by the September 2010 collision.

**194**  His opinion in part was based on a clinical note which he believed was dated prior to the September 2010 accident and which referred to neck, back and shoulder problems. In fact the clinical note was dated 2012, which led to his amended report. However he did not change his opinion, basing it instead on Dr. Grunow's notes from February and March of 2010 and the 2005 records of previous similar problems.

**195**  Otherwise, his opinion was based on what he considered charted problems that resulted in an assumed effect on function. He agreed in cross-examination that if there was no loss of function from previous accidents or injuries that a loss of function following an additional accident would be significant. From his examination and his review of her clinical records, he did not consider the extent of her pre-accident activities and functions but did not consider there to be a significant and demonstrated lack of functionality after the accident.

**196**  Asked about the examination by Dr. Rickards, the plaintiff said it was 45 minutes in total, some 20 to 30 minutes on physical examination and the rest taking history. She said repetitive movements were an issue as was her sleep. She said he tested for tenderness but her bra strap was over the main pain point in her mid-back. She did not recall her height, weight or blood pressure being taken. As to giving her history, she said she did so to the best of her ability noting a pinched nerve and her complaints in 2005 of double vision and numbness in her face, and massage treatment.

**197**  He acknowledged she reported to him that she experienced pain immediately after the accident on the roadside. He disagreed the chronic pain flowed from the accident as there were three recorded reports of chronic pain pre-accident and he assumed those records were correct. He agreed, however, that it would be significant if it was determined her pain was not chronic prior to the accident. He likewise agreed that if she had not seen a doctor regarding this pain between 2005 and 2010 that would be significant.

**Discussion and Analysis**

**198**  For the reasons that follow, I am satisfied on a balance of probabilities that Ms. Sturm suffered injuries complained of in the motor vehicle accident of September 14, 2010. These injuries are now chronic in the sense that there is ongoing pain.

**199**  As to the defendant's argument that there was a failure to mitigate, the defence has not met the legal test set out in *Chiu v. Chiu,* [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=).

**What Injuries were Suffered by the Plaintiff as a Result of the Accident?**

**200**  Both the causation and extent of the plaintiff's injuries are disputed.

**201**  The principal difficulty in assessing Ms. Sturm's claim is the contradictory evidence presented before me with regards to her pre-accident condition, her reports of pain, and the functional limitations her injuries caused.

***Credibility***

**202**  The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) at para. 186, aff'd [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=), as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [*[1926] 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont. H.C.); *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

**203**  If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, [*2007 BCCA 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X443-00000-00&context=) at paras. 15, 49-50.

**204**  With respect to her pre-accident condition, the plaintiff testified and submits she was healthy and fully functioning prior to the motor vehicle accident. While she had varied prior medical conditions, she submits she had no ongoing medical complaints.

**205**  It seems agreed the plaintiff has a history of back and neck pain, including numbness in the left hand, which had begun bothering her at the time of her hysterectomy some seven years prior to the accident. However, she gave varying reports of these injuries to the medical experts retained during the course of her claim. This issue was compounded as the experts, including Dr. Watt, were not provided pre-accident medical reports and had to rely on Mrs. Sturm's version of her medical history.

**206**  The defendant argues Ms. Sturm's credibility is in issue for as much as she was an articulate and educated woman, she was an evasive witness often recasting questions and answering her questions rather than questions of her own counsel, let alone defence counsel. This "difficulty" also showed in Ms. Sturm' discussions with her doctors where the history provided was selective or mischaracterized. In particular, the defendant submits she failed to advise Dr. MacInnes and Dr. Watt of the recurrence of neck, back and shoulder issues in February and March 2010; telling Dr. Rickards she never had any prior difficulties with her in neck, back or facial numbness; testified that Dr. Grunow, Dr. Cambridge and Dr. Rickards made inaccurate notes; stated the impact of her physical injuries on her ability to work and recreation when none of the treating physicians had said her activities need to be limited and in contrast to Dr. Grunow's finding in December 2010 that she was capable of working full-time.

**207**  These critiques are best demonstrated by her reports of her hours worked pre-accident. Ms. Sturm gave varying reports of her hours of work. In a daily activity report she prepared for Dr. Watt dated October 8, 2013, she said a usual work day was from 9:00 a.m. until 3:00 p.m., estimating and five and one-half hours of work time. She said at trial that was not exact and what she meant was 20 hours a week and denied it was an average of five and a half hours daily. She was also referred to Mr. Nordin's vocational assessment of November 17, 2015, where he had noted her saying her pre-accident hours were not quite full time. At trial, she defended this by saying she thought full time was eight, and six to seven hours was part time, that before the accident she might work 12 hours in a day and then work four or five hours the next day and did not have a time log. She was referred to page 4 of Mr. Nordin's report where it was recorded in November 2015 she worked four hour days but not four hours in a row. She said at trial she recalled saying three to four hours. Asked if that equated with Dr. Watt and the five hours she recorded, she said that was inconsistent but that it reflected that her back was then worse and it was harder to work. She was referred to Dr. MacInnes' report of November 3, 2015, where at para. 4 she said pre-collision she was working 30 to 35 hours a week. She was also cross-examined on her examination for discovery, where she said she worked seven or eight hours a day. She responded that these were merely providing estimates for different people at different times.

**208**  Against her claims of functional incapacity, the defendant outlines the capacity illustrated in the plaintiff's own medical reports; the lack of complaints to a family doctor after a few months post-accident; and the Facebook video from November 2011 introduced into evidence in which Ms. Sturm was running in the snow and playing with her dog, contrary to her suggested limitations. With respect to the medical reports, no trigger points were found; Ms. Sturm demonstrated a full range of movement; and although there were complaints of pain, there neither pain behaviour noted in the afternoon with Dr. Watt, nor any pain behaviour noted by Dr. MacInnes subsequently.

**209**  Further, the medical evidence was largely based on the plaintiff's self-reports of pain. The defendant argues Ms. Sturm had exaggerated her complaints, the effect of the injuries on her function and her enjoyment of life which was not consistent with the medical evidence.

**210**  Another difficulty in the assessment is that Ms. Sturm has not needed much in the way of medical treatment. She saw Dr. Grunow a few times in 2010. In 2011 she saw him several times but it seemed to be more about her complaints of her blood pressure. All other investigations, including a neurologist and MRIs have shown little of medical value. She did go to physiotherapy for a lengthy period in 2010 and 2011, the records suggesting she was taken through stretches and otherwise assessed but not providing much by way of detail as to what was treated and how and the final outcome, save the treatments did seem to help her and eventually came to an end. She was prescribed pain killers in 2012, but she appeared to not take well to them and stopped, saying they affected her mental status and made her "foggy".

**211**  Ms. Sturm says that the medical profession could not help her.

**212**  With respect to the plaintiff's limitation of function, Ms. Sturm gave evidence as to the difficulty she has with her daily activities in her home office, doing the housekeeping, in working in her garden and various other matters including the difficulty she faced on the trip to Spain in 2012.

**213**  That is contradicted by some of her own witnesses and her evident ability to drive two hours each way to North Vancouver to see her daughter on a regular basis in the two years following the accident.

**214**  At the same time, a number of factors indicate that while her involvement in her previous activities had diminished, particularly her gardening and her volunteer activity with the Rotary Youth Exchange program, she still had good function.

**215**  Mrs. Sturm attended for a full functional assessment with Dr. Watt and Mr. Nguyen in 2013, and later, in 2015, with Dr. MacInnes and a vocational assessment by Mr. Nordin. All of these assessments would require her driving several hours, and at minimum, sitting and going through the various kinds of testing. Save for the testing at Dr. Watt's office, there was little record of any of the pain or other difficulty that she complained of in court. None of the writers seemed to specifically suggest there was any pain behaviour in front of them, save for the functional testing which occurred after a period of activity. Although there was a finding by Dr. Watt of deconditioning, she was average on her aerobic testing and appeared fit and healthy.

**216**  As a witness, Ms. Sturm presented a complex picture. Both on direct examination and cross examination, she habitually reworded the questions put to her then answered her own question. Counsel attempted to correct this, and I even intervened at one stage. At times this seemed to be a deliberate aversion to answering the question which might be a form of dissembling. But I cannot say I found her untruthful. Indeed, Ms. Sturm was a credible witness despite at times being, as her counsel described her, tangential. If she presented to the doctors or other experts in the same way, I do find it likely that some of them had difficulties in assessing Ms. Sturm, which may explain the state of their records as against each other. I thus find her testimony and reports generally reliable, on the central issue of being pain free prior to the September 2010 accident and to that extent I can rely on the plaintiff's doctors opinions.

***Causation***

**217**  The plaintiff must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paras. 13-17; *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at para. 9.

**218**  The general test for causation is the "but for" test, which requires the plaintiff show that the injury would not have occurred but for the ***negligence*** of the defendant: *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.

**219**  Dr. MacInnes and Dr. Watt were of the opinion that the injuries sustained in the car accident of September 14, 2010, caused her current symptoms and impairment for the reasons described above. Mr. Rickards disagreed, opining that she demonstrated pre-existing chronic pain suggesting a degenerative disorder and that the July 2010 accident more likely caused any additional injury.

**220**  The plaintiff was critical of Dr. Rickards' opinion given its apparent initial reliance on there being massage therapy treatments in September 2010 when in fact they were post-accident i.e. September 2012 and therefore the doctor relied on Ms. Sturm presenting with neck and shoulder symptoms prior to the motor-vehicle accident of September 2010. It was suggested that Dr. Rickards had failed to accurately assess the matter and the reliance on prior clinical records of alleged soft-tissue difficulties in the neck and shoulder made his opinion invalid. In sum, while he was candid, Dr. Rickard's report was based on a mistaken assumption, namely pre-accident injuries, which coloured his whole report.

**221**  I agree with these critiques.

**222**  With respect to the motor vehicle accident of July 2010 was the cause of the injuries said to be sustained by the September 2010 accident, the defendant submits it is improbable that an earlier accident that appeared to have caused more substantial damage to the vehicle at issue would not have caused injuries. However, there was no evidence to suggest she sustained any injury in the July 2010 car accident and she had no medical treatment post-accident. In my view, those submissions are entirely speculative and are dismissed.

**223**  In my view, the plaintiff has met her burden for proving her injuries would not have occurred but for the accident. Both Dr. Watt and Dr. MacInnes provided convincing opinions that the accident caused the injuries demonstrated, and these opinions are corroborated by the evidence the plaintiff was functional immediately before the accident and the proximity in time between the September 14, 2010, accident and her first attendance to Dr. Grunow.

**224**  What I do take from the earlier medical records are the similar complaints pre- accident which were treated from time to time but not between March and September 2010, but flared again with the accident in September 2010, and gradually became moderately chronic.

***Extent of the Plaintiff's Injuries***

**225**  With regards to the extent of her injuries, the plaintiff submits she suffers from chronic myofascial pain syndrome, experiencing pain in her neck, her back in her cervical and thoracic spine, as well as her left shoulder, arm, and chest. She also experiences numbness to the left side of her face and the first three fingers of her left hand, headaches, and difficulty sleeping. She testified she previously suffered lumbar back pain, pelvis/hip pain and thigh pain, but these have resolved. She submits her ongoing injuries reduce her functionality, and requires she continually monitor herself to ensure she does not aggravate her injuries on a day-by-day basis. She testified her pain ranges from mild to almost excruciating.

**226**  The defendant submitted the plaintiff's injuries were minor to moderate. Ms. Sturm did not seek immediate medical attention, visiting the family doctor six days after the accident. Her initial exam showed slow movements in all planes and tender in all muscle groups of the neck, and back and pelvis and thighs but no restriction on range of motion without numbness or tingling.

**227**  The defendant further submits that she returned to her pre-accident level of health by fall of 2011, when she apparently ceased requiring or attending regular physiotherapy treatments.

**228**  The defendant also notes a number of items indicating that in fact she was not greatly limited: the all-day assessment with no evident reduction in ability with Dr. Watt in 2013, the driving to and from Vancouver, including seeing Dr. Nordin and her daughter on frequent occasions without any difficulty for a two hour drive each way, and the summer work in 2015, which appeared to be a regular basis, providing full day's work to the Bridal Falls venture.

**229**  Considering the evidence of the experts and reconciling the evidence as best I can, I conclude Ms. Sturm has suffered mild to moderate whiplash injuries to her back, neck and left shoulder in the motor vehicle accident of September 14, 2010. These injuries are chronic in the sense that there is ongoing pain and cause her some limitation in her functionality.

**Has the Plaintiff Failed to Mitigate?**

**230**  A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, [*2010 BCSC 1111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2115-00000-00&context=) at para. 234.

**231**  Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gregory v. Insurance Corp. of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=).

**232**  *Chiu* at para. 57 sets out the test for failure to mitigate by not pursuing recommended treatment:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

**233**  The defence argues the plaintiff failed to mitigate her damages and there should be a 25%-30% reduction. For lost past earnings, loss of future earning capacity, cost of future care, loss of housekeeping capacity the defendant submits there should no award.

**234**  The plaintiff for her part submits she attended kinesiology, massage therapy, physiotherapy, did her own exercising including walking and pool therapy had done all that might have been done in the situation. She saw physiotherapists four times from the date of the accident to October 7, 2010 and from October 8, 2010, went to KiNRG Sports Therapy for kinesiology sessions 69 times to treat the pain in her neck, back and shoulders and her facial numbness. Ms. Sturm thereafter attempt to continue active physical rehabilitation at her home gym and swimming pool and by doing yoga, stretching, small weight exercises and walking.

**235**  I am satisfied there has not been a failure to mitigate. In my view, Ms. Strum received little prescriptive advice by the doctors as to what she should do to achieve better function and reduce her pain. To the extent she did, she followed that advice reasonably.

**236**  Though Ms. Sturm admits she has no had physiotherapy since October 2010 with Mr. Lock or October 2011 with Ms. Tamen, her situation was not acute and she had been maintaining her function with her own home exercise.

**237**  With further reference to Dr. Watt's suggestions, Ms. Sturm had not sought the trigger point injections; stated she could not afford retaining a fitness trainer and did not have extended health coverage since possibly 2014, and was not certain whether it covered physiotherapy or chiropractic treatment. With respect to her weight loss, she explained that her current weight (165 lbs) was only slightly above her normal weight range. She tries to diet to regulate it.

**238**  As noted by Dr. MacInnes, her symptoms are not acute and chronic pain is not easily treated. I find these explanations reasonable and am not otherwise convinced they would have reduced her damages.

**239**  Otherwise, the defendant has not led evidence of what improvements would have been made in terms of her symptoms or their severity.

**240**  In sum, while the defendant has established that the plaintiff has failed to undertake some recommended treatments or courses of action, doing so has not been shown to be unreasonable and the efficacy of those treatments or courses of action has not been established.

**What are the Extent of the Plaintiff's Damages?**

***Non-Pecuniary Damages***

**241**  Before her accident Ms. Sturm was an active mother, office assistant, volunteer, and gardener. Though the collision was not of great consequence to the other inhabitants of the car, it has affected her. As a result of the accident, she experienced pain in her neck, back, chest, arms, pelvis and thighs with tenderness noted at all muscle groups and tingling and numbness to her hands and arms. Though she has made some recovery, her myofascial pains has been continuous and chronic, affecting her ability to work, her social life, and her ability to pursue her hobbies.

**242**  Dr. MacInnes' opinion was that Ms. Sturm had achieved maximum medical improvement and would be required to actively self-manage her symptoms and minimize the activities that worsened her symptoms.

**243**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. *Trites v. Penner*, [*2010 BCSC 882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=) at paras. 188-189; *Andrews v. Grand & Toy Alta. Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) at paras. 243-44.

**244**  In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, [*2004 BCCA 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**245**  The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**246**  The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) (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, Chief Justice McEachern said:

In *Butler v. Blaylock*, [*[1981] B.C.J. No. 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NJ-00000-00&context=), decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**247**  Given the medical findings of chronic myofascial pain syndrome, the plaintiff referred to *Kam v. Van Keith*, [*2015 BCSC 1519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GWF-M0T1-F8KH-X2FP-00000-00&context=); *Johal v. Meyede*, [*2013 BCSC 2381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X18M-00000-00&context=) and [*2015 BCSC 1070*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GBY-KWR1-FG12-60DH-00000-00&context=); *Forder v. Linde,* [*2014 BCSC 1600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G060-00000-00&context=), and suggested non- pecuniary damages be set at $110,000.

**248**  The defendant suggested non-pecuniary damages should be in the low end of the chronic pain awards provided, resulting in a range of $45,000-$55,000.

**249**  Ms. Sturm's injuries and complaints are not analogous to the cases provided by the plaintiff's counsel. Those cases generally included younger plaintiffs with far more serious injuries, including brain damage and whose injuries were found to deny them likely promotions in the positions they held at the time of trial.

**250**  As to the figures suggested by the defendant, they are simply not in keeping with the evidence as I find it.

**251**  However, on review of the defendant's cases I find *Prempeh v. Boisvert*, [*2012 BCSC 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6247-00000-00&context=), to be most like the circumstances in the case before me. There, a plaintiff sustained injuries to her low back and right wrist from a fall onboard a transit bus, resulting in chronic mechanical low back pain as a result of the accident. This pain was persistent and of varying levels and aggravated by lifting or prolonged sitting and standing. Both her back and wrist pain had episodic flare-ups. In order to continue her work she required a back-brace, though these challenges caused her stress.

**252**  After consideration of the factors set out in *Stapley*, including the fact that she was 46 years old, suffers from chronic pain of mild to mid severity and duration with some functional disability who has lost her some of the active lifestyle she enjoyed and is faced with a relatively significant bar from re-entering the workplace, I set her non-pecuniary damages at $70,000.

***Loss of Housekeeping Capacity***

**253**  For an award of loss of housekeeping capacity, the onus is on the plaintiff to establish a real and substantial possibility that he will not be able to perform all of his usual and necessary household services, and as such will be required to hire someone perform such services or have someone provide them gratuitously: *Hartnett v. Leischner*, [*2008 BCSC 1589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2WW-00000-00&context=) at para. 109.

**254**  The plaintiff submits she has had significant difficulties keeping her house clean and that her son and husband have taken on more of those responsibilities.

**255**  The defendant takes issue with a number of the points raised by the plaintiff beyond those. First, the defendant notes no medical recommendations had been given regarding housekeeping or gardening activity.

**256**  The plaintiff's evidence indicated she had significant difficulties keeping her house clean and that her son and husband had taken on more of the responsibility. Ms. Sturm for instance indicated when she was vacuuming she would take frequent breaks and do something different due to increased back pain. What housework she does do is not done as well as it was before the accident.

**257**  In my view, the plaintiff should be encouraged to continue housekeeping in light of the expert's call for her to keep active and the value of her maintaining her self-sufficiency.

**258**  At the same time, some accommodation should be made.

**259**  Ms. Bhatti, who runs a service that provides housekeeping assistance for injured people, testified a home the size of Ms. Sturm's would require four hours a week of housekeeping assistance at $34 per hour at a total cost of $7,072 per annum. She would possibly require two cleaners. Given the fact that her children have moved on and in light of the difficulties she faces maintaining it, I consider there to be a substantial possibility that the Sturms will not continue to occupy their 6000 square foot house and reduce the award on the basis of that contingency. Further, as noted by the defendant, Ms. Bhatti valued the necessary housekeeping services without taking into account the cleaning Ms. Sturm or her family may do. I allow $3,000 for 10 years, totalling $30,000.

**260**  With respect to her garden, Ms. Sturm testified gardening is her passion. Since the accident, however, her family has had to become involved to maintain the work she put in before the accident.

**261**  Similar to my considerations above, I have no doubt that gardening is good for Ms. Sturm in short periods. It provides her relaxation and serves as a mild form of exercise. But, as testified to by Ms. Gehman, a gardener in the spring and fall can do the heavy work at that time of the year that Ms. Sturm may not be able to do. Considering Ms. Gehman's testimony, but similarly reducing the amount in light of the fact that Ms. Sturm will be performing some services herself, I make an award of $1,000 per annum for 15 years, totalling $15,000.

***Past Loss of Earning Capacity***

**262**  Compensation for past loss of earning capacity is based on what the plaintiff would have earned but for the injury sustained: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=) at para. 49.

**263**  The plaintiff submits at the time of the accident the plaintiff was working in an administrative capacity for Pan-a-Tec and Tri-R. She testified she continued to work for Pan-a-Tec in a reduced capacity until the business stopped being viable in 2014. Her position is that but for her injuries she would have sought employment with another company to help support her family, noting their financial difficulties. The plaintiff submits that an administrative assistant makes approximately $40,000 a year, referring to the average provided by Mr. Nordin, and reducing this salary by 30% over those two years argues she should be awarded $56,000 for her past loss of income.

**264**  The defendant submits that any claim for lost earnings is speculative - the plaintiff never sought work though her own experts and the CL19 report indicated she could and by fall 2011 all treatments had finished.

**265**  Further, from Mr. Sturm's evidence it was noted that she had continued to do the cooking and cleaning and is primarily responsible for the children and their activities. The decision to transfer bookkeeping functions from Ms. Sturm to a professional was made before the accident but took some time to actually happen; he acknowledged fluctuations in her health post-accident but testified she was still doing a task when asked to.

**266**  There are a number of issues with the plaintiff's submissions. First, the amount sought is not in any way reflective of what monies were paid to her previously. The evidence of prior earnings from 2005 to 2010 was initially by way of earnings ranging from $16,000 to $36,000 and from 2010 to 2013 in dividends for $25,000 to $70,000, the latter reflecting pay out of shareholder loans.

**267**  Second, I have no medical finding that she was not able to work during 2014 and 2015, although her work place activity may have been reduced. In 2015 she did work from the spring to fall at Bridal Falls and received a very positive assessment from Mr. Lowe of the work she did.

**268**  The physical testing by Mr. Nguyen in late 2013 appeared to find, and I accept, that Ms. Sturm has some functional workplace difficulties. But they do not, and here I disagree with Mr. Nordin, mean she is competitively unemployable. The evidence is that she stepped into an important role in the Bridal Falls development in the summer of 2015, becoming the welcoming face to visitors and fixing the computer systems so that the information regarding the customers and the sales contracts was readily available. Mr. Lowe spoke very well of her. She is able to sit, stand, reach and walk in a light to sedentary job. She is personable and she plainly has work place skills. Yet Ms. Sturm has not made any attempt to find "outside work" beyond her vague reference to "looking for a job" that would accommodate her.

**269**  Considering all of the above, I am unable to say the plaintiff would have worked in an administrative role at another company, or any other role, but for her injuries.

***Future Loss of Earning Capacity***

**270**  As addressed in part above, the plaintiff testified that but for her injuries she would have worked until the age of 70. On discovery she said she would work to age 65. She argues she worked consistently from 1985 to 1993 and later began assisting with the family business Pan-a-Tec and later Tri-R relatively soon after. She further testified that it was her intention to continue working for the family business following the accident, though this option is no longer available given the company's financial difficulties.

**271**  Mr. Nordin opined her competitiveness as an office administrator was adversely impacted by the accident, providing that she would require a degree of flexibility that may not be available elsewhere. Similarly, Dr. Watt indicated she could go back to work but she had limitations and found that her competitive employability had been mildly adversely affected for her sedentary light light-duty job. She has difficulty sitting, standing, or walking for prolonged periods of time and is occasionally incapacitated by her pain. Suggesting she could have made $46,000 a year, Mr. Nordin and her counsel calculate the present value of her loss to be $660,256.40, subject to any contingencies.

**272**  A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.); *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=).

**273**  The assessment of damages is a matter of judgment, not calculation: *Rosvold* *v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 18.

**274**  Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's ***negligence***: *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory* at para. 32. All relevant positive and negative contingencies must be considered: *Fox* *v. Danis*, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=) at para. 92 and 102-103. Such contingencies must be shown to be probable, i.e. there is a real and substantial possibility they will occur: *Athey*; *Rosvold* at para. 9.

**275**  There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

**276**  Given that the plaintiff has a very limited employment record outside of the family company and thus little work history to provide context, my view is that the capital asset approach is more appropriate.

**277**  The capital asset approach involves considering factors such as (1) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (2) whether the plaintiff is less marketable or attractive as a potential employee; (3) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (4) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) at paras. 53 & 56.

**278**  I am satisfied that some of the factors as set out in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.), are to be found in Ms. Sturm's case. She is rendered less capable overall from earning income from all types of employment and she is thus less marketable or attractive as an employee to a potential employer. She has lost the ability take advantage of all job opportunities which might otherwise be open to her and she is less valuable to herself as a person capable of earning in a competitive labour market. While I agree she could likely have continued contributing to her family business in a similar, but reduced, capacity as she previously did, it is unlikely she can be similarly accommodated by a third party employer. Likewise, it is unlikely she will see any additional recovery according to the evidence of Drs. MacInnes and Watt.

**279**  Nonetheless, her contributions to the Bridal Falls project demonstrate she can be a valuable employee. Indeed, as addressed above, I do not accept that Mr. Nordin's assessment of her functional workplace difficulties means she is competitively unemployable. She has demonstrated the capacity to make valuable contributions to an employer despite any reduction in her function. She is able to sit, stand, reach and walk in a light to sedentary job. She is personable and she plainly has work place skills.

**280**  There are also a number of negative contingencies I must take into account. The first is that the plaintiff went a long period of time without seeking employment. While this coincided with her adopting a domestic role and pursuing her personal passions and volunteer work, it is probable that should the family business return to its earlier profitability she would return to her work in that capacity, from the home, rendering her reduced earning capacity nil. As well, considering the fact that Ms. Sturm had begun considering replacing her within his company, there is a real and substantial possibility she would not have worked. Likewise, there is a real and substantial possibility that the plaintiff would have had a difficulty returning to the workforce in the first place given the fact she had not worked outside the home in decades.

**281**  In sum, I have found there is a real and substantial possibility she will or would have sought outside work in her current circumstances, and that she is less capable of earning income, less marketable, less able to take on certain occupations in light of her injuries, and less valuable to herself as a person earning income. Conversely, I have found a number of contingencies must be taken into account to reduce any such award. I put the final figure at $100,000.

***Costs of Future Care***

**282**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Gignac v. Rozylo*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras. 29-30.

**283**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable, both in the sense of being required and being costs that, on the evidence of the experts in the relevant field of expertise, the plaintiff will be likely to incur: *Tsalamandris v. McLeod*, [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=) at paras. 62- 63; *Brewster v. Li*, [*2013 BCSC 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20CN-00000-00&context=) at paras. 157-158.

**284**  The plaintiff claims $10,000 for her future cost of care. She submits this amount covers pain killers and other medications; a gym membership; ongoing physiotherapy; three to five intramuscular stimulation trigger point injections; an active self-management program, including cognitive behavioural therapy and a personal fitness trainer; yoga or Pilates sessions; and membership in a commercial weight loss program.

**285**  Drs. MacInnes and Watt have provided opinions on treatments that would be of benefit to Ms. Sturm. Ms. Sturm testified she would have pursued the treatments recommended but for her difficult financial situation.

**286**  The defendant submits with respect to future care costs that though as the doctors have noted pain and suggested treatments, there was no specific costing for any of the proposed claims. With regards to their likelihood to be incurred, the defendant notes that no medical treatment had been undertaken since November 2011, despite the suggestions of her doctors. The only activity she has undertaken with regards to her health is walking and yoga.

**287**  Certain amounts claimed cannot be said to be medically necessary. With respect to a gym membership, Ms. Sturm testified she was not attending a gym as she had a home gym and indoor pool. If she requires training, this can be done in physiotherapy and translated to an at-home routine.

**288**  Otherwise, the plaintiff has not provided any specific costs accompanying the treatments suggested.

**289**  In *Johal v. Meyede*, [*2014 BCCA 509*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6F-0731-JSJC-X1B6-00000-00&context=) at para. 44, in awarding an amount for cost of future care a trial judge must analyze each item of care to determine whether there was an evidentiary link between the caregiver's assessment of pain or disability and the recommended care; that there is a real and substantial possibility that the expense will be incurred, and the specific amount awarded for each item claimed.

**290**  While I have some evidence of modest recommendations about future medical care, I have no evidence as to costing and in light of the case law, I can make no award.

***Special Damages***

**291**  The plaintiff claims $5,862 as set out under Exhibit 9. The special damages claimed include:

Fraser Valley Physiotherapy - $110.00

KiNRG Sports - $4,160.00

Chiro Flow Pillow and Therapain Spray - $75.00

Fraser Valley MRI - $1,500.00

Baclofen and Lyrica prescription - $17.85

Total: $5,862.85

**292**  As to special damages the defendant disputed certain items but agreed to a total of $4,287, excluding the MRI and amounts incurred from October 2011. The defendant noted that though the MRI and chiropractic treatments were considered, no doctor made a specific recommendation for either (though Dr. Nagaria recommended an MRI be taken, Mrs. Sturm decided to incur the MRI bill to avoid an 8-month wait).

**293**  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: *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.).

**294**  I have determined Ms. Sturm's injuries persisted beyond the fall of 2011 and continue to affect her at present, contrary to the defendant's submissions. In my view, the prescriptions and therapy incurred after this date were thus reasonably incurred. Likewise, Dr. Nagaria did seek to have the plaintiff examined with an MRI. Though he did not seem to make a specific recommendation that one be obtained earlier at the plaintiff's expense, I consider it reasonable given the persistence of the plaintiff's injury and the lack of a precise diagnosis as at that time.

**Conclusion**

**295**  In sum, the plaintiff is awarded:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $70,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future loss of earning capacity: | $100,000 |  |

Loss of housekeeping capacity:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Housekeeping | $30,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Gardening | $15,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages | $5,862.85 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $220,862.85 |  |

**296**  If costs are not agreed to, counsel may speak to the matter and obtain a date before me through the scheduling manager.

R. CRAWFORD J.

**End of Document**

[***Wilson v. Honda Canada Financial Inc., [2013] B.C.J. No. 1368***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M128-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: May 27-30, 2013.

Judgment: June 25, 2013.

Docket: M110296

Registry: Vancouver

**[2013] B.C.J. No. 1368** | 2013 BCSC 1137 | 3 C.C.L.T. (4th) 212 | 229 A.C.W.S. (3d) 730 | 2013 CarswellBC 1925

Between Jeffrey John Wilson, Plaintiff, and Honda Canada Financial Inc., Harpal Kaur Goria, and Ronald Leigh Howe, Defendants

(186 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Neck — Soft tissue — Head injuries — Headaches — Considerations impacting on award — Mitigation — Credibility — Action for damages sustained in motor vehicle accident allowed in part — 45-year-old plaintiff sustained soft tissue injuries to neck and shoulder, and headaches, and missed 10 months work — Plaintiff now had intermittent pain, but would have recovered by summer 2011 had he followed medical advice — Plaintiff awarded $40,000 non-pecuniary loss — Past wage loss $47,076 plus net portion of $2,235 — Plaintiff failed to establish he would have worked for father's company but for accident — Plaintiff not entitled to damages for excessive, self-imposed massage therapy regime — Plaintiff awarded $2,000 future care and $3,710 special damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Action for damages sustained in motor vehicle accident allowed in part — 45-year-old plaintiff sustained soft tissue injuries to neck and shoulder, and headaches, and missed 10 months work — Plaintiff now had intermittent pain, but would have recovered by summer 2011 had he followed medical advice — Plaintiff awarded $40,000 non-pecuniary loss — Past wage loss $47,076 plus net portion of $2,235 — Plaintiff failed to establish he would have worked for father's company but for accident — Plaintiff not entitled to damages for excessive, self-imposed massage therapy regime — Plaintiff awarded $2,000 future care and $3,710 special damages.**

|  |
| --- |
| Action for damages for personal injuries sustained in a 2009 motor vehicle accident. Liability was not at issue. The plaintiff sustained soft tissue injuries to his neck and shoulder, and headaches, and claimed to still be suffering. The 45-year-old plaintiff had done a variety of maintenance work for his father's real estate company since he was a child. The plaintiff's career was in the fire department and he was a fire inspector at the time of the accident. The plaintiff had always been athletic. Following the accident, the plaintiff had to miss 10 months from his employment as a fire inspector, for which he received benefits and for which it was recognized the insurer had a subrogated claim. The defendant argued the medical evidence did not support the plaintiff's claim he continued to experience pain and headache flare-ups, and the plaintiff was largely recovered by spring 2010 and failed to mitigate his losses. The plaintiff sought $125,000 non-pecuniary damages, past wage loss for both his fire department employment and his father's company, $100,000 loss of earning capacity, $30,000 cost of future care and $31,895 special damages.  HELD: Action allowed in part.  The plaintiff's complaints were subjective, so credibility was key and the plaintiff was evasive and prone to exaggeration. The medical evidence did not support the plaintiff's claim he had ongoing symptoms and he failed to submit clinical therapy records. By his self-reporting to doctors, the plaintiff's symptoms were merely intermittent by May 2010 and were very intermittent now. The plaintiff's low back injury resolved quickly after the accident. He neck and shoulder pain was severe and his headaches frequent for six months after the accident. The plaintiff's doctors consistently recommended a supervised exercise regime and tapering off of massage therapy, but the plaintiff insisted on continuing with extensive massage therapy. It was only just before trial that he first attended a kinesiologist, but only for six sessions. The plaintiff failed to mitigate his damages and would have recovered fully, with the possibility of occasional flare ups, by summer 2011 had he followed medical advice. The plaintiff missed 10 months of work due to debilitating pain and had to curtail his sporting activities, though he continued with his social activities and his relationships were not affected. The plaintiff's injuries did not affect his return to work or current lifestyle, and he exaggerated his involvement in sports prior to the accident. The plaintiff was awarded $40,000 non-pecuniary loss. The plaintiff was entitled to $47,076 wage loss benefits paid while he was off work, plus the net amount from $2,235 for amounts he would have received for captain's work. The plaintiff's ability to work for his father's company was not mentioned in any of his medical reports and his own evidence indicated that, between his family life and fire department work, he had no time to do so. Furthermore, there was less physically demanding work available at his father's company. The only reasonable inference was that the plaintiff stopped working for his father's company for reasons that had nothing to do with his injuries, so it did not factor into past wage loss or loss of earning capacity. The plaintiff had returned to work and was expected to fully recover and there was no loss of earning capacity. The future care claim related to massage therapy was denied given the medical evidence did not support massage and the plaintiff's regime of twice-weekly was excessive. The plaintiff was awarded $2,000 for a supervised exercise program. The plaintiff's special damages claim for massages was largely rejected. He was awarded $3,710 special damages. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 98*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B06K-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: D.M. Mah, B. Souza, A/S.

Counsel for the Defendants: G. Ritchey.

**Reasons for Judgment**

|  |
| --- |
| **S.C. FITZPATRICK J.** |

**Introduction**

**1**  This action involved the assessment of damages sustained by the plaintiff, Jeffrey Wilson, arising from a motor vehicle collision on April 8, 2009. He was rear-ended by the vehicle driven by the defendant, Ronald Leigh Howe, who immediately before had been rear-ended by the defendant Harpal Kaur Goria's vehicle, which was leased by the defendant Honda Canada Financial Inc.

**2**  Mr. Wilson suffered soft tissue injuries as a result of the accident. Liability is not in issue.

**3**  Mr. Wilson claims damages as follows: non-pecuniary, past wage loss, loss of earning capacity, cost of future care, and special damages.

**Issues**

**4**  The most significant issue for determination is the extent and duration of Mr. Wilson's injuries. He says that he continues to suffer from neck and shoulder pain and headaches, and that he requires ongoing and extensive massage therapy to address his symptoms.

**5**  The defence contends that Mr. Wilson was, to a large extent, fully recovered by spring 2010 and that he would have fully recovered within approximately two years of the accident but for his failure to mitigate his damages by following the advice of his medical doctors. Following from that position, the defence says that Mr. Wilson is entitled to a modest non-pecuniary reward, wage losses while off work following the accident, and some minor special damages.

**Facts**

**Prior to the Accident**

**6**  Mr. Wilson was 45 years old at the time of the accident. He has a sister and two younger brothers.

**7**  Mr. Wilson's father, Robert Wilson, is a retired firefighter. Robert Wilson has also been involved in real estate over his working career, buying and renovating houses and then purchasing apartment buildings. He operates through his company, Taja Investments Ltd. ("Taja"). At present, Taja owns one apartment building with 28 suites in the West End of Vancouver.

**8**  Robert Wilson did many tasks relating to his real estate properties over the years, with some assistance from his firefighting colleagues. All of his children were also involved from time to time from a young age, first doing odd jobs and then more difficult tasks as they grew up. Mr. Wilson has worked for Taja since he was 10 years old, assisting his father in managing and maintaining the apartment units by performing various tasks, including gardening, painting, electrical, plumbing, repairs, and janitorial work. Mr. Wilson described much of this work as physically demanding.

**9**  Mr. Wilson was very involved in athletics from a young age. He played soccer at a very high level. After competing in national championships in his late teens, he made some effort to become a professional soccer player without success. He also played handball at a very high level, competing in certain world championships in the early 1990s. He continued to play handball at this level for a few more years until it interfered with his employment.

**10**  In 1993, when he was around 30 years of age, Mr. Wilson started working as a firefighter with the City of Burnaby. There are two divisions in the fire department: fire suppression and fire investigation. Fire suppression is the very physical task of donning substantial equipment and attacking a fire to put it out.

**11**  At the time of the accident, Mr. Wilson was working as a fire investigator having moved from fire suppression due to his asthma condition. In this role, Mr. Wilson was required to investigate and determine the cause and origin of fires. This involved preparing reports and participating in scene reconstruction. He was working on a rotating schedule involving two day-shifts, two night-shifts, followed by four days off. This type of work was much less physically demanding. Mr. Wilson indicated that only light lifting was required.

**12**  In addition to his work as a firefighter, Mr. Wilson continued to work for Taja from 1993 through his company, Billboard Enterprises Ltd. ("Billboard"). Billboard was paid for Mr. Wilson's labour at the rate of $50 per hour.

**13**  While in the fire department, Mr. Wilson continued his athletics to some extent by competing in the World Police and Fire Games that are held every two years. He first competed in 1995 and then in 1997, winning gold for certain events in soccer and handball. He did not compete in 1999 and 2001 by reason of cost and health issues. In 2003, he attended but did not do well at that competition. He did not compete in 2005 because of injury. In 2007, he again competed on a soccer team and won gold, but did not compete in handball.

**14**  Mr. Wilson was married in August 1991. He has two children, ages 12 and 20. Mr. Wilson and his first wife separated in January 2006 and were divorced in October 2008. They have shared custody of their children. At the time of separation, Mr. Wilson's time with his children was scheduled to align with his shift schedule with the fire department as set out above.

**15**  Starting in late 2005, due to his marital difficulties, Mr. Wilson began to do less work for Taja. Robert Wilson tried to call on his other children, but they did not pick up the level of work that Mr. Wilson had done in the past. Robert Wilson then stepped in and did what he could and hired others to assist.

**16**  Mr. Wilson began a relationship with someone else in 2007. Beginning in November 2008 and at the time of the accident, Mr. Wilson was living with his girlfriend in a house they owned in Port Moody. Mr. Wilson's children were also staying at this house from time to time. Mr. Wilson began working more for Taja in 2008, as will be discussed in more detail below.

**17**  At the time of the accident, Mr. Wilson was still involved in athletics, but at a level significantly below his earlier pursuits. He was playing on an "over 40" soccer team and was still competing at the World Police and Fire Games every two years in both handball and soccer, as his schedule, health and inclination dictated. In addition, he played a weekly pickup hockey game and golf from time to time.

**The Accident**

**18**  The collision occurred on April 8, 2009 around 4 p.m. on Canada Way near Edmonds Street in Burnaby, B.C. Mr. Wilson was driving southbound on Canada Way in the curb lane and was stopped to make a right turn. There were a few cars in front of him. The defendant Goria, driving a 2008 Honda CRV, rear-ended a 2005 Subaru Outback being driven by the defendant Howe. Upon impact, Howe accidentally hit the gas, causing him to rear-end Mr. Wilson's car.

**19**  Mr. Wilson had no warning of the impending collision and was not able to brace or prepare for the impact. His car was pushed ahead, but he did not hit the vehicle in front of him. Mr. Wilson described the impact as being sucked back into the seat and having the seat wrap around his shoulders. He immediately felt tightness on the right side of his neck and shoulder area. He also had a slight jarring feeling in his low back.

**20**  Fire and ambulance personnel arrived in due course. Mr. Wilson was checked out by the ambulance attendants. When asked, Mr. Wilson declined to go to the hospital, although he immediately proceeded to his family doctor's medical clinic to have his injuries assessed.

**After the Accident**

**21**  Mr. Wilson's family physician is Dr. Keith Symon. Dr. Symon was not at the clinic when Mr. Wilson arrived after the accident, so he saw a locum there. At that time, Mr. Wilson had pain in his neck and upper back and a slight headache. He was told to use ice and take pain medication to alleviate his symptoms. He was given a note to be excused from work until April 15, 2009.

**22**  Mr. Wilson returned to see Dr. Symon on April 17, 2009 about continuing pain in his neck and upper back. The low back pain had resolved soon after the accident and was no longer an issue after that time. He was given another note to be excused from work until May 4, 2009. He began physiotherapy sessions with Eddie Cannon at New West Orthopaedic & Sports Medicine on April 15, 2009, which treatment he discussed with Dr. Symon at his later visits. Mr. Wilson continued these physiotherapy treatments on a regular basis until June 2011 and received further treatment in November 2011.

**23**  In June 2009, Mr. Wilson was referred by Dr. Symon for acupuncture and massage therapy. He did intramuscular stimulation treatment for approximately four months and also received massage therapy from June to September 2009, although he stopped the massage therapy when he thought that he was doing too much with both physiotherapy and massage therapy.

**24**  Mr. Wilson had ongoing headaches and pain in his neck and upper back for the remainder of 2009. Given these complaints, Dr. Symon supported Mr. Wilson being off work for the remainder of 2009.

**25**  Furthermore, throughout 2009, Mr. Wilson was not able to participate in his sporting activities. In particular, Mr. Wilson says that he was unable to participate in the 2009 World Police and Fire Games due to his injuries.

**26**  In the summer of 2009, Mr. Wilson's relationship with his girlfriend ended for reasons unrelated to the motor vehicle accident. They eventually sold the house they owned in November 2009.

**27**  By September 2009, Mr. Wilson was still having constant headaches and pain in his neck and upper back, which symptoms he relayed to Dr. Symon. For the rest of the year, Mr. Wilson regularly attended physiotherapy on average 12 times a month. He said that he obtained temporary relief from this treatment.

**28**  In November 2009, while off work from the fire department, Mr. Wilson accepted a position to continue working as a fire investigator under the fire prevention arm of the fire department. As a result, his hours were changed to 10-hour shifts from Monday to Thursday, with Friday off. He decided to change positions because as the most senior applicant, he would receive an increase in his usual salary to that of a captain. As well, the fire department agreed to allow him to attend his medical appointments during his lunch hours.

**29**  By early 2010, Mr. Wilson was continuing to have headaches and pain in his neck and upper back. Nevertheless, in early January 2010, Mr. Wilson embarked upon a graduated return to work program with the fire department, returning to full duties in February 2010. Despite his return, there were certain restrictions in his duties relating to lifting, prolonged sitting, pushing/pulling, climbing ladders, and repetitive twisting, turning and bending.

**30**  While he was off work, Mr. Wilson was paid disability benefits through the Burnaby Municipal Benefits Society (the "Society"). The parties agree that the Society has a subrogated claim in respect of benefits paid to Mr. Wilson to the extent that a wage loss is established during that time.

**31**  In February 2010, Mr. Wilson met his current wife, Debra Avis. Ms. Avis lives and works in Calgary. They began a long-distance relationship shortly after that time and were married in July 2011. As of the date of the trial, they continued to have a long-distance relationship whereby they would see each other on the weekends, with one of them flying either to Vancouver or Calgary for visits.

**32**  Mr. Wilson takes the position that his injuries arising from the motor vehicle accident have been ongoing since that time. He says that the initial massage helped with certain "trigger points" and "fascia release", but that his headaches and neck and shoulder pain were constant for about a year. He says that he was approximately 70% recovered by May 2010, at which time he was getting flare-ups and headaches. Also, he indicated that the physiotherapy was helping minimize his "trigger points" and "fascia release". By the summer and fall of 2011, his symptoms had essentially plateaued and he embarked on an extensive massage therapy program. He also exercises in a gym on a regular basis now.

**33**  He says that he still gets intermittent headaches and that he has pain and instability in his neck and upper back and "trigger point flare-ups". He says that these symptoms are usually in conjunction with these headaches. He says that he is slightly above a 70% recovery now. He is unable to relate any factor that causes these symptoms, whether it be treatments, exercise, lack of treatment or exercise, or any other activity.

**Credibility and Reliability of Mr. Wilson's Evidence**

**34**  The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* [*(1926), 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont. H.C.); *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Faryna* ]; *R. v. S.(R.D.)*, [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

**35**  If a plaintiff's account of his or her change in physical, mental, or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, [*2007 BCCA 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X443-00000-00&context=) at paras. 15, 49-50.

**36**  The defence takes serious issue with Mr. Wilson's credibility in relation to his evidence at trial.

**37**  As will become apparent during my discussion of the medical evidence, Mr. Wilson's complaints are by and large subjective. There is little, if any, objective evidence from the medical professionals who have given opinions in this matter. In light of these circumstances, it is necessary to carefully consider Mr. Wilson's subjective evidence as to the extent of his injuries.

**38**  A cautious approach to assessing injuries which depend on subjective reports of pain was discussed by McEachern C.J. 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=) at 399 (S.C.):

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 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

**39**  The second aspect of the defence's challenge to Mr. Wilson's credibility arises from the manner in which he gave his evidence. I agree with the defence that Mr. Wilson refused to respond to direct questions, instead giving a speech that he thought was more favourable to his case. Further, his direct evidence at trial concerning the level of sports that he played at just prior to the accident certainly was crafted to and did give the impression that he played at a very high level. On cross-examination, however, it became apparent that, in fact, he was only playing at a "social" level.

**40**  It was also apparent that Mr. Wilson's discovery evidence concerning his accomplishments at the World Police and Fire Games was simply incorrect, and one of his incorrect answers was simply volunteered. In my view, there was no reasonable explanation provided by Mr. Wilson as to why he gave this incorrect evidence. I conclude that he was not particularly diligent or careful in providing truthful answers.

**41**  There were many other issues raised with respect to Mr. Wilson's evidence, particularly as it related to the medical evidence.

**42**  Suffice it to say, I am convinced by the defence's arguments that there are serious issues regarding Mr. Wilson's credibility in light of his evidence and in the context of the overall evidence presented at the trial. Accordingly, I approach his evidence with caution.

**The Course and Nature of Mr. Wilson's Injuries and Medical Treatment**

**43**  Given his involvement in sports and his work as a firefighter, it is unsurprising that Mr. Wilson has had his share of injuries over the years. In addition, as I noted above, he was diagnosed with asthma in 2001. Nevertheless, I accept his evidence that prior to the motor vehicle accident, he had no history of ongoing headaches and neck and right shoulder pain consistent with the injuries he suffered as a result of the accident.

**44**  The plaintiff must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range. Further, 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.

**45**  The primary test for causation asks: but for the defendant's ***negligence***, would the plaintiff have suffered the injury? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at paras. 21-23.

**46**  Causation must be established on a balance of probabilities before damages are assessed. In this regard, 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:

[78] ...Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey* *v. Leonati* ]. ...

**47**  The defence does not contest that Mr. Wilson suffered soft tissue injuries to his neck, shoulder and back and that he experienced headaches, all as a result of the motor vehicle accident.

**The Medical Evidence**

**48**  The defence takes the position that the medical opinion evidence tendered by Mr. Wilson does not support his claims. The defence did not present any medical evidence, nor did it call any of Mr. Wilson's doctors to attend for cross-examination.

**49**  Mr. Wilson presented opinions from his family doctor, Dr. Symon, and three specialists, all of whom saw Mr. Wilson at the request of his counsel, not Dr. Symon. Although there is nothing wrong with counsel doing this, it highlights that the purpose for these further reports was to substantiate Mr. Wilson's claims in this action.

**50**  It will also become apparent that Mr. Wilson undertook an extremely extensive physiotherapy and massage therapy program involving some 390 separate attendances for treatment between the date of the accident and March 29, 2013. Yet no clinical records or reports from any of the treating therapists were submitted. Nothing is known about the qualifications of these treating therapists, although there is reference on some slips from the massage therapists that they are registered massage therapists ("RMTs"). Unsurprisingly, the defence challenges most of these visits.

**51**  The defence further takes the position that none of the doctors have identified any objective basis for Mr. Wilson's ongoing complaints and that their opinions fundamentally depend upon Mr. Wilson's truthfulness in reporting his symptoms and disabilities to them. Further, the defence says that if Mr. Wilson's evidence is unreliable in respect of his reporting to the doctors, the factual foundation for their opinions is undermined.

**52**  Interestingly, even Mr. Wilson challenges some aspects of these medical reports since they are inconsistent with his own complaints and his course of treatment, which was largely self-directed.

**53**  I will summarize the medical evidence below. These reports begin in the spring of 2010, which follows from the period of time when it is agreed that Mr. Wilson was suffering these symptoms and unable to work.

**Dr. Robert McGraw**

**54**  Dr. McGraw, an orthopaedic surgeon, saw Mr. Wilson once on April 22, 2010 and prepared his report dated May 7, 2010. Mr. Wilson reported to Dr. McGraw at the time that he was continuing to experience accident-related headaches which were getting less severe and less frequent. Mr. Wilson was also said to report on pain in the upper neck and the base of his skull. Mr. Wilson advised that his trapezius muscles were very tender and tight and that he had some upper back pain.

**55**  Dr. McGraw stated that Mr. Wilson should return to his pre-accident condition without disability:

**Cervical Spine**

In the motor vehicle accident of April 8, 2009, Mr. Wilson sustained soft tissue injuries in the cervical spine not associated with neurological impairment or fracture. He is improving but not yet asymptomatic. The principal problem associated with the persistent neck pain is the potential for headache and cervicogenic headache. This has recently shown improvement.

The long-term prognosis is good. ...

**Thoracolumbar Spine**

Mr. Wilson is experiencing only intermittent discomfort in the upper back now. There is no low back component. ...

The long-term prognosis for recovery in the upper back is good. The writer does not anticipate there will be any long-term consequences...

...

**Time Off Work**

It is the writer's opinion that the time taken off work was appropriate. During the period of time off work, Mr. Wilson was complying with the treatment program recommended by his physician. Mr. Wilson has unique employment requirements; that is to say, he is not able to return to his pre-accident employment if he has restrictions on activity. He has now returned to work but does have restrictions which present a barrier to promotion.

...

**Causation**

It is the writer's opinion that the current complaints referable to the neck and upper back are causally related to the motor vehicle accident of April 8, 2009.

**Long-Term Prognosis**

It is the writer's opinion that Mr. Wilson has the potential to return to his pre-accident physical status without impairment or disability. [Emphasis added.]

**56**  Dr. McGraw also included his view of Mr. Wilson's past treatments and his recommendation for the future. He noted the "constant" physiotherapy and massage therapy treatments that Mr. Wilson had received since the accident. Dr. McGraw recommended that Mr. Wilson get involved in an active exercise program conducted by a kinesiologist or personal trainer. The objective of the program was to improve his physical condition and teach Mr. Wilson how to deal with his episodes of pain without pharmaceuticals. Mr. Wilson was said to be open to that recommendation. Dr. McGraw specifically said in his report that all passive modalities should be discontinued, by which I take it to mean that he specifically advised Mr. Wilson that the ongoing and extensive physiotherapy sessions should stop. I also take this to mean that he recommended against massage therapy.

**57**  Dr. McGraw was of the opinion that after three or four months in such an exercise program, Mr. Wilson should join a gym and continue a self-directed exercise program. He also advised Mr. Wilson to be assessed two to three times a year by a kinesiologist or personal trainer to ensure that the program was appropriate and that Mr. Wilson was complying with the program.

**58**  Despite Dr. McGraw describing Mr. Wilson as being very "motivated" by these recommendations, Mr. Wilson entirely rejected Dr. McGraw's advice. He continued taking physiotherapy sessions approximately ten times a month during 2010, with a further eight sessions to November 2011. He did not hire a kinesiologist or personal trainer in respect of an exercise program.

**59**  On February 27, 2013, Dr. McGraw was asked to review further records which indicated that despite his advice, Mr. Wilson had continued with extensive physiotherapy and had also undertaken extensive massage therapy since his visit. Dr. McGraw did not alter his opinions.

**Dr. Keith Symon**

**60**  Dr. Symon, who practices in family medicine, is Mr. Wilson's family physician. He is the only doctor who had seen Mr. Wilson for any length of time during his recovery and who provided a report, which is dated June 6, 2011.

**61**  Dr. Symon indicated that as of Mr. Wilson's last clinic visit on May 5, 2011, he was greatly improved but was experiencing intermittent flare-ups of symptoms. Dr. Symon indicated that the long-term prognosis for his condition was good. No permanent disability was anticipated. Dr. Symon stated, however, that Mr. Wilson continued to experience intermittent flare-ups of pain and some residual chronic neck pain and headaches, which could lead to periods of temporary disability.

**62**  In terms of treatment, Dr. Symon stated:

Mr. Wilson will need intermittent physiotherapy treatments for the foreseeable future. He would also benefit from occasional massage therapy, acupuncture, personal training and supervised sports activities. He will not be a candidate for surgical intervention.

[Emphasis added.]

**63**  It can be seen that, as with Dr. McGraw, Dr. Symon's diagnosis and treatment recommendation were largely predicated on Mr. Wilson's reports of his symptoms.

**64**  In addition, like Dr. McGraw's advice regarding ongoing treatment, Mr. Wilson completely ignored Dr. Symon's advice. Mr. Wilson had already begun an extensive massage treatment schedule beginning in January 2011 (against Dr. McGraw's advice). Further, despite Dr. Symon advising that he should obtain only "occasional" therapies, by July 2011 he had received four treatments. This would eventually increase to twice-weekly treatments beginning in the fall of 2011. Mr. Wilson stated that this treatment program arose from "his view" of how he should deal with his injuries.

**65**  Mr. Wilson also did not hire a personal trainer after receiving Dr. Symon's advice. He explained that he did not understand what a kinesiologist was and that he thought his physiotherapist had the qualifications of a personal trainer. Both explanations belie belief.

**Dr. Gordon Robinson**

**66**  Dr. Robinson is a medical doctor who specializes in neurology. His practice is entirely devoted to the assessment and management of patients with headache disorders. He met once with Mr. Wilson in December 2011 and prepared his report on January 25, 2012. At that time, the headaches were certainly intermittent since Mr. Wilson reported that he had been essentially headache free for two months before the visit, with only a mild headache a week before. He found:

This man was involved in a motor vehicle accident on April 8, 2009. As a result of the accident he sustained soft tissue injury to his neck, shoulders and upper back. I do not believe that there was any damage to his nervous system.

Headache related to his neck injury was present from the outset. Headaches were constant for the first 6 months and could be severe. Since that time there has been gradual improvement in head pain, and during the last 6 months his headaches have become considerably less frequent.

He did not have a history of headache prior to the motor vehicle accident.

I believe that his history and examination is consistent with a diagnosis of chronic headache related to whiplash.

...

Although many patients may recover within weeks to months there is a substantial number that continue to have headache and neck pain years after the injury. Most at risk for chronic difficulties are females, probably due to their longer, more slender neck with less developed musculature. Other negative prognostic factors include patients who were struck without warning, while the head was turned, the presence of a previous neck injury, underlying degenerative neck disease and/or advanced age.

...

Although most patients do not have substantial benefit to treatment such as physical therapy, massage, acupuncture and chiropractic manipulation, he is experiencing considerable benefit with massage treatments. I believe it reasonable for these to be continued over the next 3-6 months, and if his improvement continues I would suggest that they gradually be tapered off.

His prognosis for recovery is good. Even though he has had a prolonged course there has been considerable improvement within the last 6 months. It is probable that he will become headache free over the next 3-5 years but may continue to have discomfort in his neck, right shoulder and mid back.

For the most part his activities will return to normal. However, the capacity to return to high-performance athletics may not be possible given the potential lingering effects of the motor vehicle accident. [Emphasis added.]

**67**  Dr. Robinson was asked to provide another report based on certain factual "clarifications" provided by Mr. Wilson's counsel. On February 28, 2012, Dr. Robinson stated that nothing had altered his opinions. Further, Dr. Robinson confirmed his previous opinions on February 28, 2013 after reading updated clinical records, including those from the massage therapist, and Dr. Feldman's report, discussed below.

**Dr. Rubin Feldman**

**68**  Dr. Feldman is a medical doctor who specializes in physical medicine and rehabilitation, with an expertise in post-trauma rehabilitation. He saw Mr. Wilson once and prepared a report on July 4, 2012. He thought Mr. Wilson's prognosis would be a complete recovery by the end of 2012:

1. ...He still had pain in the occipital area of his head bilaterally present particularly after doing exercise with increased movement. He also noted the presence of constant back pain for which he was treated with Advil. He was frequently awakened at night by pain as well, at which time he also had a sensation of stiffness in his muscles. He never had any numbness. He did note the presence of pain also in the upper thoracic area and provoked pain when he tried to stretch his pectoralis muscles. He seemed to have trigger points to the right and left of the midline in his thoracic area and from there spreading into the occipital area of his head with radiation of this into his axillae. ...

...

1. This man was noted to have sustained soft tissue injuries in the subject accident which seemed to be resolving at the time I saw him. The only abnormalities which seemed to persist were related to the musculature in his neck. ...

...

1. This 48-year-old man was reviewed at your request for the purpose of providing you with the results of an independent medical examination performed approximately three years after he had been involved in a motor vehicle accident, the details of which have been described in this report.
2. His history indicated gradual improvement in function after an initial period in which pain was constant and interfered with his work for a period of about six months. A graduated return to work seemed to be successful in allowing him to return to his previous employment but he still experienced exacerbations of pain periodically on certain movement particularly involving his neck and shoulders.
3. My examination when I saw him did not really reveal too much in the way of abnormalities. Any abnormalities that were seen were related to problems of movement of the neck with range of motion being normal but muscle spasm intervening with some movements at times.
4. Towards the latter portion of time prior to my seeing him, he seemed to be making some improvement and was returning to a certain amount of normal function. This observation by other examiners together with my findings would indicate that in fact, the prognosis for a complete return of function probably by the end of 2012 could be expected.

...

1. As to the diagnosis, in response to question (5a), he had the same soft tissue injuries to the muscles of his neck and upper back. As to prognosis, in the same question, I would suggest that the prognosis is good for a complete recovery by the end of 2012.
2. There is no doubt that these injuries were sustained as a result of the subject motor vehicle accident.
3. In response to question (5b), the accident is the only causal incident which could have caused this.
4. In response to question (c), I do not expect him to be permanently disabled. I have also identified the length of time that he will be temporarily disabled, suggesting that by the end of 2012 there should be no disability.
5. In response to question (d), he is working full time and had begun this in January 2010. He should be able to continue this activity with very few restrictions mainly related to possible provocation of pain on a temporary basis. [Emphasis added.]

**69**  Dr. Feldman saw no problem with Mr. Wilson continuing with his firefighting work. He believed that Mr. Wilson should continue this activity with only a few restrictions mainly related to the possible provocation of pain on a temporary basis. Dr. Feldman's advice concerning ongoing treatment was the same as that given by Dr. McGraw back in May 2010, namely that he start a supervised exercise program followed by a self-directed exercise program at a gym.

**70**  Again, this advice for a supervised exercise program was rejected by Mr. Wilson. In addition, Dr. Feldman's prognosis of a complete recovery by the end of 2012 is disputed by Mr. Wilson, who says that he has not recovered completely.

**Conclusions Regarding Injuries**

**71**  From the foregoing, it is clear that there is no medical evidence to support Mr. Wilson's claim of future disability from the time of trial. No doctor has opined on Mr. Wilson's assertions that his symptoms are continuing at this time.

**72**  Indeed, all of Mr. Wilson's self-reporting to his medical doctors indicates that his headache and neck and shoulder pain symptoms were intermittent by May 2010. Mr. Wilson confirmed on cross-examination that he generally cannot tell what brings on his symptoms. Some of Mr. Wilson's notes of his headaches during 2011 even suggest that it was the massage treatments that were bringing on the headaches. He further confirmed that he can go long periods of time without any symptoms whatsoever. As stated above, Dr. Robinson noted in January 2012 that he had had only a mild headache a week prior and that nothing had happened before then in the two months before the visit.

**73**  A number of lay witnesses, including his friend Kevin Lynn, testified that Mr. Wilson talks about his pain and the therapy when they are together. His friend, Jeffrey Bray, said that Mr. Wilson had almost an overriding concern about his health after the accident. His brother, Anthony Wilson, said that Mr. Wilson talked about his injuries and indicated that he hurt and had headaches often.

**74**  Mr. Wilson says that this evidence indicates "surrounding circumstances" which are consistent with his assertions of ongoing symptoms and continuing injury.

**75**  I conclude and find as a fact the following with respect to Mr. Wilson's injuries:

1. Mr. Wilson suffered soft tissue injuries to his neck, shoulder and back areas as a result of the motor vehicle accident.
2. Mr. Wilson's low back injuries resolved very quickly after the accident.
3. Mr. Wilson suffered from fairly constant neck and shoulder pain and headaches for the first six months, but these symptoms gradually became more intermittent and less severe until his return to work in early 2010.
4. By May 2010, Mr. Wilson's neck and shoulder pain and headaches were continuing on an intermittent basis, but were continuing to improve.
5. At the time of the trial, Mr. Wilson continued to experience pain in his neck and shoulder area and was experiencing headaches, all on a very intermittent basis.

**Mitigation of Damages**

**76**  The defence submits that Mr. Wilson's failure to act in accordance with the medical advice he received constitutes a failure to mitigate and that this failure to mitigate affects virtually Mr. Wilson's entire claim. Specifically, the defence says that Mr. Wilson acted contrary to Dr. McGraw's advice from as early as May 2010, some one year from the accident.

**77**  A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, [*2010 BCSC 1111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-2115-00000-00&context=) at para. 234.

**78**  Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 202.

**79**  As described above, all of the doctors' reports include various recommendations with respect to ongoing treatment. Those recommendations are largely consistent. All of the doctors, except for Dr. Robinson, recommended a supervised exercise program of some kind. Dr. McGraw recommended a discontinuance of passive modalities of treatment at an early stage and an active and supervised exercise program. Dr. Symon suggested "intermittent" physiotherapy and "occasional" massage therapy. Dr. Feldman concurred with Dr. McGraw regarding the exercise program and made no recommendations with respect to other therapies.

**80**  Dr. Robinson advised that most patients do not benefit from treatment such as physical therapy or massage therapy. However, since Mr. Wilson said that he had "considerable benefit" from massage treatments, it was reasonable to continue them over the next three to six months before tapering off. The defence points out, however, that Mr. Wilson's evidence does not disclose any "considerable benefit" from the treatments. Rather, he stated that he received only temporary relief.

**81**  When Mr. Wilson reported to his massage therapist in June 2011, his major complaint was identified as neck, shoulder and back pain. Although he was asked to identify any other conditions, including headaches, he did not indicate that headaches were a problem. As noted above, in some cases in 2011, Mr. Wilson's notes indicate that he actually *blamed* the massage treatments for the onset of his headaches. I therefore have some doubt as to the basis upon which Dr. Robinson arrived at his opinion regarding the reasonableness of continuing with massage treatments.

**82**  What clearly emerges from the evidence of Mr. Wilson, his lay witnesses and the doctors is that Mr. Wilson was and is, as his counsel submitted to the court, "immersed in his therapy". This therapy is largely based on Mr. Wilson's own views as to what treatment he needs in order to obtain temporary relief from his symptoms. It is also based on his clearly expressed "opinion" in terms of disagreeing with the medical advice he received over the years since the accident.

**83**  Mr. Wilson's evidence concerning his ongoing and extensive massage therapy is not supported by any evidence from his massage therapists. I am not aware of their qualifications, although some indicate that the services were provided by a RMT. None of the massage therapists who have been treating him over these many years testified as to his ongoing treatment and their observations or opinions on that course of treatment. Mr. Wilson's evidence was replete with references to these massages addressing his "trigger points" and "fascia release", but no explanation was provided as to what these were and what they had to do with his ongoing symptoms. In fact, at one point, Mr. Wilson indicated that his massage therapy was directed at parts of his body that were not related at all to his head, neck and shoulder area. Mr. Wilson indicated that these treatments were helping him "understand this", a puzzling phrase which, if nothing else, indicates that Mr. Wilson is acting as his own medical advisor.

**84**  I have already indicated that from as early as May 2010, Mr. Wilson has plainly ignored the medical advice he was given and that he has continued to ignore that advice until only recently. It appears that at a dinner party, he was convinced by another guest to undertake treatment by a kinesiologist. He obtained Dr. Symon's support for this and he undertook six treatments in February and March 2013, just before the trial. This therapy had been recommended to him by Dr. McGraw some three years ago and was later recommended in Dr. Symon and Dr. Feldman's reports. It is unbelievable that Mr. Wilson was finally prepared to take such advice from a dinner party guest in terms of his treatment, after having ignored the same advice from his medical doctors for several years. The close proximity of these treatments to the date of the trial also suggests that he was trying to avoid any suggestion that he had entirely ignored the previous medical advice.

**85**  Mr. Wilson testified that he noticed gains while taking the kinesiology treatments, but that he had discontinued them because ICBC would not agree to fund the program. I find this excuse for not proceeding with the kinesiologist program to be equally unbelievable. It is clear that expense is not particularly an issue when Mr. Wilson is seeking treatment. The cost per visit to the kinesiologist was nominal ($33.60), while the massage visits, which he still continued, cost $95.20 per visit. In fact, Mr. Wilson's special damage claim for massage therapy alone is over $17,000. Within that amount, he has claimed $344.50 for a couple's massage that he (and presumably his wife) had in Calgary in February 2011. He has also claimed over $1,700 for massages in Hawaii at the Four Seasons Resort in Maui while on holidays there in November 2012 and later in January 2013. One of these bills alone totals $771.05 for a visit that included another couple's massage, replete with special robes and, like the others in Maui and in Calgary, a generous gratuity.

**86**  Dr. McGraw recommended a supervised exercise program at his examination of Mr. Wilson on April 22, 2010. He identified the nature of the program that was recommended (kinesiologist or personal trainer). He indicated the duration of the program that was expected (3-4 months, 2-3 times per week, with follow-ups 2-3 times a year). Mr. Wilson was said to have been very motivated to pursue such a program. Dr. McGraw also expressly advised the plaintiff to discontinue passive modalities of treatment.

**87**  Mr. Wilson gave further evidence to the effect that he did not understand Dr. McGraw's recommendations. I completely agree with the defence's submissions that this evidence should not be accepted. I do not accept his contention that he did not know what a kinesiologist or a personal trainer was, or what passive modalities of treatment were. If he was unclear, there is no indication that he sought clarification. In addition, he presumably discussed these same matters with both Dr. Symon and Dr. Feldman, who recommended the same thing. He acknowledged receiving and reading all of these reports afterward, but he did not seek any clarification if he was unsure about what was being recommended.

**88**  I agree with the defence that Mr. Wilson chose to ignore Dr. McGraw's recommendations and instead self-directed his rehabilitation along a different path.

**89**  Dr. Symon confirmed that Mr. Wilson should undertake a supervised exercise program in June 2011. Nonetheless, the plaintiff continued to act contrary to that advice. Despite that advice and Dr. Symon's report, Mr. Wilson maintained that Dr. Symon supported his decision to have massage therapy two times per week seemingly without end. There is no evidence from Dr. Symon to that effect, and I reject that Dr. Symon advised Mr. Wilson to take that course of action.

**90**  The defence also submits that Mr. Wilson's damages should be assessed on the basis that if he had properly mitigated his condition, he would have achieved almost full recovery from his injuries and symptoms within 18 to 24 months, with a possibility of some intermittent pain or flare-ups thereafter.

**91**  I accept the defence's submissions and find that they have met the burden of proving that Mr. Wilson has failed to mitigate his damages. I also agree that the evidence establishes not only the failure to follow medical advice and recommendations, but also the strong likelihood that if Mr. Wilson had followed the recommendations he would have fully recovered long ago. A determination of when that would have occurred can be made by a review of the medical evidence.

**92**  Dr. McGraw identified a three to four month program in May 2010 when Mr. Wilson's symptoms were only intermittent. He clearly was of the opinion that Mr. Wilson could undertake the program and that it would improve his symptoms to the point that Mr. Wilson would, as Dr. McGraw put it, "return to his pre-accident physical status without impairment or disability". Although Dr. McGraw did not say when this recovery would be made, I surmise that it must have been some time after the recommended program and a certain follow-up period.

**93**  Dr. Symon said in June 2011 only that the physiotherapy would be needed for the "foreseeable future", and only occasionally after that. Of course, by that time, Mr. Wilson should have completed his program with the kinesiologist or personal trainer. Dr. Feldman's advice in July 2012 was to undertake the same program with the idea of a complete recovery within six months.

**94**  I find that if Mr. Wilson had adequately responded to the medical advice he received and had undertaken the program recommended, he would have been fully recovered by the summer of 2011, with the possibility of occasional flare-ups after that time.

**Damages**

**Non-Pecuniary Damages**

**95**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, disability, inconvenience, loss of enjoyment of life, and loss of amenities: *Dikey v. Samieian*, [*2008 BCSC 604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DT-00000-00&context=) at para. 139. 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.

**96**  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:

[46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, [*2004 BCCA 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T7-00000-00&context=)] that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**97**  The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**98**  Mr. Wilson is now 49 years of age. He suffered soft tissue injuries, which I have outlined above. I have also outlined my findings on the severity and duration of his symptoms.

**99**  Mr. Wilson was off work with disabling neck and shoulder pain and headaches for approximately 10 months after the accident, returning to work in January 2010. During that time, Mr. Wilson had to curtail his sports activities, which included playing soccer and occasionally golf and hockey. He was unable to participate in the 2009 and 2011 World Police and Fire Games. Mr. Wilson was also unable to act as the head coach for his son's soccer team in September 2009, although he switched to being the assistant coach.

**100**  The inability to play sports was perhaps the most significant impact advanced by Mr. Wilson in support of an award of non-pecuniary damages. I accept that his injuries curtailed his activities for some period and that they would have continued to curtail them until the summer of 2011 and perhaps occasionally afterwards. After that time, Mr. Wilson has only himself to blame for the lack of progress in his symptoms. In any event, I would again note that despite Mr. Wilson's direct evidence, and despite what he told Dr. McGraw, he was not playing sports at an "elite" level prior to the accident. He was only playing in a recreational soccer league and had the occasional hockey and golf game with friends and family. I expect that if Mr. Wilson begins to follow the medical advice at some point, he will return to these activities.

**101**  The lay witnesses, including his father, Robert Wilson, testified that Mr. Wilson is not as "happy go lucky" after the accident. Mr. Wilson's brother, Anthony Wilson, said their relationship had changed after the accident, but I consider that their relationship changed by reason of time and different priorities arising in each person's life. There is a normal shift in relationships over time.

**102**  I have already indicated that Mr. Wilson's friends, Mr. Lynn and Mr. Bray, while commenting on his generally positive disposition, say that he is less gregarious and outgoing and that he is quite focused on his health. I have no doubt as to the latter, but for the reasons articulated above in respect of mitigation, I consider that Mr. Wilson is unduly focused on his own ideas about his health and ways to recovery ? all to the point that he has ignored medical advice and has instead embarked on his own "journey", as he calls it, in dealing with his medical symptoms. In any event, it appears that Mr. Wilson continued with social activities with his friends as before, except for a game of golf with Mr. Bray which had to be cut short when Mr. Wilson had a headache.

**103**  There was no evidence that the injury negatively affected his relationships with his girlfriend or Ms. Avis, his new wife. In fact, it appears that Ms. Avis occasionally enjoys having a massage at the same time that Mr. Wilson does.

**104**  There is also no evidence that his injuries affected his work in the fire department. He was able to return after approximately 10 months and because of the seniority system in place, he was able to continue in a position that afforded him the same benefits and opportunities as before.

**105**  As for his lifestyle, Mr. Wilson had presented no evidence that the accident negatively affected that aspect of his life. He continued to travel quite extensively without difficulty, including to South America, Calgary and Hawaii.

**106**  Mr. Wilson cites three cases in support of an award of $125,000, as being within a range of $112,000 and $145,000 for chronic soft tissue injuries to the neck and back that are accompanied by headaches.

**107**  In *Parfitt v. Mayes et al,* [*2006 BCSC 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1T2-00000-00&context=), the 17-year-old plaintiff was injured in an October 24, 2000 motor vehicle collision. She was a "type A personality" and participated in athletic and sports endeavors, both recreational and organized. She was in excellent health, fit, and conditioned. The collision caused a severe whiplash injury to her neck and a moderate to severe strain of her lower back. The plaintiff experienced initial headaches, neck pain, and back pain. Her injuries improved, but she was left with ongoing pain. Some five years later, she continued to suffer from headaches caused by muscle tension. The court found that the plaintiff's migraine headaches were not caused by the collision and that the plaintiff would not have any permanent disability as a result of the injuries from the collision. Non-pecuniary damages were awarded at $120,000.

**108**  In *Knauf v. Chao*, [*2009 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24XN-00000-00&context=), the 35-year-old female accounts payable clerk and part-time server suffered injuries as a result of two motor vehicle collisions which occurred in the fall of 2002, within two months of each other. Prior to the collisions, the plaintiff was active and played badminton, skied, ran, and dragon boated. In the first collision, the plaintiff suffered severe neck and back pain, restriction of motion in her neck, and headaches. The second accident aggravated these injuries. The plaintiff did not miss work as a clerk, but she quit her job as a server. The plaintiff was unable to participate in recreational activities for approximately six months. Although the plaintiff's symptoms improved, she continued to suffer from ongoing pain and stiffness. These ongoing symptoms were not expected to resolve. The jury awarded $235,000 for non-pecuniary damages. This was reduced on appeal to $135,000.

**109**  In *Zen v. Readhead*, [*2011 BCSC 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G33X-00000-00&context=), the 40-year-old male business owner suffered injuries as a result of a 2005 motor vehicle collision. The plaintiff suffered soft tissue injuries and pain in his lower back, pelvis, and elbow, along with ongoing headaches, sleep disturbance, mood disturbance, dizziness, and some minor cognitive effects. The plaintiff's ability to be productive in his business was negatively impacted. Prior to the collision, the plaintiff participated extensively in athletics and was described as an "exercise junkie". Following the collision, the plaintiff was no longer able to do so. His relationship with his family also suffered. Although many of his injuries resolved, the plaintiff experienced chronic pain, which resulted in impaired sleep, dizziness, depressed mood, back pain, and headaches. Non-pecuniary damages were awarded at $110,000.

**110**  The defence submits that an appropriate award for non-pecuniary damages is $40,000.00, citing:

1. *Wilkinson v. Whitlock*, [*2011 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1BF-00000-00&context=): The plaintiff suffered a mild to moderate soft tissue injury to her lower back. It was painful for six months and plateaued at the time of trial. Her injuries affected her recreational activities and her ability to do chores and renovations. The plaintiff failed to mitigate damages with treatment programs, and the court found that a fitness program would improve function. The award was $40,000.
2. *Eng v. Titov*, [*2012 BCSC 300*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6243-00000-00&context=): The plaintiff suffered soft tissue injuries to his neck and shoulders and had headaches. These injuries were symptomatic three years after accident, with chronic pain and headaches about once per month. His injuries affected his day-to-day activities and his work. The court awarded $40,000.
3. *Rozendaal v. Landingin*, [*2013 BCSC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M2XR-00000-00&context=): The first accident caused neck and shoulder pain and headaches. The second accident four months later exacerbated these symptoms. The symptoms had not resolved by the time of trial. They affected the plaintiff's recreational activities and her family and social life. The award was $40,000.
4. *Bissonette v. Horn*, [*2012 BCSC 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G39J-00000-00&context=): The plaintiff suffered injuries such as an injured finger and broken tooth and headaches which were resolved after the accident. She also suffered left leg or hip and lower back pain, which had diminished following the accident but remained symptomatic at trial some four and a half years afterward. Her injuries continued to affect her work, recreation and sleep. The prognosis was guarded. The award was $50,000.

**111**  I consider that the cases cited by Mr. Wilson involve injuries far more severe than those suffered by Mr. Wilson in this case. The cases cited by the defence are more in line with Mr. Wilson's injuries and the expected course of recovery if Mr. Wilson had mitigated his damages in accordance with his medical advisors' advice. Even accepting his evidence of occasional headaches and neck pain at this time, I do not accept that these symptoms are interfering with his working or social life to the extent of the plaintiffs cited in his cases.

**112**  I award the sum of $40,000 for non-pecuniary damages.

**Past Wage Loss**

**113**  Compensation for past wage loss is 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=); *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=).

**114**  Pursuant to s. 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that, in the ordinary course, the court must deduct the amount of income tax payable from lost gross earnings:  *Hudniuk v. Warkentin*, [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=).

**115**  Although actual past events must be proved on a balance of probabilities, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. Therefore, the plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati* at para. 27.

**116**  There is no issue between the parties concerning the wage loss suffered by Mr. Wilson due to his injuries in relation to his firefighting position and his base salary arising from that position. From April 2009 until January 2010 his gross earnings were $53,074. Additional wages of approximately $4,300 were lost during the gradual return to work program. It is agreed that the net benefits paid by the Society during both time frames is $47,076.66.

**117**  The only issue between the parties arose in relation to the further amounts that Mr. Wilson says he would have been paid while acting as a captain during that period of time. It is agreed that he did act as a captain occasionally. Mr. Wilson submits that his base salary should be increased by 15% to reflect the approximate period of time in which he would have been acting as a captain and therefore, entitled to the increased wage. However, there is no evidentiary basis for the proposed 15%.

**118**  In contrast, the defence has referred to Mr. Wilson's actual experience as to how often he worked at this higher wage rate just before the accident. In my view, this is a much more supportable method by which to calculate these further amounts. In contrast to Mr. Wilson's approach, it is grounded in the evidence. Based on this approach, Mr. Wilson worked 163 hours of a total of 504 hours, or approximately 32.3% of the time, as a captain. Multiplying this number by the hourly increase of $4.167 and the total hours worked, being 1,659 hours, yields a gross figure of $2,235. The parties can calculate the net amount owing from this gross amount.

**119**  Accordingly, Mr. Wilson's wage loss in relation to his firefighting position is $47,076.66, together with the net amount from a gross wage loss of $2,235.

**120**  Mr. Wilson also claims that as a result of the accident, he was unable to work for Taja. From the outset of the trial, it was repeated that this was Mr. Wilson's major claim.

**121**  I have already indicated that Robert Wilson's company, Taja, owned and operated various apartment buildings and other units around the Lower Mainland over the course of his firefighting career. All of Robert Wilson's children were involved in the business and learned various jobs from time to time. In particular, Mr. Wilson did various maintenance and repair work on the apartments and the building itself. The work done by Mr. Wilson involved tasks such as plumbing (fixing small leaks, chasing leaks, snaking pipes, changing toilets), electrical (changing lights, installing fans, changing switches and outlets), painting (rooms, parking stall lines), tiling, landscaping/gardening (stump removal, lawn care, pressure washing), window cleaning, roofing, moving and changing appliances, garbage duty, and flooring. Much of the work was physically demanding.

**122**  In the years prior to the accident, Mr. Wilson reported the following gross / net business income arising from his work for Taja through Billboard, as follows: 2000: $37,550 / $19,394; 2001: $37,022 / $9,933; 2002: $34,095 / $15,221; 2003: $47,066 / $29,551; 2004: $47,060 / $37,061; 2005: $52,042 / $42,488. He later abandoned doing work through Billboard and performed the work under his personal name. The gross / net figures after that date are as follows: 2006: $9,500 / $9,500; 2007: $4,120 / $3,700; 2008: $24,315 / $19,062.

**123**  Robert Wilson says that Mr. Wilson did the most work for Taja. In his words, his other children helped from time to time, but they "had their own lives".

**124**  The explanation for the lower income levels commencing in 2006 is that Mr. Wilson was spending more time dealing with his marital situation following his separation from his first wife. Robert Wilson says, however, that once those difficulties were sorted out, his son started to work more for Taja in 2008. Robert Wilson says that in the period of time leading up to the accident, Mr. Wilson could work as much as he wanted.

**125**  There is also a three-month period in early 2009 just before the accident where no time was spent by Mr. Wilson on Taja matters. Mr. Wilson contends that this was as a result of him completing certain renovations to the house that he and his girlfriend had purchased in November 2008. This evidence is supported by his father's evidence.

**126**  Since the accident, Mr. Wilson has not worked for Taja except for the odd occasion when his father needed something done and his brothers were not available. On those occasions, Robert Wilson has asked Mr. Wilson to collect the rent, do some banking, and show apartments. Robert Wilson confirms, however, that Mr. Wilson has not done anything physically demanding for Taja from the time of the accident.

**127**  It is Mr. Wilson's contention that but for the injuries arising from the accident, he would have worked, at a minimum, one day per week on Fridays for Taja. At eight hours a day at $50 an hour, this would have generated a gross income of $20,000 per year. This is said to be a conservative estimate given that Mr. Wilson was still on shift work up until the time that he obtained his new position in January 2010, which would have allowed him even more time to complete work for Taja.

**128**  Robert Wilson produced a list of expenses incurred by Taja from 2009 to 2013 totaling $151,071.81, representing amounts paid to third-party providers. These items would have included such things as venetian blind repair, painting, janitorial work, tile repair, general repair work, and collecting rents and deposits. Robert Wilson estimated that Mr. Wilson would have had approximately 90% of this work available should he have wanted it. The defence was unable to challenge the accuracy of this evidence because this was a specific list prepared by Robert Wilson and Mr. Wilson for the purpose of this litigation. There was little backup documentation to support any of these listed expenses or any other expenses incurred by Taja during this period of time. At no time did Taja produce any income statements other than the ones ending December 31, 2008 and 2009, and even those years indicated that the amounts billed by Mr. Wilson to Taja represented a smaller percentage than 90%. Further, the backup documentation given by Mr. Wilson to Taja or recorded by Taja as to work done by Mr. Wilson before the accident was not provided. This documentation might have indicated, at the very least, the split between labour and supplies for amounts previously paid by Taja to Mr. Wilson.

**129**  From 2000 to 2005, Billboard earned an average annual net income of $25,608. In 2008, when Mr. Wilson returned to Taja, he earned $19,062 in net business income. Mr. Wilson therefore submits that a minimum loss of $20,000 per year is consistent with the evidence and with his past performance.

**130**  However, a comparison of this yearly amount to Mr. Wilson's 2008 tax return indicates that this is not a direct comparison. When Mr. Wilson filed his 2008 return, he claimed business expenses of $5,253, which expenses related to business tax, fees and licenses, telephone, utilities, and delivery freight and express. No amount was claimed for supplies. There is no evidence of what his business expenses would have been from 2009 to 2013 that would enable a calculation of the net income figure that is the appropriate figure from which to start.

**131**  Accordingly, Mr. Wilson's analysis and calculations can only be described as "rough and ready". He says that in the four years since the collision, he has lost, at minimum, $80,000 gross income from Taja. From that figure, he applies a notional 25% discount for taxes and the potential for work beyond eight hours per week to arrive at a net income loss of $60,000.

**132**  Aside from the calculation difficulties with this claim, there are also difficulties in light of Mr. Wilson's assertion that he otherwise would have worked for Taja in the period following the accident if he had not been injured.

**133**  Mr. Wilson returned to his fire-fighting job on January 20, 2010 with certain restrictions. Even after his return to full-time duties, various restrictions remained, particularly relating to heavy lifting. Dr. McGraw's May 2010 report specifically noted the restrictions that were put in place upon his return to work. Dr. Symon was, of course, well aware of the fact that he was off work, the basis upon which he returned to work and the restrictions on his work duties. Similarly, Dr. Robinson in his January 2012 report commented on his back to work program and the restrictions Mr. Wilson was under. Finally, Dr. Feldman in his July 2012 report commented on Mr. Wilson's history in terms of his work and his return to work.

**134**  Despite the ongoing treatment being provided by Dr. Symon over these last four years, at no time did Dr. Symon mention in his report anything about Mr. Wilson's past employment with Taja or any restrictions that he felt might be appropriate in respect of that type of employment. There is absolutely no mention of Taja at all in Dr. Symon's report.

**135**  Similarly, there is absolutely nothing in the reports of Dr. McGraw, Dr. Robinson or Dr. Feldman commenting on any aspect of Mr. Wilson's previous employment with Taja or whether Mr. Wilson was able to continue with that type of employment.

**136**  Mr. Wilson specifically obtained these reports for the purpose of this litigation. He would have known that he would be advancing a wage loss claim (and loss of capacity claim) relating to Taja. In those circumstances, it is inexplicable that he would not have mentioned that his injuries were impacting his ability to work for Taja if he was truly suffering a loss in that respect. The defence submits and I agree that the only inference to be drawn is that he did not raise it with the medical professionals because it was not an issue to him given his life circumstances. Regardless of his injuries, he was not in a position to do work or had chosen not to do work for Taja.

**137**  Mr. Wilson's evidence was that he considered that the same restrictions on his work duties at the fire department would apply to his work for Taja. I accept that Mr. Wilson believes that he has been physically unable to work for Taja since the time of the accident. However, a plaintiff's own perception is not sufficient at law to support a finding of disability. Some expert medical evidence is always necessary to assist the court: *Eddie v. Unum Life Insurance Co.*, [*1999 BCCA 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1B5-00000-00&context=) at para. 86.

**138**  Moreover, one of the questions that was raised, yet remained unanswered based on the evidence, was why Mr. Wilson did not complete other less physically challenging tasks for Taja that were equally available to him. Mr. Wilson gave evidence on his direct examination that this was a family business and that it was his intention to take over this business for the benefit of the family once his father, now 76 years of age, retired. His brother, Anthony Wilson, confirmed this evidence. In that case, why would Mr. Wilson not remain as involved as he possibly could?

**139**  Mr. Wilson did not obtain any functional capacity evaluation to address the issue of what work, if any, he could complete for Taja. No reason was advanced for the lack of this evidence.

**140**  There are also other circumstances that put in doubt Mr. Wilson's contention that he would have been ready, willing and able to undertake work for Taja but for the accident. It is agreed that in the years following his separation and divorce, he was less available to do work for Taja. By 2007, he began a relationship with his girlfriend, which even by his evidence still meant that he was principally caring for his children when he had custody of them. This became an even starker reality when the relationship with his girlfriend foundered in the summer of 2009 and he was put to the task of arranging new living arrangements. No one could challenge the proposition that extra demands are put on a parent where there are shared custody arrangements. That would include getting children to and from school and perhaps other activities on Fridays. And there can be no doubt that Mr. Wilson would have had such demands on his time even after the accident that would have trumped any available time that he could have spent working for Taja.

**141**  Furthermore, when Mr. Wilson met his current wife in February 2010, they almost immediately began a long-distance relationship. That meant flying back and forth between Vancouver and Calgary, which would have meant flying on Friday.

**142**  In addition, aside from the occasional collecting of rents, there is no evidence that Mr. Wilson even tried to return to work for Taja. Such attempts would have been of some assistance in determining whether he was precluded from completing all Taja tasks because of his injuries.

**143**  The defence also raises the fact that Mr. Wilson may not be financially motivated to complete this extra work for Taja, given that his new wife earns a substantial income. Although Mr. Wilson in his own evidence indicated that he was financially motivated to work for Taja, this remains a factor to be considered in assessing his true motivations.

**144**  Perhaps the most telling evidence on this point arises from Mr. Wilson's examination for discovery in November 2011, about two and a half years after the accident:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 509 Q |  | ... your free time is spent, a large amount of it, in Calgary with your new wife, right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | How do arrive at that? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 510 Q |  | Well, you've told me you go to Calgary two or three times a month. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yeah. So my free time also constitute any time after work, correct? So I generally have to raise my children, as I have a full-time child living with me. I do come home at 6 p.m., cook dinner like every other parent, make lunches, read them stories, do homework with them. The only time I go away is on weekends when I don't have the kids and there's not something that keeps me here for the kids, because Michelle can handle the situation. |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 511 |  | Q |  | All right. My point is that you're not actually available to work for your dad's company because you have other obligations now. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Right now I've made new choices, that's correct. |  |

...

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 738 |  | Q |  | And do you foresee yourself returning to doing any of that work, or do you feel you've made other choices now? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It depends -- it depends how long he wants to keep the building. I mean, right now I don't foresee myself in the short term returning because of the choices that I've made. But if he wishes to keep the business going in the future, there could be an opportunity for me, if I choose, and that may depend on if my wife comes here and/or if -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | 739 Q | You take retirement? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- after retirement. You know, that possibility is -- it will still be there. |  |

[Emphasis added.]

**145**  I conclude and find as a fact that Mr. Wilson was able to work for Taja, but that he made other "choices" as to how he wanted to spend his time.

**146**  Further, Mr. Wilson has not satisfied the burden to prove that he had any disability preventing him from working for Taja at any point in time. Even if I had accepted that Mr. Wilson had some current disability, I find that he has failed to provide the necessary evidence upon which the court could base an award for past wage loss.

**Loss of Future Earning Capacity**

**147**  A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and 2) if so, what compensation should be awarded for the resulting financial harm that will accrue over time? The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.); *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=).

**148**  Insofar as it is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's ***negligence***: *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185. The essential task of the court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident has happened: *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32.

**149**  The plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. If that burden is met, then there are two possible approaches to assessing the loss of future earning capacity: the "earnings approach" from *Pallos*; and the "capital asset approach" in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measureable way: *Perren* at para. 32.

**150**  The earnings approach involves a form of math-oriented methodology such as (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years, and calculating a present value, or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert* at para. 233.

**151**  The capital asset approach involves considering factors such as whether the plaintiff: (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert* at para. 233.

**152**  The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101:

[101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina* *v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* [*(2001), 84 B.C.L.R. (3d) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11; *Ryder v. Paquette*, [*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79. ...

**153**  Recently, in *Parker v. Lemmon*, [*2012 BCSC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1FJ-00000-00&context=), Mr. Justice Savage summarized the principles from *Perrin* to be applied:

[42] The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at paras. 25-32, which I summarize as follows:

1. A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
2. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
3. A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
4. An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
5. It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
6. If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
7. Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
8. An earnings approach will be more useful when the loss is more easily measurable;
9. The capital asset approach will be more useful when the loss is not easily measurable.

**154**  Mr. Wilson advanced this claim not in relation to his firefighting position, which is secure, but in relation to his contention that he would have worked for Taja but for his injuries suffered in the accident.

**155**  In large part, Mr. Wilson's contention is based on his argument that he continues to suffer chronic soft tissue pain in his neck and upper back together with headaches. He cites three cases in support: *Bancroft-Wilson v. Murphy*, [*2008 BCSC 1035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M324-00000-00&context=), aff'd [*2009 BCCA 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M287-00000-00&context=), *Pratt v. Barlow*, [*2008 BCSC 1764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0NN-00000-00&context=), and *Driscoll v. Desharnais*, [*2009 BCSC 306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3XH-00000-00&context=). In all these cases, the plaintiffs had chronic pain or headaches or both. The plaintiff in *Bancroft-Wilson* presented evidence that his injuries were not likely to be permanently disabling, and the doctors predicted that there would be substantial improvements, if not full recovery, within three to five years.

**156**  Mr. Wilson claims the amount of $100,000 under this head of damages on the basis that it reflects five years of earnings from Taja, assuming again that Mr. Wilson would work a minimum of one day per week.

**157**  The difficulty with this argument arises from the same circumstances in relation to past wage loss. That is, there is absolutely no medical evidence to suggest that Mr. Wilson is unable to complete any of the tasks that might arise from his work for Taja, including physical ones. Again, Mr. Wilson relies upon his own assessment of his abilities. In all the cases cited by Mr. Wilson, the court relied on medical evidence in support of its finding that there was both a disability and a substantial possibility that the disability would result in a future income loss.

**158**  As outlined above, Dr. McGraw's medical evidence indicated that in May 2010, he anticipated that Mr. Wilson would make a full recovery. Dr. Feldman also considered that Mr. Wilson would make a full recovery within six months by the end of 2012, although that was in conjunction with the recommended treatment program, which Mr. Wilson had not been undertaking to that time.

**159**  The only medical evidence that Mr. Wilson relies on is that of Dr. Robinson, who said that he anticipated that Mr. Wilson would become headache free over the next three to five years and that he may continue to have discomfort in his neck, right shoulder and mid back. However, Dr. Robinson gave no opinion that, even assuming that Mr. Wilson continued to have headaches and discomfort from time to time over the next three to five years, this would be disabling to the point of Mr. Wilson being unable to complete any tasks for Taja. People have headaches and discomfort all the time. In most cases, people take some medication and otherwise get on with their lives, including going to work. I am not prepared to simply assume that Mr. Wilson's headaches and discomfort would have negatively affected his ability to work.

**160**  Unlike here, in *Wilson-Bancroft*, the headaches were generally described as "debilitating", which clearly was a factor that would have affected the plaintiff's ability to work.

**161**  Further, I have found that Mr. Wilson failed to mitigate his losses by ignoring the medical advice he received as to an appropriate course of treatment. I have found that but for his failure to undertake the recommended program, he would have achieved a full recovery by summer 2011.

**162**  Finally, I have found that Mr. Wilson made a deliberate choice not to pursue work with Taja as a result of other things going on in his life, including his children, his new wife, his new job, and his obsession with his self-prescribed treatment program. I acknowledge that it appeared to be Robert Wilson's wish to pass this business along to his children and that Mr. Wilson appeared to be a likely candidate to take that over. Nevertheless, even accepting that Mr. Wilson needs further time to recover from his injuries, it has not been shown that this decision is likely to be made by Mr. Wilson in the time before he achieves full recovery.

**163**  I find that Mr. Wilson has failed to establish a substantial possibility that he will suffer income loss in the future in relation to Taja as a result of his injuries.

**Costs of Future Care**

**164**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition 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.); *Williams v. Low*, [*2000 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X038-00000-00&context=); *Spehar et al. v. Beazley et al.*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=), aff'd [*2004 BCCA 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3NB-00000-00&context=).

**165**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: 1) there must be a medical justification for claims for cost of future care; and 2) the claims must be reasonable: *Milina v. Bartsch* at 84.

**166**  Future care costs must be justified because 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: *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.

**167**  The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required.

**168**  Overall, an assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=) at para. 21. Each case falls to be determined on its particular facts: *Gilbert* at para. 253.

**169**  Mr. Wilson's claim for future care relates solely to his ongoing and extensive massage therapy treatment. He is presently obtaining treatments twice a week. At $95.20 per visit, this results in an annual cost of $9,900. Accordingly, he seeks an award in the amount of $30,000, principally on the basis of Dr. Robinson's opinion, which anticipated that he would become headache free over the next three to five years.

**170**  Dr. Robinson's report was authored in January 2012. He considered that it was reasonable for Mr. Wilson to continue with his massage therapy over the next three to six months. However, he did not comment on how frequent those treatments should be. Nor did Dr. Robinson change his opinion concerning Mr. Wilson's treatments in February 2013, despite having reviewed the clinical records of the massage therapists to July 2012 (by which time he anticipated that these treatments would have stopped).

**171**  Accordingly, I reject Mr. Wilson's claim for the massage treatments that he proposes for the future. There is no medical evidence to support such an ongoing claim. Furthermore, even leaving aside the mitigation issues discussed above, there is nothing to justify this as a reasonable claim. On the face of it, Mr. Wilson's massage program is excessive and is driven more by his personal and abiding interest in these massage treatment sessions, which he (not his doctors) prescribed as the appropriate treatment program.

**172**  I have already referred to the opinions of Dr. McGraw, Dr. Symon and Dr. Feldman, who all recommended a supervised exercise program. Mr. Wilson did undertake the start of such a program earlier this year, attending five treatments with a kinesiologist for total cost of $160. Mr. Wilson may benefit from continuing such therapy, since it was originally recommended by his doctors some years ago. Relying on Dr. McGraw's recommendation for the exercise program, and using Mr. Wilson's previous costs incurred for the program in early 2013, I award the sum of $2,000 so that he might undertake such a program.

**Special Damages**

**173**  It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, [*2011 BCSC 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at para. 281; *Milina v. Bartsch* at 78.

**174**  Mr. Wilson says his expenses were reasonable and medically justified, relying on *Mitchell v. We Care Health Services Inc*. *et al.*, [*2004 BCSC 902*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X04N-00000-00&context=):

[33] The general approach to special damages is based on the same principles as the approach to loss of earning capacity and cost of future care. The plaintiff "is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money": *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.) at 78, aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.).

[34] A court should award special damages if the expense incurred was reasonably necessary. In *Brennan v. Singh*, [*[1999] B.C.J. No. 520*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-222K-00000-00&context=) (S.C.) (QL), the defendants argued that the test for determining whether the cost of care was appropriate was "medical necessity". Mr. Justice Harvey pointed out that this standard was rejected in *Zapf v. Muckalt* [*(1996), 26 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F8D9-M1MM-00000-00&context=) (C.A.) as being too stringent. The Court of Appeal preferred a reasonableness test. The court in *Zapf* made its comments in the context of housing costs but Mr. Justice Harvey concluded that this approach should be applicable to other components of care as well. After having reviewed *Milina* and *Mann v. MacCaig-Ross*, [*[1998] B.C.J. No. 592*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S24M-00000-00&context=) (S.C.) (QL), Mr. Justice Harvey formulated the test for special damages in this way at para. 91:

[I]t is what a reasonably minded person of ample means would be prepared to incur as an expense; and cannot in the remotest sense be considered a squandering of money; and for which there is a medical basis.

**175**  Mr. Wilson claims $31,895.52, representing the total of $37,143.22 less the amount of $5,247.70 already paid by ICBC. The totals initially claimed are as follows:

1. Physiotherapy: $6,725.25 (representing treatments from April 2009 to November 2011);
2. Massage therapy: $17,286.60 (representing treatments from June 2009 to September 2009, and from January 2011 to March 2013);
3. Miscellaneous: $7,487.69 (representing various physical therapy items such as ice packs, foam rollers, Pilates treatment, kinesiology treatments and finally, moving expenses in the amounts of $2000 in July 2010 and $4,700 in September 2011); and
4. Mileage expense to attend treatments: $5,643.68.

**176**  I start again from the proposition that Mr. Wilson has indeed embarked upon his own treatment program with little, if any, regard for the actual recommendations given by his medical doctors. The defence relies on the statements of the court in *Redl v. Sellin*, [*2013 BCSC 581*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2DS-00000-00&context=), which have some relevance as to how Mr. Wilson has approached his injuries and treatment:

[55] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, [*2011 BCSC 982*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6290-00000-00&context=); *Milina v. Bartsch* [*(1985), 49 BCLR (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. I accept the argument expressed through Dr. Frobb, that a patient may be in the best position to assess her or his subjective need for palliative therapy. I also accept the plaintiff's counsel's argument that in the circumstances of any particular case, it may be possible for a plaintiff to establish that reasonable care equates with a very high standard of care. In the words of Prof. K. Cooper-Stephenson in *Personal Injury Damages in Canada*, (2d ed., 1996) at p. 166:

Even prior to the Supreme Court's endorsement of the restitution principle [in *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), and *Arnold v. Teno*, [*[1978] 2 S.C.R. 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=)], in the area of special damages the courts had been prepared to allow optimum care, and damages were awarded for expenses of a character that stretched far beyond the resources of even an affluent Canadian.

That being said, and while Dr. Frobb's paradigm of the patient becoming their own physician may have at least a superficial appeal, plaintiffs are not given *carte blanche* to undertake any and all therapies which they believe will make them feel good.

[Emphasis added.]

**177**  The circumstances described by the court in *Redl* were very similar to that of Mr. Wilson:

[56] In the present case, Ms. Redl undertook an extraordinarily wide variety of therapies, some without advice, and some less conventional than others. She did so at considerable expense. It is probable, in my view, that she undertook this course of action in part through a desire to recover quickly and in part on the basis of her positive past experience, pre-accident, with massage therapy and chiropractic. However, her firm beliefs notwithstanding, there is no medical evidence that the therapies she undertook accelerated her return to work or have otherwise improved her physical condition. ... Ultimately, the evidence does not persuade me on a balance of probabilities that Ms. Redl's physical or mental well-being is or could reasonably have been expected to be any greater as a result of undertaking these frequent therapies, than it would be if she had stuck to her pre-accident pattern of weekly or bi-weekly massage and monthly chiropractic treatments.

**178**  With respect to the physiotherapy, Dr. McGraw indicated that that treatment should have been discontinued in May 2010. Despite receiving that advice, approximately two weeks later on May 25, 2010, Mr. Wilson visited Dr. Symon to obtain a note that Mr. Wilson should continue to receive "intermittent" physiotherapy treatments. He apparently told Dr. Symon about Dr. McGraw's conclusions. Needless to say, Mr. Wilson points to Dr. Symon's note as the basis for the continuing physiotherapy treatments.

**179**  Mr. Wilson puts the court in a difficult position in determining which medical practitioner is right in terms of the medical justification for this expense. Be that as it may, in my view, Dr. McGraw's opinion should be accepted since he is specialized in the field of orthopaedics as opposed to Dr. Symon's focus on family medicine. On the face of things, it appears that Mr. Wilson disagreed with Dr. McGraw's recommendations and went "doctor shopping". Dr. Symon gave no evidence at this trial in terms of why he referred Mr. Wilson for physiotherapy in June 2010 and how long he anticipated this treatment was to continue.

**180**  I am allowing the sum of $4,200 with respect to physiotherapy treatments, which equates to the period of time prior to Dr. McGraw's recommendations.

**181**  The basis for Mr. Wilson's claim for his extensive massage therapy is based on his contention that it provided temporary relief of his symptoms and that the symptoms worsened if he did not attend. As I stated earlier, this statement is suspect given his own recording of notes that indicate that the massage treatment at times brought on the headaches. Again, he relies on Dr. Robinson's opinion which, in large part, is simply based on Mr. Wilson's contention that the massage therapy was of "considerable benefit" to him. As noted above, I do not accede to Mr. Wilson's contention in this regard.

**182**  Once more, on the basis that Mr. Wilson should have accepted Dr. McGraw's recommendations, I allow the sum of $1,500 for massage therapy for the period of time to May 2010.

**183**  With respect to the miscellaneous items, the only items that are supported by the medical evidence are the ice pack, foam roller and kinesiology treatments for a total of $658.40. The remainder of the items are either unreasonable or not justified by any medical evidence. In particular, the moving expenses have not been shown to arise from any disability that Mr. Wilson was suffering or should have been suffering at the time.

**184**  In addition, I allow the sum of some $2,600 in respect of mileage claimed by Mr. Wilson for the purpose of attending his treatments to May 2010 in accordance with Dr. McGraw's recommendation.

**Summary**

**185**  In summary, damages are awarded as follows:

1. Non-pecuniary damages: $40,000;
2. Past wage loss: $47,076.66 together with the net amount from a gross wage loss of $2,235;
3. Cost of future care: $2,000;
4. Special damages: $3,710,70, which is $8,958.40 net of the $5,247.70 paid by ICBC.

**Costs**

**186**  Mr. Wilson is entitled to pre-judgment interest on the past wage loss claim and special damages awarded. Mr. Wilson is also entitled to his costs, unless the parties seek to make further submissions in that respect. If further submissions are to be made, they must be filed within 30 days of the delivery of this judgment.

S.C. FITZPATRICK J.

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[***Zhang v. Davies, [2017] B.C.J. No. 1350***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P1T-XTV1-JX8W-M3P7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

E.J. Adair J.

Heard: February 20-24, 2017.

Judgment: July 11, 2017.

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**[2017] B.C.J. No. 1350** | 2017 BCSC 1180

Between Li Zhang, Plaintiff, and Benjamin Daniel Davies and Erin Naomi Richelle Davies, Defendants

(109 paras.)

**Case Summary**

**Damages — For torts — Affecting property — Real property — Nuisance — Action by Zhang for damages for breach of restrictive covenant and nuisance in regard to defendants Davies' house allowed — Zhang asserted Davies' house blocked views and glare from metal roof made rooms in her house unusable — Intention of covenant was to preserve views for strata lots including Zhang's — Meaning of restrictive covenant was clear: Zhang's approval was required for construction specifics — Covenant was not was void and unenforceable, and did not unnecessarily restrict reasonable use of Davies' lot — Zhang also made out claim in nuisance — Total damages owing to Zhang were $109,500 — Property Law Act, ss. 35(2)(b), 35(2)(e).**

**Damages — In contract — Type of contract — Construction and building — Action by Zhang for damages for breach of restrictive covenant and nuisance in regard to defendants Davies' house allowed — Zhang asserted Davies' house blocked views and glare from metal roof made rooms in her house unusable — Intention of covenant was to preserve views for strata lots including Zhang's — Meaning of restrictive covenant was clear: Zhang's approval was required for construction specifics — Covenant was not was void and unenforceable, and did not unnecessarily restrict reasonable use of Davies' lot — Zhang also made out claim in nuisance — Total damages owing to Zhang were $109,500 — Property Law Act, ss. 35(2)(b), 35(2)(e).**

**Real property law — Interests in land — Restrictive covenants — General principles — Creation — By contract — Modification and discharge — Grounds — Registered instrument invalid, unenforceable or expired — Reasonable use of property impeded — Action by Zhang for damages for breach of restrictive covenant and nuisance in regard to defendants Davies' house allowed — Zhang asserted Davies' house blocked views and glare from metal roof made rooms in her house unusable — Intention of covenant was to preserve views for strata lots including Zhang's — Meaning of restrictive covenant was clear: Zhang's approval was required for construction specifics — Covenant was not was void and unenforceable, and did not unnecessarily restrict reasonable use of Davies' lot — Zhang also made out claim in nuisance — Total damages owing to Zhang were $109,500 — Property Law Act, ss. 35(2)(b), 35(2)(e).**

**Tort law — Nuisance — Private nuisance — Liability — Action by Zhang for damages for breach of restrictive covenant and nuisance in regard to defendants Davies' house allowed — Zhang asserted Davies' house blocked views and glare from metal roof made rooms in her house unusable — Intention of covenant was to preserve views for strata lots including Zhang's — Meaning of restrictive covenant was clear: Zhang's approval was required for construction specifics — Covenant was not was void and unenforceable, and did not unnecessarily restrict reasonable use of Davies' lot — Zhang also made out claim in nuisance — Total damages owing to Zhang were $109,500 — Property Law Act, ss. 35(2)(b), 35(2)(e).**

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| Action by Zhang for damages for breach of a restrictive covenant and for nuisance in regard to the defendants Davies' house. Zhang asserted the Davies house as constructed blocked her views and the glare from its metal roof made rooms in her house unusable. The Davies' house, strata lot 5, had been constructed across a residential street from Zhang's house, strata lot 3, which had been purchased prior to the Davies' construction. The lots were part of a five-strata lot development. The original restrictive covenant was in favour of lots 1, 2, and 3. A later revision to the covenant removed a specified height restriction, but stated that the original covenant remained in full force and effect. Zhang claimed the house was in breach of the restrictive covenant, which provided that no house could be constructed on the property purchased by the Davies without Zhang's prior written approval of the plans and specifications. The Davies argued the restrictive covenant was void and unenforceable, and Zhang failed to establish a claim in nuisance. The Davies asserted the case of Anderson changed the law regarding the validity of restrictive covenants, in that if a person was required to go outside the restrictive covenant in order to know what was or was not permitted, then the restrictive covenant was void and unenforceable. The Davies also argued the restrictive covenant should not be enforced because it unnecessarily restricted the reasonable use of strata lot 5.  HELD: Action allowed.  Restrictive covenants were to be construed by looking at the precise words in the context of the facts when the document was created, and considering the background and purpose of the document as guides to interpretation. Here, given the location of strata lots 1, 2 and 3 in relation to strata lots 4 and 5, the intention of the parties in entering into the original covenant was to preserve views for strata lots 1, 2 and 3. Although the later modifications removed the height restrictions, the original intention to preserve the views remained. Further, the meaning of the restrictive covenant was clear: before any house was constructed on strata lot 5, the Davies were to first obtain the written approval of Zhang of the plans and specifications. It was not disputed the Davies had not done this. The case of Anderson had not changed the law respecting interpretation of restrictive covenants. The restrictive covenant in Anderson, in which there was uncertainty with respect to terms and included an "agreement to agree", was unlike the restrictive covenant in the case at bar. The restrictive covenant in this case did not require the parties to conclude an enforceable agreement; it simply required written approval from the owner of strata lot 3 regarding any house on strata lot 5. On the issue of the unnecessary restriction of the reasonable use of strata lot 5, the Davies had failed to show the continuation of the restrictive covenant provided no practical benefit. There was practical benefit to strata lot 3, in terms of the view and the real estate value. The restrictive covenant was valid and enforceable. Further, Zhang had made out a nuisance claim in relation to the glare from the metal roof. The appropriate nuisance damages award was $7,500. The damages for breach of the restrictive covenant were set at $102,000, a 10 per cent loss of the assessed value. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *R.S.B.C. 1996, c. 79*,

Property Law Act, [*R.S.B.C. 1996, c. 377, s. 35*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B1T3-00000-00&context=), s. 35(1)(e), s. 35(2), s. 35(2)(b), s. 35(2)(e)

**Counsel**

Counsel for the Plaintiff: J. Michael Hutchison, Q.C.

Counsel for Defendants: Paul G. Morgan.

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**Reasons for Judgment**

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| **E.J. ADAIR J.** |

**1. Introduction**

**1**  This action concerns a dispute between neighbours who live across the street from one another in a residential neighbourhood known as "Tanner," in the District of Central Saanich, B.C. The dispute has, unfortunately, created a great deal of tension and ill-will.

**2**  The plaintiff, Ms. Li Zhang, purchased her home in December 2013. The house is on the west side of the street, on an elevated site, and faces east. When Ms. Zhang purchased the home, she had unobstructed views from the main floor and the second floor, out to the valley, the ocean and the mountains. At the time, the property directly across the street from her had nothing built on it.

**3**  In 2015, the defendants, Ben and Erin Davies, purchased that property, and built their new home on it. Now, Ms. Zhang no longer has unobstructed views to the east. Instead, and especially on the main floor of her house, Ms. Zhang's views are obstructed by the Davies' house. Moreover, the Davies' house has a metal roof. According to Ms. Zhang, during parts of the day on sunny days, the glare of the sun reflecting off of the Davies' metal roof is very intense and uncomfortable, and it makes rooms at the front of Ms. Zhang's house unusable.

**4**  Ms. Zhang asserts that the Davies' house was built in breach of a restrictive covenant in favour of her property. The restrictive covenant provided that no house could be constructed on the property purchased by the Davies without Ms. Zhang's prior written approval of the plans and specifications for that house. There is no dispute that Ms. Zhang never gave such approval. Ms. Zhang asserts that she is entitled to damages for breach of the restrictive covenant and for nuisance.

**5**  The Davies say that Ms. Zhang's claim should be dismissed. They say first that they have no liability to Ms. Zhang, because the restrictive covenant is void and unenforceable, and Ms. Zhang has failed to establish a claim in nuisance. They say in the alternative that, if they have any liability to Ms. Zhang, any damages must be extremely modest.

**2. Factual background**

**6**  At the beginning of the trial, counsel filed (as Ex. 1) an agreed statement of facts setting out admissions of fact and also admissions concerning the authenticity of documents. In addition, I heard oral evidence. In some instances, the oral evidence contradicted the admitted facts. However, in general, there is little dispute about most of the relevant facts.

**7**  Ms. Zhang's property and the Davies' property are two strata lots in a five-lot bare land strata development created in the early 1990s by Mr. Davies' grandparents, David and Margaret Stubbs. Ms. Zhang owns strata lot 3. The Davies own strata lot 5, which lies to the east of strata lot 3 and part of strata lot 2.

**8**  Mr. and Mrs. Stubbs were the original owners of all five strata lots. The Stubbs have a house on strata lot 4, which is on the east side of the street, to the north of strata lot 5, and to the east of strata lots 1 and 2.

**9**  In October 1991, Mr. and Mrs. Stubbs, in their capacity as registered owners of strata lots 4 and 5, granted a restrictive covenant (the "Original Covenant") in favour of themselves in their capacity as registered owners of strata lots 1, 2 and 3. The Original Covenant provided in relevant part:

WHEREAS:

1. The Grantor [Mr. and Mrs. Stubbs] is the registered owner of lands and premises . . . more particularly known and described as Strata Lots 4 and 5 . . .
2. The Grantee [Mr. and Mrs. Stubbs] is the registered owner of the lands and premises . . . more particularly known and described as Strata Lots 1, 2 and 3 . . .
3. The Grantor proposes to construct a single family residence on the Grantor's lands;
4. The Grantee has requested and the Grantor has agreed to grant a restrictive covenant over the Grantor's lands upon the terms and conditions hereinafter set forth.

NOW THEREFORE in consideration of the sum of One Dollar . . . the parties hereto agree as follows:

1. No dwelling house shall be constructed on the Grantor's Lands unless the plans and specifications of the dwelling house have been first approved in writing by the Grantee, being the registered owner for the time being of said Strata Lots 1, 2 and 3, and without restricting the generality of the foregoing the height of any improvements erected or constructed upon said Strata Lots 4 and 5 and [sic] shall not exceed the following limits:
2. as to Strata Lot 4, the maximum height of any residence and out buildings appurtenant thereto shall not exceed the geodetic elevation of 76.9 metres;
3. as to Strata Lot 5, the maximum height of any residence and out buildings appurtenant thereto shall not exceed the geodetic elevation of 78.7 metres;
4. The burden of this covenant shall run with the Grantor's land and the benefit shall be appurtenant to the Grantee's land.
5. This agreement and everything herein contained shall be binding upon the parties hereto, their successors and assigns.

. . .

**10**  The Original Covenant was duly registered in the Land Title Office.

**11**  In December 2000, Mr. and Mrs. Stubbs, and Carol Ann Stubbs (the previous owner of strata lot 3) agreed to a modification of the Original Covenant (the "Modification"), which provided in relevant part:

WHEREAS by Agreement bearing date the 25th day of October 1991, [Mr. and Mrs. Stubbs], being the Registered Owners of Strata Lots 1 to 5 inclusive . . . did cause Strata Lots 4 and 5 . . . to be charged by [the Original Covenant] . . . , whereby no building having a height greater than that expressed therein would be permitted to be erected upon said Lots.

NOW THEREFORE THIS AGREEMENT WITNESSETH THAT the parties hereto, being all of the Registered Owners of all the Strata Lots . . . , do hereby consent to the deletion from the [Original Covenant] the requirement that buildings erected on Strata Lots 4 and 5 . . . be limited to a specified height.

In all other respects the said agreement shall remain in full force and effect and without limiting the generality of the foregoing, the Registered Owners for the time being of said Strata Lots 4 and 5 . . . shall not commence the construction of a single family residence upon either of said Strata Lots without first submitting for the written approval of the Registered Owner, or Registered Owners, of Strata Lots 1, 2 and 3 . . . the plans and specifications of such dwelling house proposed to be erected upon Strata Lots 4 and 5 . . ..

**12**  The Modification was duly registered in the Land Title Office. There were no other modifications of the Original Covenant so far as strata lot 3 was concerned.

**13**  I will refer to the Original Covenant and the Modification, collectively, as the "Restrictive Covenant."

**14**  Ms. Zhang is originally from China, where her husband still lives. Since 2012, Ms. Zhang has lived in Canada with the couple's two children (who are now teenagers), and she is now a permanent resident. She communicates in Mandarin. Her English language communication skills (both oral and written) are very limited.

**15**  Ms. Zhang described how she came to purchase her home.

**16**  It was just before Christmas 2013. Ms. Zhang and her daughter (the younger of her two children) came across an open house for the property. Ms. Zhang explained that her daughter encouraged her to go in and look around, which the two of them did. The agent who was holding the open house showed Ms. Zhang through the house, pointing out in particular rooms with a view to the east. Ms. Zhang recalled that the views were beautiful, especially the ocean and the mountains. Ms. Zhang found the views to be a particularly attractive feature of the house since she had come to B.C. from Beijing, where (she said) there are no views. A brochure about the property was available, and Ms. Zhang picked one up. Although the text was in English, which Ms. Zhang was unable to read, the brochure included pictures of the house and property, and of the views from the property. An admitted fact is that the property was marketed to Ms. Zhang with emphasis on views from the home and she relied on this marketing in deciding to purchase the property.

**17**  Ms. Zhang decided very quickly that she wished to buy. She made an offer the day of the open house. Her offer was accepted immediately, and the sale closed before Christmas. The final purchase price was $790,000.

**18**  On cross-examination, Ms. Zhang was pressed about whether, in buying her house, she knew about the Restrictive Covenant, and, if so, to what extent. I conclude that Ms. Zhang was told about the Restrictive Covenant by her conveyancing solicitor when she purchased her new home, although at trial she was unable to recall the details. It would be routine for a conveyancing solicitor to review title matters, including charges such as a restrictive covenant, with his or her client in connection with a purchase of real estate. Ms. Zhang testified that she placed the documents relating to the purchase that she was given by her solicitor in a safe at home, and she did not get them translated. In my opinion, whether or not Ms. Zhang relied on the contents of the Restrictive Covenant in purchasing her home is of little consequence. Moreover, the defendants admit that Ms. Zhang relied on marketing emphasizing the views in deciding to purchase the property. The state of Ms. Zhang's knowledge about the Restrictive Covenant does not affect its validity or enforceability. In any event, Ms. Zhang clearly knew about the Restrictive Covenant by February 2015.

**19**  Ms. Zhang and her children moved into their new house in the latter part of February 2014. As Ms. Zhang recalled, for a few days after moving in, she took many pictures of the view to the east, which she described as very beautiful.

**20**  The Davies closed on the purchase of strata lot 5 around February 13, 2015. The plans for the house they intended to build are dated February 6, 2015. The Davies knew of the Restrictive Covenant when they purchased strata lot 5.

**21**  The parties agree (as part of the admitted facts) that on or about February 15, 2015, Mr. Stubbs approached Ms. Zhang and requested that she approve, in writing, the construction of the house planned for strata lot 5. The parties also agree that Ms. Zhang requested that she be provided with a copy of the plans so that she could determine the impact of the planned construction on her property. In addition, the parties agree that Ms. Zhang advised Mr. Stubbs that she would consider the requested approval after she had an opportunity to review the plans and seek advice about them.

**22**  Ms. Zhang was assisted in her communications with Mr. Stubbs by Mr. Soon Loo, an electrician who had done some work in Ms. Zhang's house and who spoke Mandarin. Although I accept that, at trial, Mr. Loo was doing his best to recall relevant events, I conclude that his memory is simply unreliable, especially for details. For example, although he was firm in his evidence that, when he and Ms. Zhang met with Mr. Stubbs, no one took any pictures, Ms. Zhang testified that she in fact took pictures (which are found at Tab 2 of Ex. 2) of the plans she was shown by Mr. Stubbs. Mr. Loo was unable to recall when he and Ms. Zhang met with Mr. Stubbs, and thought it was in April or May. In fact, there is no doubt it was in February 2015.

**23**  In closing argument, Mr. Hutchison (counsel for Ms. Zhang) made submissions to the effect that Mr. Stubbs' and the Davies' treatment of Ms. Zhang, so far as approaching her for approval of the plans and specifications, was "markedly dissimilar" from their dealings with the owners of strata lots 1 and 2. He argued further, based on Mr. Loo's evidence that Mr. Stubbs told him and Ms. Zhang that showing the plans to Ms. Zhang was merely a courtesy, that Mr. Stubbs engaged in active deception of Ms. Zhang, and that "consistent with this deception," Mr. Stubbs did not provide a set of plans for Ms. Zhang when Mr. Loo asked for them. However, given my concerns about Mr. Loo's reliability, I am not prepared to draw such conclusions. I see nothing sinister or deceptive about the manner in which Ms. Zhang was approached for her approval of the plans and specifications for the dwelling house on strata lot 5.

**24**  According to Mr. Davies, he provided Ms. Zhang with a copy of the plans within a week of February 15. Although there is some disagreement about when Ms. Zhang received a copy of the plans, and from whom, I accept Mr. Davies' evidence on this point. The timing is generally consistent with the evidence of Mr. Ken Mar, a house designer consulted by Ms. Zhang.

**25**  According to Mr. Davies, he took the plans over to Ms. Zhang's house and tried to explain to Ms. Zhang what the Davies' house would look like. However, given the language barrier, communication was difficult. As he recalled, Ms. Zhang's daughter was interpreting. According to Mr. Davies, he asked Ms. Zhang to sign off on the plans on that occasion. However, Ms. Zhang, who was concerned about the height of the Davies' house, wanted to take the plans to a designer for review and advice.

**26**  The plans contain notations about construction details, including the material (metal) that was going to be used for the roof. Since Ms. Zhang was unable to read English, she was unable to read the construction details on the plans. However, I am not prepared to find that, for purposes of the Restrictive Covenant, the Davies were required to provide Ms. Zhang with a translation. Ms. Zhang clearly had the ability to obtain assistance in translating and understanding English documents when she felt it necessary. In any event, the parties agree that the plans that were provided to Ms. Zhang did not disclose the glare that would result from the metal roof.

**27**  Once Ms. Zhang had the plans, she wanted to get some professional advice. A friend, Ms. Janet Yu, put her in touch with Mr. Mar. Ms. Zhang and Ms. Yu met with Mr. Mar, with Ms. Yu acting as Ms. Zhang's interpreter. One of the questions Ms. Zhang asked Mr. Mar to consider was whether she would still have a view from the main floor of her house. As Mr. Mar recalled, Ms. Zhang's main concern was about the height of the Davies' house, in particular in relation to the views from the great room on the main floor of Ms. Zhang's house. Ms. Zhang (with Ms. Yu translating) asked Mr. Mar to review the plans to see whether there was any way to lower the height. Mr. Mar recommended retaining the services of a surveyor. This was done, but took about a week. In the meantime, the plans were left with Mr. Mar, who reviewed them. He considered what might be the best way to reduce the height of the Davies' house without compromising the design too much. He never went to Ms. Zhang's house and his knowledge about her house and views was based only on what he was told.

**28**  Ms. Zhang and Ms. Yu then met again with Mr. Mar. As Ms. Zhang recalled, Mr. Mar told her that, when the Davies house was completed, she would not have a view from the main floor of her house. As she recalled, she asked Mr. Mar if there was any way to keep the view intact, and he told her that if the roof height was reduced, she would get some view. According to Mr. Mar, he understood that Ms. Zhang was willing to approve construction if the roof height of the Davies' house was reduced to a 2-in-12 pitch, even though this would not have restored her view from the main floor. Ms. Zhang then asked Mr. Mar to communicate with the Davies to see what was possible.

**29**  Ms. Zhang's evidence at trial to the effect that she was not willing to accept a house being built on strata lot 5 if it affected her view is, in my opinion, inconsistent with what she communicated at the time to Mr. Mar.

**30**  According to Mr. Mar, as far as he was concerned, there was nothing else of note on the plans. He described them as "typical." As he recalled, in his dealings with Ms. Zhang, he was not asked to consider anything other than height in relation to the Davies' house.

**31**  By March 11, 2015, the Davies had obtained written approval of the plans and specifications for their new house from the owners of strata lots 1 and 2. However, the Davies did not have written approval from Ms. Zhang. Despite that, construction on the Davies' house started on March 11, 2015.

**32**  According to Mr. Davies, they started construction because Ms. Zhang had had the plans "for a month" (in fact, an exaggeration), and neither he nor his wife were sure that she would ever sign off on them. The Davies had a building permit, financing for the construction and trades lined up. Even though they knew Ms. Zhang had not given her written approval, the Davies were not prepared to wait any longer to start construction.

**33**  On March 12, 2015, Mr. Mar sent an email message to Mr. Davies, as he had discussed with Ms. Zhang. The subject was "roof ht." The message read in relevant part [as per original]:

Zhang Li has asked me to relay to you if you could possible [sic] reduce the height of your proposed roof for your residence. If you would consider changing the roof pitches from a 3 in 12 to a 2 in 12 thru out.. this could lower the roof over the garage eg. about 24 [inches] from your geodetic height at this area. You could still have a 9 [ft] ceiling at the living/mast bed floor but the garage ceiling plate would have to be lowered to a 8 [ft] ceiling so that it would not effect your dormer detail.

Mrs Li would approve your application from a concept revision if these conditions stated are met. Please contact me if you have further questions.

**34**  The Davies considered Mr. Mar's proposal completely unacceptable.

**35**  Ms. Davies responded to Mr. Mar's email message on March 16, 2015, and said:

Hello Ken,

In regards to your email below and previous emails from Mrs. Li, we will not be lowering the height of the roof on the house. We are within the height restriction placed on the property and Central Saanich has granted us a building permit. There are no obligations on our end to make any changes.

We do not wish to discuss this any further.

**36**  In fact, there was no height restriction in the Restrictive Covenant, although there was a height restriction in a later modification of the Restrictive Covenant affecting strata lot 2. Ms. Davies' response to Mr. Mar indicates some misunderstanding in that respect.

**37**  Construction continued on the Davies' house. This action was filed on June 2, 2015. A few days after the action was filed, Mr. Davies approached Ms. Zhang twice and tried to persuade her to give her written approval of the drawings. However, Ms. Zhang felt very uncomfortable with Mr. Davies coming over to her house. After the second visit, she erected a large sign essentially telling him to stay away and to contact her lawyers. The police were also called.

**38**  Construction on the Davies' house was completed October 15, 2015. The house now blocks the view looking directly east from the main floor of Ms. Zhang's house, although other views from the main floor are less affected The views from the upper floor of Ms. Zhang's house are essentially intact.

**39**  However, according to Ms. Zhang, after completion of construction of the Davies' house and with the arrival of better weather in 2016, she began to be plagued by another problem created by the Davies' house.

**40**  On sunny days, the sun shining on the metal roof of the house, especially the slope of the garage, created a strong glare inside the east-facing rooms of Ms. Zhang's house from sunrise until about Noon. According to Ms. Zhang, as a result of the glare, she has had to abandon altogether use of master bedroom on the second floor of the house. The glare makes her feel dizzy, and she is unable to sleep in that bedroom. She said in addition that, in the front bedroom on the second floor (next to the master), the drapes would "never be opened" because of the glare. According to Ms. Zhang, the effect of the glare on her was "continuous," and, in addition to making her feel dizzy, the glare also impaired her vision. She has gone so far as to seek medical advice about the situation. According to Ms. Zhang, when the sun is shining, she is unable to use the rooms (kitchen, eating area, dining room and living room) at the front of her house on the main floor because of the effects of the glare. She identified a photograph taken in her dining room with a window covering drawn as illustrating the very strong effect of the glare in that room. Window coverings have only offered a partial solution. According to Ms. Zhang, sitting at the table in her kitchen eating area with the blinds closed to shield from the glare would be depressing. Ms. Zhang acknowledged that she had not thought about installing more effective window coverings on the windows on the front of the house.

**41**  One of the problems with the photographs in evidence and relied on to illustrate the glare is that none is dated or time-stamped. There is, for example, no reliable evidence concerning how long the situation illustrated by the photograph taken of the dining room lasts, and Ms. Zhang acknowledged that she was unable to say that what was shown by that photograph was caused only by the glare from the Davies' roof. Another picture of the Davies' house, which Ms. Zhang took from her master bedroom in the afternoon on what looks like a bright, sunny day, shows no glare from the roof.

**42**  Mr. David Aberdeen, a qualified real estate appraiser, described his experience of the glare when he inspected Ms. Zhang's house on June 29, 2016 for the purpose of preparing an appraisal report for this action.

**43**  As Mr. Aberdeen recalled, he was at the house for about 2 hours, between about 10:30 a.m. and 12:30 p.m. He said that, during his inspection, the reflective light from the roof of the Davies' house was "extremely bright" in many of the main rooms of Ms. Zhang's house, including the dining room, living room, kitchen eating area (which is next to an east-facing window), the master bedroom and second bedroom. Mr. Aberdeen described the light reflection as "much stronger than I anticipated, to the extent that it was uncomfortable to remain in those rooms." Pictures in his report (such as those on p. 25) illustrate the glare from the reflection from the Davies' roof. He said that the glare was very unpleasant, and that it surprised him. He described it as "like having a flashlight shining in your eyes," and it was so objectionable that a person would not want to spend any time in the rooms at the front of Ms. Zhang's house. During his inspection, Mr. Aberdeen did not experiment with closing blinds in rooms where the glare was uncomfortable.

**44**  In his cross-examination, Mr. Aberdeen acknowledged that he discussed the glare issue with Ms. Zhang to some extent, but, to him, it was obviously an issue.

**45**  According to Ms. Zhang, she also installed a light-weight metal panel at the front of her deck because of the "disturbance" she has had from her neighbours, the Davies. She explained that she put up the panel because she did not want to be seen by her neighbours when she was cooking on her deck. In other words, the panel functioned as a privacy screen. (Mr. Aberdeen, on the other hand, concluded that the panel was to shield from the glare.) Ms. Zhang described herself as "always living in terror" since the Davies built their house.

**46**  Mr. Aberdeen was qualified to give opinion evidence on real estate values, including an opinion about the loss in value experienced by Ms. Zhang's property resulting from the construction of the Davies' home.

**47**  In Mr. Aberdeen's opinion, the loss in value to Ms. Zhang's property resulting from construction of the Davies' home was, as at November 1, 2016, $153,000.

**48**  In arriving at his opinion, Mr. Aberdeen considered that the construction of the Davies' home changed the view outlook to the east from Ms. Zhang's property in two ways:

1. the physical height of the Davies' home blocked a significant portion of the pre-existing view to the east. Mr. Aberdeen characterized this impact as a loss of the pre-existing view benefit; and
2. the Davies' home was constructed with a metal roof, and the reflections of sunlight from the roof are "offensive and objectionable." Mr. Aberdeen characterized this impact as a negative external influence.

**49**  Mr. Aberdeen first estimated the current (as of November 1, 2016) market value of Ms. Zhang's property assuming that the view was unaffected and that the property was in the same condition as when Ms. Zhang purchased it. He then estimated the impact of the value of Ms. Zhang's property as a result of construction of the Davies' home, based on examples of negative external influences on other properties developed from market data.

**50**  To estimate the market value as if the view were unaffected, Mr. Aberdeen adjusted the December 2013 sale price paid by Ms. Zhang to reflect changes in market conditions and real estate values. In his opinion, this method provided the "best evidence" of the market value of Ms. Zhang's property with views unaffected. Mr. Aberdeen concluded that the increase in value for properties similar to Ms. Zhang's over the period between December 2013 and November 1, 2016 was 29.2%. Applying that percentage to the purchase price for Ms. Zhang's home, he arrived at a market value as of November 1, 2016 of $1,020,000. His evidence on this point was essentially unchallenged.

**51**  Mr. Aberdeen then undertook an analysis of the impacts on the view from Ms. Zhang's property. However, despite extensive research, he was unable to locate comparables where the negative influence involved a view (or lack of view).

**52**  Mr. Aberdeen then estimated the loss in value to Ms. Zhang's property as a result of construction of the Davies' home to be "in the order of" 15% of its market value, or $153,000 (15% of $1,020,000). Mr. Aberdeen did not separate out the impact of the loss of the pre-existing benefit (the view) from the impact of the negative external influence (the glare).

**53**  The Davies also tendered opinion evidence from a qualified real estate appraiser, Ms. My Phung, who (like Mr. Aberdeen) also testified at trial.

**54**  The opinion sought from Ms. Phung was altogether different from the task given to Mr. Aberdeen. Ms. Phung was asked to estimate the proposed market value of Ms. Zhang's property, as of January 13, 2017, based on the difference in roof height between the actual roof height of the Davies' house (a "3-in-12" pitch) and the roof height mentioned in Mr. Mar's March 12 email (a "2-in-12" pitch). Ms. Phung estimated the market value based on a 2-in-12 roof pitch at $975,000 and the market value based on the existing 3-in-12 roof pitch at between $965,000 and $970,000. Ms. Phung was not asked to consider the effect of the glare from the metal roof - the negative external influence.

**3. Is the Restrictive Covenant valid and enforceable**?

**55**  Restrictive covenants are to be construed according to the ordinary rules of contractual interpretation. The precise words used must be looked at in the context of the factual matrix at the time the document was created, taking into account the background and purpose of the document as guides to interpretation.

**56**  In my opinion, given the location of strata lots 1, 2 and 3 in relation to strata lots 4 and 5, the intention of the parties in entering into the Original Covenant was to preserve views for strata lots 1, 2 and 3. Although the specific height restrictions were removed in the Modification, in my opinion, the intention of the parties - in particular in stating that otherwise the Original Covenant remained "in full force and effect" - remained the same, and was to preserve the views for strata lots 1, 2 and 3.

**57**  Moreover, in my opinion, the meaning of the Restrictive Covenant is clear. It required that, before any dwelling house was constructed on strata lot 5 (part of the "Grantor's Lands"), the Davies (as the owners of strata lot 5) first obtain the written approval by Ms. Zhang (as Grantee under the Restrictive Covenant) of the plans and specifications for the dwelling house. There is no dispute that the Davies did not do this.

**58**  However, the Davies say that the Restrictive Covenant is invalid and unenforceable. They say further, and in the alternative, that the Restrictive Covenant restricts the reasonable use of strata lot 5.

**59**  Although neither Ms. Zhang nor the Davies pleaded s. 35 of the ***Property Law Act***, *R.S.B.C. 1996, c. 377*, in closing argument both sides cited and relied on authorities interpreting that section, which provides as follows:

**Court may modify or cancel charges**

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

. . .

1. a restrictive or other covenant burdening the land or the owner;

. . .

1. The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
2. because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
3. the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
4. the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
5. modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
6. the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

**60**  The Davies did not file a counterclaim seeking to have the Restrictive Covenant cancelled, which, in the circumstances, is unusual. However, essentially, their defence to Ms. Zhang's claim relies on the grounds described in ***Property Law Act*** s. 35(2)(e) and (b) as grounds that justify cancellation of a restrictive covenant.

**61**  In support of their argument that the Restrictive Covenant is invalid and unenforceable, the Davies cite ***585582 B.C. Ltd. v. Anderson***, [*2015 BCCA 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G7S-1GH1-JBDT-B3FB-00000-00&context=), ***Newco Investments Corp. v. British Columbia Transit*** [*(1987), 14 B.C.L.R. (2d) 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-6376-00000-00&context=) (C.A.), and ***Re Sekretov and City of Toronto*** [*(1973), 33 D.L.R. (3d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JSC5-M0XP-00000-00&context=) (Ont. C.A.).

**62**  In ***Anderson***, the restrictive covenant at issue was registered against the defendant's strata lot in a building on Lake Okanagan operated as a resort hotel. The covenant prohibited rental of the strata lot to the public except in accordance with a rental pool management agreement setting out the terms under which the resort's rental manager would rent the unit. However, no form of rental pool management agreement was attached to the restrictive covenant, and an agreement had to be individually negotiated between the owner of the strata lot and the rental manager.

**63**  The plaintiff commenced an action seeking an injunction against the defendant to restrain him from renting his unit unless he entered into a rental pool management agreement. The defendant filed a counterclaim relying on s. 35(2) of the ***Property Law Act***, in particular subsection (e). The defendant's summary trial application, seeking a declaration that the restrictive covenant was void, was dismissed at first instance. However, his appeal was allowed.

**64**  Tysoe J.A. (for the court) wrote, at para. 21:

[21] One of the requirements of a restrictive covenant is that its terms must be clear. As Mr. Justice Taggart stated in *Newco Investments Corp. v. British Columbia Transit* [*(1987), 14 B.C.L.R. (2d) 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-6376-00000-00&context=) at 224 (C.A.):

Covenants such as these which run with the land must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them.

He also cited ***Re Sekretov*** with approval.

**65**  Tysoe J.A. concluded that the covenant in the case before him lacked certainty, and was therefore invalid and unenforceable. He said:

[26] In the present case, the covenant prohibits the rental of a unit to the public unless it is done in accordance with the "Rental Pool Management Agreement", defined as an agreement between the owner of the unit and the rental manager setting out the terms by which the rental manager will manage the unit and make it available for rental use. The form of the agreement is not attached to the covenant, nor is it incorporated by reference into the covenant. Indeed, the agreement did not even exist at the time of the creation of the covenant. Rather, it is an agreement that must be negotiated between each owner of a strata lot and the rental manager.

[27] There is no certainty with respect to the terms of the Rental Pool Management Agreement and, as a result, there is a lack of certainty in the covenant itself. By looking at the covenant registered against a unit, a successor in title to the unit cannot determine the terms by which the unit may be rented to the public.

[28] If an owner of a unit and the rental manager are unable to negotiate the terms of a rental pool management agreement, there is no independent mechanism by which the terms can be established. Similar to *Newco Investments*, the covenant has no provision for arbitration in the event the parties cannot agree. A central aspect of the covenant constitutes an agreement to agree, which is itself unenforceable.

**66**  In oral submissions, Mr. Morgan (on behalf of the Davies) argued that ***Anderson*** changed the law respecting the validity of restrictive covenants in this way: that, if a person is required to go outside the restrictive covenant in order to know what is or is not permitted, then the restrictive covenant is void and unenforceable.

**67**  However, I do not agree that ***Anderson*** brought about, or intended to bring about, any change in the law respecting interpretation of restrictive covenants. There is certainly no indication of this in Mr. Justice Tysoe's judgment. The authorities cited and principles relied on were well-established. Moreover, a number of Court of Appeal decisions discussing the interpretation of restrictive covenants were not mentioned by Tysoe J.A.

**68**  For example, in ***Gubbels v. Anderson*** [*(1995), 8 B.C.L.R. (3d) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62T4-00000-00&context=) (C.A.), Lambert J.A. wrote (at para. 15):

15 Counsel for the appellants said that someone ought to be able to go into the Land Titles Office, look immediately at the land registry records and know right away exactly what effect the documents pertaining to title had. But that is not the nature of the land registry system. The nature of the system is to provide notice of any matters that affect title. The restrictive covenant is referred to and the restrictive covenant must be given the interpretation it requires as a contractual document and not an interpretation that would be given to it by a layman coming into the Land Titles Office. Sometimes some skill is required in the process of interpretation, but the most rudimentary tool of interpretation is that a document should be interpreted in the context of its own factual matrix. It must be looked at as the conditions existed at the time it was created. . . .

**69**  In ***Vantreight v. Gray*** [*(1994), 100 B.C.L.R. (2d) 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0C4-00000-00&context=) (C.A.), Lambert J.A. wrote, at para. 5, concerning arguments with respect to vagueness:

. . . A document will not be set aside for vagueness unless, after the application of legal reasoning and legal analysis, it is impossible to decide the meaning that should be given to the document.

**70**  I am, therefore, unable to accept Mr. Morgan's argument that the Court of Appeal in ***Anderson*** intended to change the law.

**71**  In my opinion, the terms of the restrictive covenant in ***Anderson*** are quite unlike the Restrictive Covenant. As Mr. Justice Tysoe pointed out, there was no certainty with respect to the terms of the "Rental Pool Management Agreement," which did not even exist. Moreover, a central aspect of the covenant was an agreement to agree, which itself is unenforceable.

**72**  However, unlike the restrictive covenant in ***Anderson***, the Restrictive Covenant does not require that the parties conclude an enforceable agreement on anything. Rather, it simply requires written approval from the owner of strata lot 3 of the plans and specifications of the dwelling house before a dwelling house on strata lot 5 may be constructed. The Restrictive Covenant states clearly and distinctly the obligation imposed on the owners of strata lot 5 in relation to construction of a dwelling house on that strata lot.

**73**  ***Newco Investments*** also does not assist the Davies. In that case, the owners of two parcels of land were proposing to construct a hotel and a station for a rapid transit system on their respective parcels. The restrictive covenant in issue contained eleven paragraphs, only some of which were in issue. Paras. 3 and 4 were two of the provisions that Newco contended were unenforceable because they were too vague and uncertain. They provided for the construction of "improvements for the public good." The owner of the parcel upon which the hotel was to be constructed was made responsible to pay for these improvements in accordance with a formula set out in the covenant. Construction of the station commenced and the owner of the land upon which it was being constructed purported to designate that certain improvements were for the public good, the payment for which the owner of the other parcel would be responsible.

**74**  The Court of Appeal held that these provisions of the restrictive covenant were unenforceable for two related reasons. The first was that the term "improvements for the public good" was vague and uncertain, lacked the required definition and precision and was open to a variety of interpretations. The second was that there was no provision for a resolution of disputes under the restrictive covenant in the event the parties could not reach agreement as to what improvements were for the public good.

**75**  However, I note that one of the paragraphs of the restrictive covenant that was not challenged in ***Newco Investments*** was para. 1, which provided:

1. The Covenantor will not at any time construct or place on the Lands any improvement or buildings unless the improvement or buildings are compatible with the plans and specifications of the U.T.A. for the construction of the Main Street Facilities; and to assure this result no excavation or construction of any buildings or improvements shall be commenced by the Covenantor under or over the Lands and until all plans and specifications for the same have first been submitted to and approved in writing by the U.T.A. The U.T.A. shall give approval or disapproval of the plans and specifications within a reasonable time.

**76**  Apart from the requirement in the final sentence to give approval or disapproval of the plans and specifications "within a reasonable time," the basic terms of this paragraph are closely analogous to the Restrictive Covenant. Although Taggart J.A. (for the court) concluded that paragraphs 3 to 6 of the restrictive covenant were unenforceable, he concluded (at para. 39) that paragraphs 1 and 2 were "quite separate" from paragraphs 3 to 6, as were paragraphs 7 to 11. "The consequence is that no violence is done to the covenants that remain when [paragraphs] 3 to 6 are cancelled." The offending paragraphs were therefore severed from the remaining, valid paragraphs of the restrictive covenant.

**77**  ***Newco Investments*** does not, therefore, assist the Davies. Neither, in my opinion, and given the clear language of the Restrictive Covenant, does ***Re Sekretov***.

**78**  I turn then to the Davies' argument that the Restrictive Covenant unnecessarily restricts the reasonable use of strata lot 5, and therefore should not be enforced. This argument engages the authorities that consider s. 35(2)(b) of the ***Property Law Act***.

**79**  When considering whether to cancel or modify (or, in this case, to enforce or not enforce) a charge, the court can take into account both subjective and objective elements. However, such consideration is not a balancing exercise. Rather, the persons in the position of the Davies must show that the reasonable use of the land (construction of a dwelling house, obviously a reasonable use) will be impeded without practical benefit unless the restrictive covenant is cancelled or not enforced - in other words, that the continuation of the restrictive covenant provides no practical benefit. It is clear that "practical benefit" can include subjective factors such as "neighbourhood aesthetics" and views. See ***Wallster v. Erschbamer***, [*2011 BCCA 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2V6-00000-00&context=), at para. 19; ***417489 B.C. Ltd. v. Scana Holdings Ltd***. [*1997 CanLII 4401*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X408-00000-00&context=) (B.C.S.C.), at paras. 72-74; ***Olenczuk v. Mooney***, [*2014 BCSC 825*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2J8-00000-00&context=), at para. 57 ("An unobstructed view of Okanagan Lake is a factor that continues to benefit lot 2.").

**80**  As I have stated above, the intention and purpose of the Restrictive Covenant was to preserve views for strata lots 1, 2 and 3. The evidence establishes that there was a practical benefit, specifically to strata lot 3, in terms of the view and the real estate value. The property was marketed to Ms. Zhang with emphasis on the views, and they were important to her. Although Mr. Aberdeen and Ms. Phung disagree on the extent to which the real estate value of strata lot 3 is impaired by the dwelling house constructed by the Davies, even on Ms. Phung's analysis, the value has been impaired to some extent because of the impact on the view. The Davies have failed to demonstrate that, as a result of the Restrictive Covenant, the reasonable use of strata lot 5 would be impeded without practical benefit to others.

**81**  I conclude therefore that Restrictive Covenant is valid and enforceable, and that the Davies' dwelling house was constructed in breach of it. Ms. Zhang is, accordingly, entitled to a remedy for that breach.

**82**  However, before turning to the matter of remedy for breach of the Restrictive Covenant, I will address Ms. Zhang's claim in nuisance.

**4. Are the Davies liable for nuisance?**

**83**  In closing submissions, Mr. Hutchison argued that it was appropriate to treat the Davies' breach of the Restrictive Covenant as a form of private nuisance. However, he cited no case where breach of a restrictive covenant has been approached in this way, and, in principle, I am not persuaded that it is either necessary or appropriate to do so in order to grant a remedy (whether an injunction or damages or both) where breach of a restrictive covenant has been proved. Based on the legal principles concerning nuisance, which I set out below, loss of a view - even a beautiful view - cannot be characterized as an interference with the use of land that would be intolerable to an ordinary person, so as to create an actionable nuisance.

**84**  However, Mr. Hutchison also submitted that Ms. Zhang has made out a claim in nuisance in relation to the glare from the Davies' metal roof.

**85**  The legal principles relating to nuisance are conveniently summarized by Verhoeven J. in ***Suzuki v. Monroe***, [*2009 BCSC 1403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B222-00000-00&context=), at paras. 33-36 and 39:

[33] A leading authority in British Columbia on the law of nuisance is *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* [*(1979), 95 D.L.R. (3d) 756*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BY-00000-00&context=). The judgment of the Court was delivered by McIntyre J.A. He noted at 759 that "The essence of the tort of nuisance is interference with the enjoyment of land. (Street, *Law of Torts*, at p. 212.)". He added at 759:

That interference need not be accompanied by ***negligence***. In nuisance one is concerned with the invasion of the interest in the land, in ***negligence*** one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree ...

[34] McIntyre J.A. referred to the following proposition from H. Street, *The Law of Torts*, 4th ed. (London: Butterworths, 1968) at 215:

A person then, may be said to have committed the tort of private nuisance *when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable*.

[35] He added at 760-61:

What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said, see McLaren, "Nuisance in Canada", *supra*, that Canadian Judges have adopted the words of Knight Bruce, V.-C., in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, [at p. 322], 64 E.R. 849, to the effect that actionability will result from an interference with "the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions". These words were approved by Middleton, J., in the Ontario High Court in *Appleby v. Erie Tobacco Co*. [*(1910), 22 O.L.R. 533*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBT1-F8KH-X2JH-00000-00&context=) at pp. 535-6. In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration, and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected.

[36] The principles were also reviewed by the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board*, [*[1989] 2 S.C.R. 1181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652P-00000-00&context=), at 1190 through 1192, and more recently in *St. Lawrence Cement Inc. v. Barrette*, [*2008 SCC 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1DH-00000-00&context=), at para. 77. There, the Court stated as follows (references omitted):

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

. . .

[39] The invasion complained of must be substantial and serious, and it must be clearly unacceptable according to accepted concepts of the day.

**86**  In my opinion, Ms. Zhang has made out the elements of a claim in nuisance in relation to the glare resulting from the Davies' metal roof.

**87**  No objective measurements of the strength and intensity of the light created by the glare were tendered in evidence (unlike ***Suzuki***, where there was objective evidence of the noise in issue, in addition to the subjective reports of the plaintiffs). In my opinion, Ms. Zhang tended in her evidence to exaggerate somewhat the effect of the glare, and the inconvenience she perceives it creates. This tendency is illustrated, for example, by her claim that, because of the glare, the drapes in the second floor front bedroom would never be opened. This simply cannot be true.

**88**  However, Ms. Zhang's evidence of her experience of the glare is supported by Mr. Aberdeen, who, in the circumstances, should be treated as an impartial observer and reporter. The objectionable effect of the glare, and the harm caused, is not merely the result of personal and heightened sensitivity of Ms. Zhang. Based on the evidence of Ms. Zhang and Mr. Aberdeen, when the glare occurs, it is intolerable, and I find that it would be intolerable to an ordinary person.

**89**  The duration of the interference caused by the glare is unpredictable. On cloudy or overcast days, there is no interference. Even on sunny days in the summer, the interference is limited to morning hours, to about Noon. The interference also, based on the evidence, is seasonal, and so depends on the angle of the sun. On the evidence, it is not an issue in fall and winter, for example. Moreover, the glare does not affect all parts or all rooms of Ms. Zhang's home.

**90**  However, on the sunny mornings when the sun reflects off the metal roof of the Davies' house, the glare unreasonably and substantially interferes with the use of important rooms in Ms. Zhang's house. While the effects might be mitigated to some extent by window coverings, at best, that is a partial solution. Moreover, there were no issues with direct sunlight in the year that Ms. Zhang lived in her house before the Davies' house was built. Sunlight is not the problem; rather, it is sunlight reflecting off the Davies' roof. In my opinion, the social utility of the aesthetic choice of a metal roof must rate as low or very low, compared with the problems that choice have created for Ms. Zhang.

**91**  Mr. Hutchison submitted that general damages in the order of $15,000 would be appropriate compensation for the nuisance, although Mr. Hutchison acknowledged making the assessment is difficult. Having regard to the quantum of damages awarded in ***Suzuki***, I conclude that an appropriate award in this case is $7,500.

**92**  In closing argument, Mr. Hutchison also sought an injunction on behalf of Ms. Zhang in these terms: requiring the Davies "to take reasonable steps to reduce the reflective capabilities and nature of their roof, presumptively treatment of the surface either by paint or other material that would stop or significantly reduce the reflective nature so apparent." However, there was no evidence at trial that any steps could be employed to "reduce the reflective capabilities and nature" of the Davies' roof, apart from anecdotal comments from Mr. Aberdeen about different roofing materials. But Mr. Aberdeen was not qualified as an expert on roofing material, or the reflective qualities of different types of roofing material. There was no evidence whether "treatment of the surface" by anything in particular would be effective to subdue the glare.

**93**  The request for an injunction is, therefore, refused.

**5. Remedy for breach of the Restrictive Covenant**

**94**  I turn then to consider the remedy for breach of the Restrictive Covenant.

**95**  Mr. Hutchison submits that damages for breach of the Restrictive Covenant should be based Mr. Aberdeen's opinion evidence on the loss in value to Ms. Zhang's property, and assessed at $153,000. He argues that little or no weight should be given to Ms. Phung's opinion evidence.

**96**  For his part, Mr. Morgan submits that damages for breach of the Restrictive Covenant should be based on Ms. Phung's opinion evidence, and assessed in the range of between $5,000 and $10,000. He submits further that Mr. Aberdeen's opinion evidence cannot be given much weight because Mr. Aberdeen does not distinguish the loss in value resulting from the loss of view, from the loss in value resulting from the negative external influence of the glare.

**97**  Mr. Aberdeen's assessment of the loss in market value as a result of the construction of the Davies' house is not personal to Ms. Zhang. Rather, it reflects Mr. Aberdeen's opinion of how the market would react. However, in my opinion, this is not the same as estimating the loss resulting from breach of the Restrictive Covenant.

**98**  As I have stated above, in my opinion, the intention of the parties to the Restrictive Covenant was to protect the views for strata lot 3. Several times in closing submissions Mr. Hutchison referred to Ms. Zhang has having a "veto" over construction of a dwelling house on strata lot 5 as a result of the Restrictive Covenant. However, in my opinion, in 2015, Ms. Zhang was not going to exercise a veto so as to prevent anything being built on strata lot 5. Rather, Ms. Zhang's concerns, having reviewed the plans and specifications and taken advice from Mr. Mar, were focussed on the height of the proposed dwelling house, and the potential effect on her views. This was the entire focus of her discussions with Mr. Mar. Even after learning from Mr. Mar about the extent of her view with a 2-in-12 roof pitch, Ms. Zhang was not invoking a veto. The proposition advanced at trial that Ms. Zhang was unwilling to accept construction of a house on strata lot 5 - and invoke a veto - if it affected her view is inconsistent with Mr. Mar's evidence and the email Mr. Mar sent to the Davies in March 2015.

**99**  Moreover, in my opinion, the idea that Ms. Zhang, in connection with being asked to provide her written approval for the plans and specifications, would have been concerned with building materials - in particular, the roof material - is inconsistent with the concerns she actually expressed at the time to Mr. Mar, and the specific issue she asked him to address with the Davies. Ms. Zhang's discussions with Mr. Mar show that she was prepared to accept some loss of view, and, having had the plans for several weeks and taken advice, the view was the only thing she raised with Mr. Mar. I reject Ms. Zhang's evidence at trial that there would have been other things she would have been concerned about and raised - for example, design, construction materials and aesthetics - before she would have been prepared to give her approval. Rather, in my opinion, her evidence at trial about such matter represents an after-the-fact reconstruction influenced by subsequent events, in particular, the problem that later developed with the glare from the metal roof and the very uncomfortable relationship that has developed between her and the Davies. Her evidence at trial is, therefore, not reliable.

**100**  In that light, in my opinion, the damages resulting from the breach of the Restrictive Covenant must be assessed from the perspective of the loss of value from the loss of the view, and not from the loss of value from the loss of the view and the negative external influence of the glare from the roof.

**101**  This, then, creates a basis to compare the opinions of Mr. Aberdeen and Ms. Phung. Ms. Phung only considered the market value based on the view. Mr. Aberdeen's assessment must be adjusted so that it does the same. I think it reasonable to say that, had Mr. Aberdeen been asked to make an assessment of the loss on the basis of the loss of the view only, his assessed loss would be smaller than $153,000. On the other hand, Ms. Phung's opinion is premised in part on the Davies accepting a 2-in-12 roof pitch, which clearly, on the evidence, they were never prepared to do.

**102**  Although not stated in this way in Mr. Aberdeen's report, I conclude that he has assessed the market value of Ms. Zhang's property as of November 1, 2016 to be $867,000 ($1,020,000 minus the "loss" quantified at $153,000). This then compares with Ms. Phung's market value (assessed as of January 13, 2017) of between $965,000 and $970,000.

**103**  However, Mr. Aberdeen's market value of $867,000 must, in my opinion, be adjusted upward for purposes of assessing the damages resulting only from breach of the Restrictive Covenant. I am not prepared to adjust it as far as the market value opinion expressed by Ms. Phung because, as between Mr. Aberdeen and Ms. Phung, Mr. Aberdeen has more experience appraising residential real estate, and I have concluded his opinion is therefore entitled to greater weight.

**104**  I would adjust Mr. Aberdeen's number at p. 69 of his report from 15% of the unaffected value of $1,020,000 to 10%, to reflect the loss of value from breach of the Restrictive Covenant, on the basis that the loss of the view benefit accounted for the greater portion of the 15% (as compared with the negative external influence, which I conclude is not an consequence of the breach).

**105**  I therefore assess the loss to Ms. Zhang as a consequence of the breach of the Restrictive Covenant at $102,000 ($1,020,000 multiplied by 10%).

**6. Summary and disposition**

**106**  In summary, I find that the Restrictive Covenant is valid and enforceable, and that the Davies built their house in breach of it. I assess damages in favour of Ms. Zhang for breach of the Restrictive Covenant in the amount of $102,000. I also find that the Davies are liable to Ms. Zhang for nuisance in respect of the glare from the metal roof of the Davies' house, and I assess damages in favour of Ms. Zhang in the amount of $7,500. I therefore award total damages to Ms. Zhang in the amount of $109,500.

**107**  Ms. Zhang's request for an injunction is dismissed.

**108**  Ms. Zhang is also entitled to interest pursuant to the ***Court Order Interest Act***, *R.S.B.C. 1996, c. 79*.

**109**  Subject to any submissions that the parties may wish to make, Ms. Zhang, as the successful party, is entitled to costs on Scale B. The parties are at liberty to make submissions with respect to costs provided they do so within 60 days of these reasons. Submissions may be made in writing or orally, as the parties may wish. I will leave counsel to make the appropriate arrangements.

E.J. ADAIR J.

**End of Document**

[***Bain v. Empire Life Insurance Co., [2004] B.C.J. No. 2483***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0KK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Smithers, British Columbia

Tysoe J.

Heard: September 22, 23, 24, 29, 30 and October 8,

2004 (Smithers), and October 22, 2004 (Vancouver).

Judgment: November 30, 2004.

Smithers Registry No. 12793

**[2004] B.C.J. No. 2483** | [*2004 BCSC 1577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DV-00000-00&context=) | [*37 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DV-00000-00&context=) | [*[2005] I.L.R. I-4372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DV-00000-00&context=) | [*27 R.P.R. (4th) 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DV-00000-00&context=) | [*136 A.C.W.S. (3d) 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DV-00000-00&context=)

Between Robert Gareth Bain and Doreen Elsie Bain, plaintiffs, and The Empire Life Insurance Company, L'Empire, Compagnie D'Assurance-Vie and Marc Whittemore, defendants

(99 paras.)

**Case Summary**

**Limitation of actions — Actions in contract — Mortgages — Recovery of land — Equity — Equitable relief — Contracts, unconscionable bargain.**

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| Action by Bain to set aside a reverse mortgage transaction as unconscionable and to damages for solicitor's ***negligence***. In 1994 Mr. and Mrs. Bain were retired homeowners who responded to Empire about an advertisement for reverse mortgages. They met with an Empire representative on two occasions. The transaction involved the insurance company loaning money secured by a mortgage against the home. Some of the money was advanced to the homeowners up front, and some was used to purchase an annuity. No payments were made on the mortgage and interest at approximately 12 percent was compounded semi-annually and added to the outstanding balance. The Bains would not be liable for any amount the mortgage exceeded the value of the house. The Bains met with a solicitor, Whittemore, for independent legal advice. Whittemore had an arrangement with Empire to provide independent legal advice to borrowers who did not have their own lawyer. During the meeting with Whittemore the Bains signed the necessary documents. They received $14,000 up front and monthly payments of $152 on their $175,000 house. Bain testified that he did not realize Whittemore was acting on his behalf until he noticed Whittemore's fee on the trust reconciliation, and claimed that Whittemore did not fully explain the transaction to him. Bain further testified that he began to regret he had entered into the transaction about a year later when he realized that the interest accrual was out of control. The Bains decided to sell the house in 2002 in order to "stop the bleeding" and. They paid the $96,000 owing under the mortgage into trust pending the outcome of this action, which they commenced in early 2003. Empire argued that the transaction was not unconscionable, that the Bains were fully informed about the nature of the transaction, and that the action was out of time.  HELD: Action dismissed.  A six-year limitation period applied to the solicitor's ***negligence*** action. That period would have expired long before this action was commenced. Empire's monthly payment did not constitute confirmation of the cause of action because the secured party was never in possession of the collateral. However, had Empire commenced a foreclosure proceeding, Bain could have challenged the validity of the transaction by way of counterclaim. Some of Bain's claims constituted claims "for the title to property or for a declaration about the title to property by any person in possession of that property". Such claims were not subject to a limitation period and Bain could therefore pursue these claims only. Empire did not misrepresent the nature of the transaction or misstate any material facts. The accurate interest accumulation was demonstrated to Bain on more than one occasion. There was no undue pressure on Bain to grant the mortgage. Neither of the Bains had any physical or mental infirmary, nor were they unable to understand the character, nature, or language of the transaction. The interest rate did not grossly exceed the interest rate payable by other borrowers in similar circumstances. The terms of the transaction were not so harsh or adverse as to be inequitable and there was no evidence that the amount paid for the annuity was unreasonable. Whittemore explained all of the documents to the Bains and they knew what they were signing. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, S.B.C. 2004,

c. 2, ss. 2, 4, 4(3),

4(3)(b)(iii), 4(3)(b)(iv), 4(3)(b)(vi), 5, 7, 8, 8(3), 9, 10,

69.

Consumer Protection Act, R.S.B.C. 1996, c. 69, ss. 41, 50(2), 60.

Financial Institutions Act, *R.S.B.C. 1996, c. 141*.

Land Title Act, *R.S.B.C. 1996, c. 250*.

Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(2), 3(3), 3(4), 3(4)(e), 3(4)(j), 3(5), 4,

4(1), 5, 5(1), 5(4), 6, 6(4)(b).

Mortgage Brokers Act, [*R.S.B.C. 1996, c. 313, s. 17*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-605D-00000-00&context=).

Trade Practices Act, R.S.B.C. 1996, c. 457, ss. 3(3), 4(3).

**Counsel**

Counsel for the Plaintiffs: Glenford E. Greene

Counsel for the Defendant, The Empire Life Insurance Company, L'Empire, Compagnie D'Assurance-Vie: Brian J. Konst

Counsel for the Defendant, Marc Whittemore: Colleen J. Cattell

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| **TYSOE J** |

Introduction

**1**  At issue in these proceedings is a "reverse mortgage" granted in 1994 by the Plaintiffs, Mr. and Mrs. Bain, to Colonia Life Insurance Company ("Colonia"), a predecessor of the Defendant, The Empire Life Insurance Company ("Empire Life"), and the legal advice given to Mr. and Mrs. Bain by the Defendant, Marc Whittemore, in connection with the reverse mortgage.

**2**  It is pleaded by Mr. and Mrs. Bain as against Empire Life that (i) the reverse mortgage transaction was an unconscionable transaction, (ii) representations made by agents of Colonia to Mr. and Mrs. Bain were deceptive acts or unconscionable acts or practices; (iii) agents of Colonia made negligent or fraudulent misrepresentations to Mr. and Mrs. Bain, and (iv) the doctrine of non est factum applies to the signing of the mortgage documents. It is alleged by Mr. and Mrs. Bain as against Mr. Whittemore that he was negligent in connection with the advice he gave them in connection with the transaction.

**3**  The Defendants deny these allegations. They also assert that the claims against them are barred by the Limitation Act, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=), and cannot be maintained against them.

**4**  In addition to the above allegations, the Second Amended Statement of Claim contained an assertion that Mr. Whittemore was not acting independently of the agents of Concordia (sic) (Colonia changed its name to Concordia Life Insurance Company in 1998) and that he acted together with Concordia to make it appear to Mr. and Mrs. Bain that the agreements were legitimate and a reasonable investment. During closing submissions, counsel for Empire addressed this allegation on the basis that it constituted a plea of conspiracy. Neither counsel for Mr. and Mrs. Bain nor counsel for Mr. Whittemore made any reference to the cause of action of conspiracy during their closing submissions. In my view, the assertion is not sufficient to constitute a plea of conspiracy and, in his written reply, counsel for the Bains confirmed that they did not plead the tort of conspiracy. I intend to say nothing more about it.

Background Facts

**5**  Mr. and Mrs. Bain, who are presently 70 and 69 years of age, married in 1955 and moved from Victoria to Kelowna in 1957. They raised a family of two daughters and one son, all of whom left the Kelowna area in the late 1970's to pursue their independent lives.

**6**  Mr. Bain began his career in Kelowna as a labourer in a plywood plant. He worked his way up and eventually became the superintendent of the plant. In this position, he was in charge of the daily operations of the plant and was the second most senior employee of 150 employees. He was terminated from his position in 1983 or 1984 but found employment a few years later in the area of job training for young people. This led in 1991 to a position with the Southern Interior Construction Association, where Mr. Bain assisted in the training and placement of students in the construction trades. He retired from this job in 1999.

**7**  Mrs. Bain has also worked for most of the marriage. She was a medical stenographer and a supervisor in the x-ray department at Kelowna's hospital until 1980. She was retired for four years and then began working for the Kelowna Arts Council, where she continues to work on a part-time basis dealing with the rental of a heritage building to third parties.

**8**  Mr. and Mrs. Bain lived in rental homes for the first few years after they moved to Kelowna. They purchased their first home in 1963 and upgraded to a house on Water Street in 1966. They purchased the Water Street house for the price of $16,500 and financed the purchase with a mortgage from Fidelity Life, which they paid off over the course of 20 years. It was this home against which they granted the reverse mortgage to Colonia in 1994, by which time the home had appreciated in value to $175,000.

**9**  Mr. and Mrs. Bain admit that they have been poor money managers. In the first part of the 1990's, their expenses were exceeding their income and bills were mounting up. By June 1994, the outstanding balance on their Visa credit card was between $6,000 and $8,000, and they probably had a few other unpaid bills. They had heard about reverse mortgages on the radio and they had also read about them in newspapers. One day in June 1994, Mrs. Bain heard an advertisement for reverse mortgages on her car radio by a local firm called Lifestyle Home Earnings Reverse Mortgage Corp. ("Lifestyle"). She told her husband about the advertisement when she got home. He said "this is for us" and he phoned to make an appointment with Lifestyle.

**10**  Lifestyle held a franchise granted by Home Earnings Reverse Mortgage Corporation of Canada ("Home Earnings") which, in turn, had a relationship with a number of insurance companies, including Colonia. The monies advanced under reverse mortgages were lent by the insurance companies and Lifestyle was remunerated in the form of a commission. At the time, there was an annuity feature attached to reverse mortgages funded by the insurance companies. The insurance companies were prepared to advance up to a maximum amount of money under the mortgage, with the maximum amount depending on the value of the property, the age of the borrowers and other factors. However, only a portion of the amount secured by the mortgage was advanced in cash to the borrowers. The balance was required to be used to purchase an annuity to be issued by the insurance company in favour of the borrowers. In the case of Colonia, the portion advanced in cash was approximately one-third of the mortgage amount and the remainder was used to purchase the annuity.

**11**  It appears from the documents and the recollections of the parties that Mr. Bain first met with representatives of Lifestyle on June 22, 1994 and that both Mr. and Mrs. Bain met with them on June 23, 1994. They were provided with a type of document which has been variously called a chart, a table, a quotation, an offer and an analysis. The first chart given to the Bains was dated June 22 and was premised on a total loan of $39,000, a lump sum payment of $13,650, a monthly annuity payment of $159, an interest rate of 11.85% and a $190,000 value of the Bains' home. The chart showed what would be owing under the reverse mortgage on a yearly basis from the time the Bains were aged 60 to the time they would be aged 80, as well as the balances when they would be aged 85 and 90. Beside the column showing the annual outstanding balances were two columns showing the value of the Bains' home at each of the ages. One of these columns was based on the home value increasing at the rate of 6% a year and the second one was based on 8% annual increases. It was stated at the bottom of the chart that it was for illustration purposes only.

**12**  At the second meeting, Mr. and Mrs. Bain filled out an application for a Home Earning Reverse Mortgage with a lump sum advance of $13,650 and an annuity providing monthly payments of $160. The Bains were also given a document called "Home Earnings Reverse Mortgage Mandatory Information". It was two pages in length and the information on it included the following:

1. interest on the mortgage was added to the amount outstanding, and reference was made to the chart;
2. the mortgage had to be repaid if the mortgaged house was no longer the principal residence of the homeowner;
3. the mortgage could be repaid within the first five years with a specified interest penalty and thereafter with no penalty;
4. the homeowner was required to take a joint life payment, which was a reference to the annuity;
5. there was a "cooling off period" of 60 days from the date the application was signed;
6. the homeowner was responsible to pay for property taxes and insurance;
7. an appraisal of the home was required at the expense of the homeowner; and
8. the applicants were required to seek independent legal advice.

**13**  Lifestyle arranged for an appraisal of the Bains' home by a certified appraiser, and an appraisal report in the amount of $175,000 was issued on June 29, 1994. It is not clear from the evidence whether the Bains met again with Lifestyle as soon as the appraisal was available but the Bains were given another chart dated June 30. This chart was premised on a total loan of $36,000, a lump sum payment of $13,650, a monthly annuity payment of $149.25, an interest rate of 11.85% and a $175,000 value of the Bains' home. The chart again showed the amount owing under the mortgage and the home value at the various ages of the Bains. The two columns of home values were based on annual increases of 5% and 7%.

**14**  On July 5, Home Earnings issued a commitment letter to the Bains advising them that their application had been approved in the amount of $36,000, with an interest rate of 11.85%, a lump sum of $13,650 and a $22,350 annuity providing monthly payments of $152.14 a month. The annuity was described as "Joint Life - 10 Year Guar.", which was intended to mean that the annuity would be paid as long as either of the two spouses remained alive and that, if both spouses died within the first 10 years, their estate would receive the payments for the remainder of the 10 year period. Attached to the commitment letter was an addendum called "Home Earnings Plan - Mandatory Information for Life + 2 Plans". It contained information similar to the information in the mandatory information document given to the Bains on or about June 23. One additional item of information in the addendum was that if the primary spouse died within the first 10 years of the granting of the mortgage, the term of the mortgage would be the greater of another 2 years or the remaining portion of the 10 year guarantee period.

**15**  Mr. and Mrs. Bain accepted the commitment letter by signing it on July 6. They were also given another chart dated July 6. This chart was premised on the same facts as was the June 30 chart, but it showed the annual amount from the annuity to be $152.14, and the two columns of home values were based on annual increases of 6% and 8%.

**16**  The mortgage documents were prepared by Colonia's Vancouver lawyers and were sent to Mr. Whittemore, who had his office in the same building as Lifestyle. Mr. Whittemore was engaged to give independent legal advice to the Bains, but they say that they did not realize that he was acting for them until after the transaction was completed. Mr. Whittemore had previously agreed with Lifestyle that he would provide independent legal advice on reverse mortgages to borrowers who did not have their own lawyer.

**17**  On July 22, Mr. and Mrs. Bain signed the mortgage documents and two disclosure statements. The evidence regarding the signing of these documents varies greatly. Mr. and Mrs. Bain testified that:

1. they thought that Mr. Whittemore was acting for the insurance company and did not appreciate at the time that he was acting on their behalf;
2. they signed all of the documents in Mr. Whittemore's boardroom over a period of 30 minutes;
3. Mr. Whittemore did not explain any of the documents to them and simply pushed the documents in front of them to sign; and
4. all they talked about was (i) a political figure coming to visit Kelowna, (ii) the circumstances of the lawyer who had prepared the Bains' wills and who had become a judge, and (iii) the possibility of Mr. Whittemore preparing new wills for them.

**18**  On the other hand, both Mr. Whittemore and the mortgage broker involved in the transaction, Mr. Jensen, testified that the disclosure statements would not have been signed by the Bains in the presence of Mr. Whittemore. Mr. Jensen testified that, based on his invariable practice, the disclosure statements would have been signed by the Bains in his presence after he explained each provision of the statements to them. Attached to one of the disclosure statements was the July 6 chart, which Mr. Jensen testified that he would have gone over. In his discussion with the Bains, Mr. Jensen testified that he would have focused on the accrual of interest on a compounded basis and the interest penalties upon repayment of the reverse mortgage in the first 7 years.

**19**  Mr. Whittemore testified that he did not have a specific recollection of his meeting with the Bains other than a vague recollection of discussing a political figure. Based on his usual practice in providing independent legal advice to between 25 to 30 sets of homeowners granting reverse mortgages in 1994, 1995 and 1996 and based on the documents in his file, Mr. Whittemore testified that:

1. he would have made it clear that he was acting as their lawyer, and he was there to explain the documents to them and to answer any questions they might have;
2. he would have reviewed the details of the commitment letter but would have told them that he was not providing advice on the annuity;
3. he would have reviewed the June 30 chart with them, going through the effect of interest accumulation when no payments were being made on the reverse mortgage and making it clear that the home values shown on the chart were assumed increases and that the actual real estate market fluctuated;
4. he would have discussed the circumstances in which the mortgage company could require repayment of the mortgage loan;
5. he would have discussed the document entitled No Equity Guarantee Acknowledgement, in which the Bains acknowledged that there was no guarantee of any equity available to them if the value of the home was insufficient to satisfy the mortgage balance;
6. he would have reviewed the other documents, including the Direction to Pay and the Certificate of Independent Legal Advice; and
7. the meeting would have lasted at least 45 minutes.

**20**  Mr. and Mrs. Bain testified that as Mr. Whittemore was showing them out of his office, Mr. Bain asked him if they had made a good deal and Mr. Whittemore either assured them that they did or told them that they had made a very good deal. Mr. Whittemore denied this conversation and testified that if he used the word "good", it would have been to wish the Bains a good day or a good evening as they were leaving.

**21**  The mortgage signed by Mr. and Mrs. Bain (the "Mortgage") was in the principal amount of $36,000 with interest at the rate of 11.85% calculated half-yearly. The Mortgage was expressed to be payable on demand but the terms of the Mortgage provided that demand would not be made except in the case of default or upon the earlier of (i) the death of the survivor of the borrowers, and (ii) the later of two years after the death of the older borrower and 10 years after the interest adjustment date under the mortgage. The Mortgage contained a provision stating that accrued interest would be capitalized at the end of each interest calculation period and the amount added to the principal would bear interest. It also contained a provision whereby the lender waived the right to claim any shortfall in the event that the value of the land was less than the mortgage money.

**22**  One of the disclosure statements given to Mr. and Mrs. Bain was pursuant to the Mortgage Brokers Act, *R.S.B.C. 1996, c. 313*, and it set out the effective annual interest rate during the first year of the Mortgage to be 14.19% after taking the appraisal fee, legal fees and a brokerage fee into account. It also set out when the Mortgage was payable and the pre-payment penalties in the event the Mortgage was paid off in the first 5 years. Forming part of this disclosure statement was a summary of s. 17 of the Mortgage Brokers Act, which gave borrowers the right to rescind a mortgage within 48 hours of its signing, together with the form of notice to be used if the borrowers decided to exercise the right of rescission. The second disclosure statement was pursuant to the Financial Institutions Act, *R.S.B.C. 1996, c. 141*, and it declared that the mortgage broker was independent from the lender and was not receiving any payment from the lender.

**23**  The other documents signed by Mr. and Mrs. Bain in the presence of Mr. Whittemore included the direction to pay, the No Equity Guarantee Acknowledgment, the Certificate of Independent Legal Advice and a statutory declaration as to various matters. In the Certificate of Independent Legal Advice, Mr. Whittemore declared that he had advised the Bains fully as to the effect of the transaction and that the Bains understood the nature and effect of their liability under the transaction. The Bains also signed the Certificate of Independent Legal Advice by way of verifying the declarations contained in it.

**24**  Mr. Whittemore sent the executed documents to Colonia's lawyers. After the Mortgage was registered, Colonia's lawyers sent Mr. Whittemore two cheques. One was in payment of his legal fees and disbursements. The second cheque was in the amount of $13,271.06, representing the $13,650 cash advance under the Mortgage less the brokerage fee and Mr. Whittemore's charges, payable to Mr. and Mrs. Bain. This cheque was picked up by Mr. Bain and was used to pay off the Bains' Visa balance and some other bills. The balance was put in their bank account and, in the words of Mrs. Bain, was "frittered away over time". The Bains testified that they first realized that Mr. Whittemore had been acting as their lawyer when they reviewed the trust reconciliation provided by Colonia's lawyer and saw that his fees had been paid out of the $13,650 cash advance.

**25**  The Bains were subsequently provided with the policy contract for the annuity. They began receiving the monthly payments of $152.14 on August 27, 1994. The monthly annuity payments are continuing at the present time.

**26**  Mr. and Mrs. Bain began to regret that they had entered into the reverse mortgage/annuity transaction. Mrs. Bain testified that about a year after they granted the Mortgage, they realized that they had made a mistake and that they chose not to tell anyone and swept it under the carpet until they realized they had nothing left in their house, at which point they told their children. Mr. Bain testified that it was not until income tax time rolled around that he realized that the interest accrual was out of control and that the transaction was highway robbery. Colonia and its successors sent the Bains annual statements showing the interest which accrued each calendar year and the total amount owing under the Mortgage. Mr. Bain testified that he did not show these letters to his wife and destroyed them.

**27**  Mr. and Mrs. Bain told their children about the reverse mortgage in the spring of 2002. Two of the children investigated the situation and by the fall of 2002, they decided that the house should be sold to stop the "bleeding". They did not consider refinancing the Mortgage by way of a conventional mortgage. The house sold for $189,900. The amount owing under the Mortgage, in the approximate sum of $96,000, has been paid into a lawyer's trust account pending the outcome of this action.

**28**  Mr. Bain testified that the experience of the reverse mortgage has been devastating for him and has put him into a depression. A report dated July 8, 2003 from a psychiatrist was introduced into evidence, but it attributed Mr. Bain's depression to his retirement rather than to the subject matter of this action.

Issues

**29**  The threshold issue is whether the claims made by Mr. and Mrs. Bain are barred by the Limitation Act. If they are barred, there is no need to consider them further. To the extent that their claims are not statute barred, the issues raised by the pleadings are as follows:

1. was the reverse mortgage transaction an unconscionable transaction or were representations made by agents of Colonia deceptive acts or unconscionable acts or practices?
2. did agents of Colonia make negligent or fraudulent misrepresentations to Mr. and Mrs. Bain?
3. does the doctrine of non est factum apply?
4. was Mr. Whittemore negligent?
5. what remedies are appropriate?

In addition to rescission, Mr. and Mrs. Bain are seeking damages, aggravated damages for mental stress and punitive damages.

Discussion

1. Limitation Act

**30**  Subsections (2) and (3) of s. 3 of the Limitation Act provide that a person may not bring certain specified actions after the expiration of specified time periods (i.e., 2 and 10 years) after the date on which the right to bring the action arose. Subsection (5) states that any other action not specifically provided for in the Act may not be brought after the expiration of 6 years after the date on which the right to do so arose. Subsection (4) contains a list of actions which are not governed by a limitation period and may be brought at any time. Section 4 provides that the lapse of time is not a bar to counterclaims or third party proceedings. Section 5 contains provisions dealing with the effect of confirming causes of action. Section 6 deals with the postponement of the running of time in respect of a limitation period.

**31**  The cause of action of ***negligence*** is not specifically mentioned in the Act, and the law is clear that s. 3(5) establishes a 6 year limitation period for ***negligence***. Counsel for Empire submits that s. 3(5) is also applicable to the claims against his client; I will return to this point after considering issues as to when the limitation periods began to run and whether the running of time with respect to the limitation periods has been postponed or is otherwise not to be taken into account.

**32**  Counsel for Mr. Whittemore submits that the cause of action against a solicitor for negligent advice arises when the advice is given, which is when the solicitor breached his or her duty of care. Counsel for Empire submits that the causes of action alleged against his client arose, at the latest, when Mr. and Mrs. Bain granted the Mortgage. Counsel for the Bains replies that the causes of action did not arise until his clients discovered the facts giving rise to the claims and relies in this regard on the following passage from Central Trust Co. v. Rafuse [*(1986) 31 D.L.R. (4th) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=) (S.C.C.):

I am thus of the view that the judgment of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional ***negligence***, as was suggested in Forster v. Outred, [1982] 2 All E.R. 753 at pp. 765-66. (pp. 535-6)

**33**  However, Rafuse was decided under the Nova Scotia legislation, which does not contain provisions for the postponement of the running of time with respect to a limitation period or for the extension of limitation periods. It has been held that this so-called "judge-made discoverability rule" does not apply in jurisdictions, such as British Columbia, where the legislation does provide for postponement or extension of time: see Wittman (Guardian ad litem of) v. Emmott [*(1991), 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=) (B.C.C.A.), Rarie v. Maxwell [*(1998), 124 Man.R. (2d) 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-K0BB-S18G-00000-00&context=) (Man. C.A.) and Burke v. Heaton [*(2003), 228 D.L.R. (4th) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JF1Y-B23W-00000-00&context=) (Man. C.A.). It was explained in the following terms in Burke v. Heaton:

What one must be mindful of in attempting to sort out the issue that this case presents is that there are few cases on which one can rely because of the fact that the discoverability rules that apply in Manitoba are different than most Canadian jurisdictions but similar to those applicable in England. The discoverability rule is not applicable in Manitoba because the Act permits a plaintiff to apply for an extension of the limitation period where the relevant damage is discovered only after the limitation date has passed: Rarie v. Maxwell [reported [*124 Man.R. (2d) 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-K0BB-S18G-00000-00&context=)]. In Manitoba, the cause of action accrues in the traditional way (upon damage occurring), but if the relevant damage is discovered only after the limitation date has passed, then the plaintiff can apply for an extension of the limitation date. Therefore, the reason for disregarding Forster or Costigan in other Canadian jurisdictions does not apply in this province. (para. 26)

British Columbia is similar to Manitoba, and the discoverability rule does not apply in this jurisdiction. Although I have reached this conclusion as part of my analysis, it is my view that the outcome of this issue is the same whether one applies the discoverability rule or the provisions of s. 6 of the Limitation Act.

**34**  The relevant portions of s. 6 are the following:

1. The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

...

1. for professional ***negligence***;
2. based on fraud or deceit ...
3. 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
4. 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
5. 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.
6. For the purpose of subsection (4),
7. "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,
8. "facts" include
9. the existence of a duty owed to the plaintiff by the defendant, and
10. that a breach of a duty caused injury, damage or loss to the plaintiff,
11. if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and
12. if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
13. The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

**35**  This action was commenced on January 3, 2003. In order for the claims not to be statute barred, the running of time with respect to a 6 year limitation period would have had to begin running by no later than January 3, 1997.

**36**  I agree with the submissions made by counsel for Empire and Mr. Whittemore that all of the relevant facts were known by Mr. and Mrs. Bain in July 1994, when they granted the Mortgage and came to the realization that Mr. Whittemore had been acting as their solicitor. They did not learn any new facts in relation to their claims against Empire or Mr. Whittemore between July 1994 and the commencement of this action. In July 1994, the Bains were aware of all of the facts which a reasonable person, having taken appropriate advice, would regard as showing that an action would have a reasonable prospect of success. There was no reason why the Bains ought not to have brought an action in July 1994. There was no postponement of the running of time under s. 6 and the claims to which a 6 year limitation period applies became statute-barred when no action was commenced by July 2000.

**37**  At the very latest, the 6 year limitation period began to run when Mr. and Mrs. Bain realized that they made a mistake in granting the Mortgage (although they did not learn of any new facts in order to come to this realization). Mrs. Bain testified that this occurred approximately one year after they granted the Mortgage. Mr. Bain testified that it occurred when tax time rolled around, which could have been either April 1995 or April 1996. This was still more than 6 years prior to the commencement of the action in January 2003.

**38**  Counsel for Mr. and Mrs. Bain argues that the limitation period did not commence running until February 1997 when the Bains received a letter from Colonia stating that the amount owing under the Mortgage as at December 31, 1996 was $47,627.27. However, the letter did not contain new facts which were outside their means of knowledge. As shown in the final chart dated July 6, 1994, the amounts owing under the Mortgage after 2 years and 3 years were $45,321 and $50,850, respectively. They had this chart in their continuous possession from July 1994. In addition, the Bains knew the interest rate applicable to the Mortgage and could have calculated the outstanding balance at any time. The mortgage balance after 2 1/2 years was not a new fact which was outside their means of knowledge prior to their receipt of the letter.

**39**  Counsel for Mr. and Mrs. Bain submits that Mr. Bain was suffering from mental distress and was not in position to seek legal advice. However, the criteria under s. 6(4) is the advice a reasonable person would have sought on the facts. His mental distress is not relevant. In addition, Mrs. Bain was not under any impediment. While discussing Mr. Bain's alleged mental distress, I should mention for the purposes of clause (b) of s. 6(4) that there was no evidence that it was a reason why the Bains ought not to have brought an action. The medical evidence was that Mr. Bain's depression was due to his retirement in 1999, and there was no evidence that the bringing of an action during the 6 year period after the right to bring an action arose would have worsened the depression or that the action was not brought out of a concern in this regard.

**40**  Counsel for Mr. and Mrs. Bain argues that Empire or its predecessor confirmed the cause of action and that s. 5 of the Limitation Act therefore applies to postpone the running of the limitation period until the time of the confirmation. Subsection (1) of s. 5 provides that if a person against whom an action lies confirms the cause of action, the time during which the limitation period ran prior to the date of the confirmation does not count in the reckoning of the limitation period. Counsel says that the payment by Empire of the monthly annuity amounts to the Bains constituted a confirmation under s. 5(4), which reads as follows:

If a secured party is in possession of collateral, either of the following is a confirmation by the secured party to the payer or performer of the payer's or performer's cause of action to redeem the collateral

1. acceptance by the secured party of a payment to the secured party of principal or interest secured by the collateral, or
2. acceptance by the secured party of
3. payment to the secured party in respect of that party's rights to realize on the collateral, or
4. any other performance by the other person of the obligation secured.

This argument ignores the opening words of the subsection. Neither Empire nor its predecessor was ever in possession of the collateral (being the residence of the Bains charged by the reverse mortgage). Also, the causes of action asserted in this proceeding do not include a cause of action to redeem the collateral. Further, payment of the annuity amounts did not constitute acceptance by Empire of a payment to the secured party or of any other performance by the Bains. The requirements of s. 5(4) have not been met.

**41**  The next argument made by counsel for Mr. and Mrs. Bain is one which has some appeal. Counsel submits that the Bains are really making a counterclaim against Empire and relies on s. 4(1) of the Act, which reads as follows:

If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is not bar to

1. proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
2. third party proceedings,
3. claims by way of set off, or
4. 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.

This argument also ignores the opening words of the subsection. It is a pre-condition to the operation of s. 4(1) for an action to have first been brought before a counterclaim can be made. In the present situation, there is no other action in which the Bains have asserted a counterclaim. Subsection (1) of s. 4 is not applicable.

**42**  I commented that this argument had some appeal. The reason is that if Empire had commenced a foreclosure proceeding on the Mortgage, it would have been open for Mr. and Mrs. Bain to defend the proceeding by challenging the validity of the Mortgage on most of the grounds they are putting forward in this action. The Bains could have attempted to entice Empire to commence foreclosing proceedings by failing to pay the property taxes, failing to maintain insurance on their house or breaching some other provision of the Mortgage. Rather than pursuing this course of action, the Bains sold their house and arrangements were made for the amount owing to Empire under the Mortgage to be held in trust pending the outcome of this action. It does not seem right that the Bains could have challenged the validity of the Mortgage in a foreclosure proceeding (if one had been commenced), but are prevented from doing the same thing in a separate action.

**43**  This brings me back to the question of whether some or all of the claims made by Mr. and Mrs. Bain have no limitation period. Counsel for the Bains relies in this regard on clauses (e) or (j) of s. 3(4), which provides that there is no limitation period in respect of certain specified actions. Two of these actions are specified in clauses (e) and (j), which read as follows:

1. by a secured party in possession of collateral to realize on that collateral;

...

1. for the title to property or for a declaration about the title to property by any person in possession of that property;

In my opinion, clause (e) has no application to this case. This proceeding is not an action by a secured party in possession of collateral - it is not an action by Empire, which was the secured party, and Empire was not in possession of the mortgaged property.

**44**  On the other hand, it is my view that clause (j) does apply to some of the claims made by Mr. and Mrs. Bain. As I stated above, it would not seem right if the Bains are prevented from challenging the validity of the Mortgage when they could have done so in a foreclosure proceeding on the Mortgage by Empire. This potential unfairness is addressed by clause (j) of s. 3(4). It provides that there is no limitation period in respect of an action for a declaration about the title to property by a person in possession of the property. In the present case, the Bains were in possession of the mortgaged property when this action was commenced (the action was commenced on January 3, 2003, while the sale of the residence did not complete until January 15, 2003). Although the Second Amended Statement of Claim does not specifically request a declaration, it does seek cancellation of the Mortgage against the title to the lands and a reopening of the mortgage transaction. If necessary, I would be prepared to allow an amendment to the pleadings to seek a declaration regarding the validity of the Mortgage and the right of Mr. and Mrs. Bain to have title to the mortgaged property.

**45**  In my opinion, requests for such declarations do fall within the description in clause (j) of s. 3(4) of "a declaration about the title to property". Although a mortgage is registered as an encumbrance or charge against title under the Land Title Act, *R.S.B.C. 1996, c. 250*, the law in British Columbia is clear that a mortgage constitutes a conveyance of legal title to the mortgaged property to the mortgagee subject to the equity of redemption in favour of the mortgagor: see North Vancouver District v. Carlisle, [*[1922] 3 W.W.R. 811*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6P1-JSC5-M29Y-00000-00&context=) (B.C.C.A.) and Westcoast Savings Credit Union v. Brosterhus, [*[1986] B.C.J. No. 1907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JSC5-M2KC-00000-00&context=) (C.A.). As a result, an action requesting a declaration of the invalidity of a first mortgage qualifies as an action seeking a declaration about the title to the property. If the mortgagor is successful in obtaining a declaration that the mortgage is invalid, the declaration is tantamount to a declaration that he or she is entitled to have the title of the property re-conveyed to him or her. Hence, it would be a declaration about the title to the property.

**46**  Clause (j) of s. 3(4) results in the conclusion that there is no limitation period with respect to the issue of the validity of the Mortgage. It does not, however, extend to other claims made in this action. It does not alter the determination that there is a 6 year limitation period in respect of the ***negligence*** claim against Mr. Whittemore pursuant to s. 3(5). The phrase "a declaration about the title to property" does not encompass ***negligence*** claims even if the alleged ***negligence*** relates to the granting of a mortgage against the property. Nor does clause (j) encompass claims for compensatory damages, aggravated damages or punitive damages. What clause (j) permits Mr. and Mrs. Bain to do in this action, in view of the expiration of other applicable limitation periods, is to put forward such of their claims that may affect the validity of the Mortgage. This includes the claims that (i) the Mortgage was an unconscionable transaction, (ii) there were deceptive acts or unconscionable acts or practices, (iii) agents of Colonia made fraudulent misrepresentations to Mr. and Mrs. Bain, and (iv) the doctrine of non est factum applies. It does not include the claim of negligent misrepresentations because the remedy of rescission is available in respect of a negligent misrepresentation only when the plaintiff has acted promptly upon learning of the misrepresentation to disaffirm the contract entered into in reliance of the misrepresentation: see Riding Mountain Excavating Ltd. v. K & D Farm Corp., [*[1999] B.C.J. No. 1134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G46S-00000-00&context=), [*1999 BCCA 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G46S-00000-00&context=) at [paragraph] 21. In this case, Mr. and Mrs. Bain did not act promptly upon learning of any alleged negligent misrepresentation.

**47**  Before I turn to a consideration of the claims which are not statute-barred, I wish to make the observation that the circumstances of this case as they relate to the ***negligence*** claim against Mr. Whittemore exemplify why there should be limitation periods. Unlike the claims challenging the validity of the Mortgage, which can be determined in large part on the basis of the documentary evidence, the claim against Mr. Whittemore depends almost entirely on the memories of the parties. The events took place over 10 years ago and the memories of the parties with respect to these events are understandably poor.

**48**  Mr. Whittemore did not recall Mr. and Mrs. Bain until he saw them during the examination for discovery in this litigation and he had only a vague recollection about their meeting in July 1994. He was forced to testify about his normal practice when giving independent legal advice with respect to reverse mortgages. Mr. Bain had a very poor memory and it is my view that the memory which he professed to have was largely reconstructed.

**49**  While Mrs. Bain's memory was better, I also believe that a significant portion of her evidence was based on a reconstructed memory. An example is her evidence about the meeting with Mr. Whittemore. She testified that Mr. Whittemore did not explain any of the documents to them and that he simply pushed the documents in front of them to sign. This evidence is belied by the copies of the documents found in Mr. Whittemore's file. While Mr. Whittemore did not have a specific recollection of going over the documents with the Bains, his handwritten markings were on the chart, the commitment letter and the statutory declaration. The only reasonable inference is that he made these markings when he was explaining the documents to the Bains.

**50**  My point is that, in the absence of these markings, Mr. Whittemore was forced to defend himself against a claim in respect of which he has no specific memory. This is not fair to Mr. Whittemore when his lack of memory has been caused by a 10 year passage of time. It is appropriate in these circumstances that the Limitation Act relieves him of the obligation to defend himself against such a claim.

1. Applicable Legislation

**51**  When the Statement of Claim was initially issued, it contained a plea that the representations made by agents of Colonia were deceptive acts or unconscionable acts or practices as defined by 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=). On July 21, 2004, the Statement of Claim was amended to include assertions that the transaction was unconscionable and that it was an unconscionable transaction pursuant to the provisions of the Consumer Protection Act, [*R.S.B.C. 1996, c. 69*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61S5-00000-00&context=), and, in particular, that it was a mortgage transaction in an unconscionable transaction as defined by that statute and by the failure of Colonia to disclose the cost of borrowing for the transaction. The prayer for relief in the Statement of Claim was also amended to request all relief available to the court pursuant to the Consumer Protection Act.

**52**  During the course of the trial, I discovered by happenstance that new legislation became effective on July 4, 2004. The Business Practices and Consumer Protection Act, *S.B.C. 2004, c. 2* came into effect with a few exceptions. At the same time, the Trade Practices Act and sections 7 to 21.6 and 53 to 62 of the Consumer Protection Act were repealed.

**53**  The Trade Practices Act dealt with deceptive and unconscionable acts and practices. Sections 57 to 62 of the Consumer Protection Act dealt with unconscionable mortgage transactions. In addition, as illustrated by the leading authority of Morrison v. Coast Finance Ltd. [*(1965), 55 D.L.R. (2d) 710*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G20G-00000-00&context=), the court has an equitable jurisdiction to relieve against unconscionable bargains.

**54**  The relevant sections of the Business Practices and Consumer Protection Act are as follows:

1. In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

1. an oral, written, visual, descriptive or other representation by a supplier, or
2. any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

1. A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.
2. Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:
3. a representation by a supplier that goods or services
4. have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,
5. are of a particular standard, quality, grade, style or model if they are not,
6. have a particular prior history or usage that they do not have, including a representation that they are new if they are not,
7. are available for a reason that differs from the fact,
8. are available if they are not available as represented,
9. were available in accordance with a previous representation if they were not,
10. are available in quantities greater than is the fact, or
11. will be supplied within a stated period if the supplier knows or ought to know that they will not;
12. a representation by a supplier
13. that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,
14. that a service, part, replacement or repair is needed if it is not,
15. that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,
16. that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,
17. about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,
18. that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,
19. that a consumer will obtain a benefit for helping the supplier to find other potential customers if it is unlikely that the consumer will obtain the benefit,
20. that appears in an objective form such as an editorial, documentary or scientific report if the representation is primarily made to sell goods or services, unless the representation states that it is an advertisement or promotion, or
21. to arrange for the consumer an extension of credit for a fee, unless the fee is deducted from the advance, as defined in section 57 [definitions];
22. a representation by a supplier about the total price of goods or services if
23. a person could reasonably conclude that a price benefit or advantage exists but it does not,
24. the price of a unit or instalment is given in the representation, and the total price of the goods or services is not given at least the same prominence, or
25. the supplier's estimate of the price is materially less than the price subsequently determined or demanded by the supplier unless the consumer has expressly consented to the higher price before the goods or services are supplied;
26. a prescribed act or practice.

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.

...

7 Nothing in this Division limits, restricts or derogates from a court's power or jurisdiction.

8(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

1. In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
2. Without limiting subsection (2), the circumstances that the court must consider include the following:
3. that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
4. that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
5. that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
6. that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
7. that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
8. a prescribed circumstance.

9(1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

1. If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

10(1) Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.

1. If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [definitions], the court may do one or more of the following:
2. reopen the transaction and take an account between the supplier and the consumer or guarantor;
3. despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
4. order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;
5. set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;
6. suspend the rights and obligations of the parties to the transaction.

The definition of "consumer transaction" is contained in s. 1, as follows:

"consumer transaction" means

1. a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
2. a solicitation, offer, advertisement or promotion by a consumer with respect to a transaction referred to in paragraph (a)

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer.

The term "goods" is defined to mean "personal property, fixtures and credit". The term "credit agreement" is defined to include an agreement in relation to a loan of money. The Mortgage granted by Mr. and Mrs. Bain to Colonia falls within the definition of "mortgage loan" contained in s. 57.

**55**  I invited counsel to make application for any amendments to the pleadings they saw fit as a result of the changes to the legislation. Counsel did not make any such application, but no exception was taken during closing submissions to the state of the pleadings, and counsel were content to make their submissions on the basis of the new legislation and equitable principles. To the extent that any amendments should have been made to the pleadings as a result of the changes to the legislation, I would allow them.

**56**  The Business Practices and Consumer Protection Act has brought forward the provisions of the Trade Practices Act dealing with deceptive and unconscionable acts and practices. Section 4(3) of the new Act (setting out representations which constitute deceptive acts or practices) is a redraft of s. 3(3) of the Trade Practices Act but its overall substance is the same. Section 8(3) of the new Act (setting out circumstances the court is to consider in deciding whether an act or practice is unconscionable) is virtually the same of s. 4(3) of the Trade Practices Act.

**57**  In enacting the Business Practices and Consumer Protection Act, the Legislature did not reproduce Part 5 of the Consumer Protection Act (sections 57 to 62) dealing with unconscionable mortgage transactions. However, s. 2 of the new Act provides that Part 2 of the Act (sections 4 to 10) applies to mortgage transactions, and the circumstances required to be considered by the court in considering whether an act or practice is unconscionable under s. 8(3) of the new Act are virtually the same as the circumstances described in s. 60 of the Consumer Protection Act for the court to have considered in determining whether a mortgage transaction was an unconscionable transaction.

**58**  In my opinion, sections 7 to 10 of the new Act are the equivalent to Part 5 of the Consumer Protection Act, and nothing turns on whether one characterizes the transaction to be unconscionable or characterizes the act or practice to be unconscionable. If a transaction would be unconscionable, it would logically follow that the act or practice of the lender in having the borrower enter into the transaction would also be unconscionable. In any event, the court has the equitable jurisdiction to relieve against unconscionable bargains and, in exercising its jurisdiction, the court would look to circumstances of the nature described in s. 8(3) of the new Act.

1. Deceptive Acts or Practices and Fraudulent Misrepresentations

**59**  I will deal together with the allegations that there were deceptive acts or practices and that there were fraudulent misrepresentations because both involve representations made by the Lifestyle representatives to Mr. and Mrs. Bain. Although it is not necessary for me to deal with the allegation of negligent misrepresentations because the remedy of rescission of the Mortgage is not available in the circumstances of this case and a claim of damages for negligent misrepresentation is statute-barred, my conclusions with respect to the alleged deceptive representations and fraudulent misrepresentations would also apply to a claim that the same representations were negligent misrepresentations.

**60**  Counsel for Mr. and Mrs. Bain argues that agents of Colonia made representations which were deceptive acts or practices as set out in clauses (iii) and (vi) of s. 4(3)(b) of the new Act. However, counsel did not identify the representations upon which he was relying. In my opinion, clause (iii) is not applicable because there is no evidence that any agent of Colonia made a representation that the purpose or intent of a solicitation or a communication was for a purpose or intent which differed from the fact.

**61**  Clause (vi) requires that the representation used exaggeration, innuendo or ambiguity or failed to state a material fact. The only evidence that potentially disclosed such a representation was the following:

1. Mrs. Bain testified that whenever Mr. Beckholt, one of the Lifestyle representatives, was reviewing with the Bains the accumulation of interest shown in the chart, he would always point out the increase in the value of their home;
2. Mr. Bain testified that if he had realized how quickly the interest under the reverse mortgage would build up, he would never have gone through with the transaction;
3. Mr. Bain testified that it was unbelievable that the Lifestyle people could have painted such a beautiful picture until they got the signatures on the paper; and
4. Mr. and Mrs. Bain testified that Mr. Beckholt told them they were using their own money and would be getting some of it back each month.

**62**  The positions of Mr. Bain and Mrs. Bain are inconsistent with respect to the aspect of the transaction in respect of which they were misled. Mrs. Bain says that she realized how much the interest would accumulate but suggested that she was misled by the depiction of the value of the home. By contrast, Mr. Bain testified that he and wife discussed the home values shown on the chart and that they realized that the value of their home in the future would depend on the real estate market in Kelowna. While he understood that the values of the home shown on the chart were estimates only, he was adamant that they were never told how fast the interest would accumulate. So Mrs. Bain says that she understood the interest accumulation but was misled by the home values shown in the chart, while Mr. Bain says that they did understand the home values to be estimates only but that no one told them about the interest accumulation.

**63**  In testifying that the Lifestyle representatives painted a beautiful picture, Mr. Bain did not identify the particular representations to which he was referring. I infer from his evidence generally that he was referring to the alleged omission of the Lifestyle representatives to point out how quickly the interest would accumulate under the Mortgage.

**64**  I find that the accurate interest accumulation was demonstrated to the Bains on more than one occasion and that there was no exaggeration, innuendo or ambiguity by any of the Lifestyle representatives that misled the Bains into believing that the home values shown on the chart were anything other than estimates for illustration purposes (which the chart expressly stated). In hindsight, the percentage increases shown on the chart (5%, 6%, 7% and 8%) proved to be overly optimistic but Lifestyle selected them after consulting with Canada Mortgage and Housing Corporation about the average home increase in the Kelowna area over the preceding years. In addition, the Bains' home had increased in value from $16,500 in 1966 to $175,000 in 1994, which I calculate to be an average annual increase of 8.8% (counsel for Empire calculated it to be an 8.9% annual increase, while counsel for the Bains disputed that calculation but did not provide one of his own).

**65**  Mr. Beckholt adamantly denied that he told the Bains that they were using their own money. In her cross examination, Mrs. Bain agreed that her understanding of them using their own money was drawing down on the equity on their home. In his direct examination, after Mr. Bain testified that they had seen and heard advertisements for reverse mortgages in the newspaper and on the radio posing the question of why borrow when you can use your own money, he indicated that he took it to mean borrowing money on the value of your property. I find that even if Mr. Beckholt told the Bains that they were using their own money, the Bains were not misled by the statement. They understood it to mean that they would be borrowing money on the equity in their home, which was an accurate understanding. They never understood any such representation to mean that they were somehow lending money to themselves.

**66**  The B.C. Court of Appeal set out the elements of a fraudulent misrepresentation in Islip v. Coldmatic Refrigeration of Canada Ltd., [*[2002] B.C.J. No. 811*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0SS-00000-00&context=), [*2002 BCCA 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0SS-00000-00&context=):

In their facta, the parties take the elements of a fraudulent misrepresentation from Fridman, The Law of Contract (3rd Ed.), p. 295, as follows:

1. the wrongdoer must make a representation of fact to the victim;
2. the representation must be false in fact;
3. the party making the representation must have known the representation was false at the time it was made; and
4. the victim must have been induced to enter into the contract in reliance upon it.

To that summary I would add that the misrepresenter must have intended that the victim act on the representation. (para. 11)

**67**  In his closing submissions, counsel for Mr. and Mrs. Bain did not identify any representations made by the Lifestyle representatives which he asserted were fraudulent misrepresentations. In his written reply, counsel for the Bains asserted that the fraudulent misrepresentations were Mr. Beckholt's alleged statement that "it's your money" and the use of the chart showing the increases in the home value.

**68**  As I have stated above, Mr. and Mrs. Bain did not understand that they were lending money to themselves. On their own evidence, the Bains understood any such statement to mean that they were borrowing money on the equity or the value of their home. They were not misled.

**69**  As I have also indicated above, representatives of Lifestyle did not misrepresent to the Bains that their home would definitely increase in value by any particular percentage increase. Whatever Mrs. Bain may have understood as a result of the meetings in Lifestyle's office, I find that Mr. Whittemore did go over the June 30 chart with the Bains and made it clear that the home values were assumed values and that actual real estate market fluctuated. Mr. Whittemore testified that this was his normal practice, which is verified in this case by the fact he made handwritten markings on his copy of the chart, including two markings in the column showing home values increasing at the 5% rate. I find that the Bains understood that the home values shown on the charts were estimates only and that the actual value of their home in the future would depend on the real estate market in Kelowna.

**70**  I find that there were no false representations made by the representatives of Lifestyle or any other agent of Colonia that misled Mr. Bain or Mrs. Bain and induced them into granting the Mortgage.

1. Unconscionability

**71**  In Morrison v. Coast Finance Ltd., the B.C. Court of Appeal discussed the equitable principles relating to unconscionable transactions in the following passage:

The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against under influence does not conclude the question whether the appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable ... or perhaps by showing that no advantage was taken. (p. 713)

Thus, a presumption of fraud arises upon proof of inequality in the positions of the parties and proof of substantial unfairness of the bargain. Unless this presumption can be rebutted by showing that the bargain was fair, just and reasonable, the court will exercise its equitable jurisdiction to relieve against the unconscionable bargain.

**72**  The test was expressed in different terms in a subsequent decision of the B.C. Court of Appeal, Harry v. Kreutziger [*(1978), 9 B.C.L.R. 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2BW-00000-00&context=):

That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. (p. 177)

This test was recently cited by the B.C. Court of Appeal in Ma v. MIV Therapeutics Inc., [*[2004] B.C.J. No. 1935*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2W8-00000-00&context=), [*2004 BCCA 483*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2W8-00000-00&context=).

**73**  Having set out the general principles in relation to unconscionable transactions, I now propose to examine the circumstances which s. 8(3) of the Business Practices and Consumer Protection Act dictates must be considered by the court.

1. That the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction.

**74**  The evidence does not support the conclusion that Lifestyle put undue pressure on Mr. and Mrs. Bain to grant the Mortgage. The Bains made the initial approach to Lifestyle with the purpose of investigating the possibility of obtaining a reverse mortgage. There were at least three meetings, which the Bains attended voluntarily at Lifestyle's office. There was a two week period of time between Mr. Bain's first visit to Lifestyle's office and the signing of the commitment letter. It was another 2 1/2 weeks before the final documents were signed. The Bains were given independent legal advice by Mr. Whittemore. In addition to the 48 hour rescission period afforded by the Mortgage Brokers Act, the Bains were given a "cooling off period" of 60 days, during which they could have changed their minds and unwound the transaction.

1. That the supplier took advantage of the consumer or guarantor's inability to incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction.

**75**  Neither Mr. Bain nor Mrs. Bain had a physical or mental infirmity. They were not ignorant or illiterate, and they had the ability to understand the character, nature and language of the transaction. They are people of at least average intelligence and, given that Mr. Bain was able to rise from the bottom to near the top of the plywood plant where he worked for 25 years, it is reasonable to infer that he has above average intelligence. They were a little advanced in age, but they were both still working at the time, and there was nothing about them which affected their ability to reasonably protect their own interests.

1. That, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers.

**76**  The interest rate under the Mortgage was 11.85% per annum, calculated half-yearly. The evidence was to the effect:

1. 11.85% was in the range of interest rates charged on reverse mortgages at the time;
2. interest rates on reverse mortgages are usually 1 to 1 1/2% higher than interest rates on conventional mortgages as a result of the additional risk that the lender cannot recover the deficiency if the balance owing under the mortgage exceeds the value of the mortgaged home; and
3. interest rates on loans from other non-conventional lenders at the time would have been higher than 11.85%.

On the basis of this evidence, I find that the price paid by Mr. and Mrs. Bain in the form of an interest rate did not grossly exceed the interest rate payable by other borrowers in like circumstances.

1. That, at the time the consumer transaction was entered into there was no reasonable probability of full payment of the total price by the consumer.

**77**  Under the concept of a reverse mortgage, where the borrower is not liable for any amount greater than the value of the mortgaged home, there will always be satisfaction of the amount payable by the borrower.

1. That the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable.

**78**  None of the terms or conditions of the transaction between the Bains and Colonia were so harsh or adverse to the Bains as to be inequitable. There was a right of prepayment of the loan, with the interest penalties in the first 5 years which were not unreasonable. The Bains had 60 days within which they could unwind the transaction. In view of the fact that the expenses of the Bains were exceeding their income, it was not harsh or adverse for Colonia to require that a portion of the loan proceeds be used to purchase an annuity which would augment the Bains' income. It was not inequitable to require the Mortgage to be repaid within two years after the death of one of Bains (with a 10 year guarantee period).

**79**  Although none of the circumstances set out in s. 8(3) of the Business Practices and Consumer Protection Act were present at the time the Bains entered into the reverse mortgage transaction, it is still necessary to consider other circumstances and the transaction as a whole in order to decide whether there were any unconscionable acts or practices or whether the transaction was unconscionable.

**80**  In my opinion, a reverse mortgage is not inherently unconscionable. It is an appropriate transaction for a relatively narrow group of people. The group includes people (i) who are retired or at the end of their working career, (ii) who have expenses which exceed or will exceed their income, (iii) who have no other source of funds which are available at a lesser cost and which can be repaid if necessary, and (iv) who are not concerned about leaving the equity in their home to their heirs. Mr. and Mrs. Bain did not fall within this group because their children would have been prepared to lend or give them the money they needed to pay off their Visa account and other outstanding bills. In addition, the Bains did ultimately want to leave the equity in their home to their children. However, the Bains chose not to investigate other sources of funds and, in particular, they did not ask their children for the money they needed. This was their decision, and it was not unconscionable for Lifestyle to leave it up to the Bains to decide whether a reverse mortgage was appropriate for them.

**81**  The primary argument made on behalf of Mr. and Mrs. Bain is that the transaction was unconscionable because during the period of 20 years following the transaction, they would receive a benefit of approximately $50,000 (the cash advance of $13,650 and annuity payments of $36,520), while the amount owing under the Mortgage would grow from $36,000 to $359,949. Counsel submits that the cost is grossly disproportionate to the benefit received by the Bains. This is an appealing argument at first glance because it does seem like a lot to pay an aggregate of $360,000 over 20 years in order to receive a benefit of $36,000. However, as pointed out by Empire's expert witness, this argument fails to take into account the time cost of money and the effect of compounding interest.

**82**  In considering whether or not the mortgage transaction was unconscionable, it is useful to consider the following hypothetical transaction. Assume that a person borrowed $36,000 on a conventional mortgage at an interest rate of 11.85% per annum calculated half-yearly. Also assume that the borrower made payments every six months in an amount equal to the accrued interest and then repaid the principal at the end of a 20 year period of time. Further assume that when the lender received those interest payments, it invested them at the rate of 11.85% per annum calculated half-yearly and also invested the interest earned on each investment at the same rate. No right thinking person would consider this hypothetical transaction to be unconscionable as long as the interest rate was not grossly higher than the market rate of interest for similar transactions. At the end of the 20 year period, the lender would have received an aggregate of $359,949.10, including the repayment of the $36,000 principal amount of the loan. This is the exact amount which would have been owing under the Mortgage granted by the Bains after a period of 20 years.

**83**  The reason why the amount owing under the Mortgage grew as quickly as it did was a combination of the fact that the Bains made no payments under the Mortgage (until they paid it off) and the effect of compounding interest. It is normal for interest to be paid on unpaid interest, and a compounding period of 6 months is not unusual. The main attraction of a reverse mortgage is that regular payments are not required in circumstances where the homeowner does not have sufficient income to make the payments. Although it can be surprising to realize how high compound interest can accumulate when no payments are made, the features of compound interest and lack of regular payments are not unconscionable.

**84**  There was some suggestion during the trial that it was improper for Colonia to have insisted that Mr. and Mrs. Bain borrow money to purchase an annuity they did not need. But the Bains did need the money. They had built up the outstanding balance on their Visa account because their income was not sufficient to pay their expenses. They required additional cash flow and the annuity served that purpose.

**85**  There was also a suggestion that it was unfair for Mr. and Mrs. Bain to pay Colonia interest on the sum of money paid to purchase the annuity while Colonia also had use of that money and earned investment income on it. However, the effect was no different than if the annuity had been purchased from another insurance company. It is typical for the payor of an annuity to invest the purchase funds with the view of earning sufficient income so that it can make the annuity payments during the lifetime of the recipient, together with a reasonable profit.

**86**  There is no evidence to show that the amount paid by Mr. and Mrs. Bain for the annuity was unreasonable. One could argue that it was not wise for the Bains to borrow money at an interest rate of 11.85% when the imputed return on the annuity was presumably at a lower rate. The cost for an individual to borrow funds is routinely higher than the rate of return the individual can achieve on an investment; this is how lending institutions make their profits. This differential is off-set to some extent by the fact that annuity payments are non-taxable, while the return on other types of investments is normally taxed. And, of course, the imputed return on an annuity becomes greater if the recipient lives longer than their anticipated life expectancy.

**87**  In this case, Mr. and Mrs. Bain received independent legal advice with respect to the transaction from Mr. Whittemore. The Bains maintain that Mr. Whittemore did not give any legal advice but, as I stated above, the markings made on the documents by Mr. Whittemore (together with his testimony regarding his normal practice) indicate that he did explain the documents to them. In Ma v. MIV Therapeutics Inc., Braidwood J.A. stated at [paragraph] 24 that, although the question of independent legal advice will not carry the day in every case involving an allegation of unconscionability, its presence will be overwhelming in most cases. At the very least, the presence of independent legal advice will be an important factor to consider when examining all of the circumstances to determine whether a transaction is unconscionable.

**88**  In Miller v. Lavoie [*(1966), 60 D.L.R. (2d) 495*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G21P-00000-00&context=) (B.C.S.C.), Wilson C.J.S.C. made the following observation about predecessor legislation dealing with unconscionable transactions:

This Court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. The legislation provides one method of exercising that benevolent authority. But the Courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly. (p. 501)

I would not go so far as to call the granting of the Mortgage an act of folly on the part of the Bains. But they did enter into the transaction under no pressure and with their eyes open, and they also had the benefit of independent legal advice. In my view, the Bains were eager to accept the benefits of the transaction and did not focus on the consequences of the compounding interest or the possibility that the real estate market in Kelowna might level off. When they subsequently focused on those aspects a year after the transaction, they regretted that they had granted the Mortgage.

**89**  Taking all of the circumstances relating to the granting of the Mortgage into account, I conclude that Empire has satisfied the burden of establishing that the transaction was not unconscionable and that agents of Colonia did not commit an unconscionable act or practice.

1. Non est factum

**90**  The leading authority on the doctrine of non est factum is the decision of the Supreme Court of Canada in Marvco Research Ltd. v. Harris [*(1982), 141 D.L.R. (3d) 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M26G-00000-00&context=). Estey J. described the history of the doctrine in the following passage:

The doctrine of non est factum sprang into prominence with the judgment in Foster v. Mackinnon (1869), L.R. 4 C.P. 704. At trial in that case the jury was directed that if the defendant's signature on the documents in question "was obtained upon a fraudulent representation that it was a guarantee and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any ***negligence*** in so signing the paper, he was entitled to the verdict". On appeal, the Court of Common Pleas endorsed the direction of the trial judge ... (p. 581)

The Marvco decision focused on the issue of whether ***negligence*** or carelessness on the part of the person signing the document was a bar to a plea of non est factum.

**91**  In the present case, it is not necessary to consider whether Mr. and Mrs. Bain were careless in signing the Mortgage. The Bains have not met the threshold of establishing that they were misled by a misrepresentation as to the nature of the document they were signing. Even if one were to accept their evidence that Mr. Whittemore did not explain the documents to them, the Bains knew that they were granting a reverse mortgage and they understood the general nature of a reverse mortgage. The plea of non est factum is not available to them because the transaction effected by the reverse mortgage was not essentially different in substance or in kind from the transaction they intended to enter into: see Canadian Imperial Bank of Commerce v. Dura Wood Preserves Ltd. [*(1979), 102 D.L.R. (3d) 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-K054-G0VN-00000-00&context=) (B.C.S.C.).

1. Disclosure of Cost of Borrowing

**92**  I did not include this topic in the issues raised by the pleadings, but I should address it because it formed part of the closing submissions of counsel for Mr. and Mrs. Bain.

**93**  The Second Amended Statement of Claim did make reference to a failure to disclose the cost of borrowing, but the reference was made as a particular of the assertion that the transaction was an unconscionable transaction under the Consumer Protection Act. No submissions were made on this point.

**94**  However, counsel for the Bains did rely in closing submissions on s. 69 of the Business Practices and Consumer Protection Act, which reads as follows:

Information disclosed under the Part, whether in a disclosure statement or advertisement or otherwise, may be based on an estimate or assumption if

1. the disclosure depends on information that is not ascertainable by the credit grantor at the time of disclosure, and
2. the estimate or assumption is reasonable and is clearly identified as an estimate or assumption.

Counsel argues that the charts shown to the Bains constituted advertisements and that the assumed increases in the home value were not reasonable.

**95**  Apart from the fact that s. 69 does not come into force until January 1, 2005, it does not apply because the relevant Part of the Act does not include home values as part of the information required to be disclosed. In any event, I have found that the assumed increases of 5%, 6%, 7% and 8% were reasonable in view of the fact that the Bains' home had increased in value by an average of 8.8% from the time they acquired it to the time they granted the Mortgage.

**96**  Although no submissions were made to me with respect to the disclosure requirements of the Consumer Protection Act, I will make a brief comment about them. A disclosure statement under the Mortgage Brokers Act was given to Mr. and Mrs. Bain before they granted the Mortgage to Colonia. While this disclosure statement may not have technically complied with the requirement of s. 41 of the Consumer Protection Act to state the cost of borrowing as one sum in dollars and cents, the chart was attached to the disclosure statement and it showed the total amounts which would be owing under the Mortgage each year between the ages of the Bains from 60 to 80 and also at the ages of 85 and 90. The cost of borrowing could easily have been determined from these amounts by subtracting the principal amount of the Mortgage.

**97**  Subsection 50(2) of the Consumer Protection Act provides that a lender is deemed to have complied with the disclosure requirements of the Act despite any error, omission, or incorrect or insufficient description in the disclosure if a court is satisfied that the error, omission or incorrect or insufficient description was not of a nature to mislead or deceive the debtor. In view of the nature of a reverse mortgage, it is not possible to state the cost of borrowing as one sum over the course of the mortgage because there is no specified maturity date. I am satisfied that the failure of Colonia to state the cost of borrowing as one sum in dollars and cents was not of a nature to mislead or deceive Mr. and Mrs. Bain.

Conclusion

**98**  I dismiss the action against each of Empire and Mr. Whittemore.

**99**  If the parties are not able to reach agreement with respect to the costs of the action, counsel may make written submissions directed to me through the Smithers Registry if they are all content to waive an oral hearing. If one or more counsel wishes an oral hearing, a video-conference hearing can be arranged through the Smithers Registry.

TYSOE J.

**End of Document**

[***Banyay v. Christie and Co., [2001] B.C.J. No. 1620***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6174-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Baker J.

Heard: January 8 - 12, 15 - 19 and 22 - 24, 2001.

Judgment: August 9, 2001.

New Westminster Registry No. S034530

**[2001] B.C.J. No. 1620** | 2001 BCSC 1165 | 107 A.C.W.S. (3d) 329 | [2001] B.C.T.C. 1165

Between Gabriel Banyay, plaintiff, and Christie and Company and Dugald E. Christie, defendants

(145 paras.)

**Case Summary**

**Barristers and solicitors — *Negligence* — Standard of care — Scope of liability — Elements of negligent conduct — Error of judgment v. *negligence* — Particular negligent acts — Re conduct of trial — Re insurance claims — Evidence and proof.**

|  |
| --- |
| Action by Banyay for damages for ***negligence*** and breach of fiduciary duty. The individual defendant Christie acted as counsel for Banyay in a personal injury action. Christie also assumed conduct of several actions that Banyay had already commenced in respect of three property damage insurance claims. The trial judge in the personal injury action made findings of credibility against Banyay, who was also found to be contributorily negligent. For a brain injury he recovered $130,350 for non-pecuniary damages, past and future income loss, special damages and cost of future care. In his action against Christie, Banyay submitted that Christie should not have allowed him to testify in the personal injury action. Banyay complained that Christie did not get expert advice on how to handle him as a witness. He claimed that Christie made the presentation of the evidence unnecessarily complicated. He alleged that Christie was negligent in failing to present to the trial judge a summary of damages that had been prepared by Banyay, and in failing to pursue no-fault benefits. He said that Christie should have obtained a trial by jury. He claimed that Christie coerced him into an appeal which he lost, but that the appeal was too limited. He said that Christie should not have settled costs for less than the full amount of solicitor and client costs. Christie was alleged not to have fully accounted for the funds received from the defendants in the personal injury action. Banyay sought to recover from Christie the sum paid to Banyay's new counsel. He alleged that Christie's failure to pay or to dispute a Revenue Canada requirement to pay resulted in penalties being assessed against him. He also alleged that Christie breached the terms of the retainer in relation to his conduct of the property damage insurance claims.  HELD: Action dismissed.  There was no reasonable alternative to having Banyay testify at the personal injury trial. There was no evidence to support the suggestion that there was some unique method of eliciting Banyay's testimony, or that such a method would have altered the outcome of the trial. The brain injury issue was complex, and Christie had exercised his discretion reasonably in presenting the medical evidence. Christie was also correct in not putting to the trial judge Banyay's summary of damages, which was exaggerated and unrealistic. It was not unreasonable for Christie to have discontinued a claim for no-fault benefits after the decision of the trial judge. It was not clear that Banyay instructed Christie to file a jury notice, or that a jury would have been more generous. Advising as to an appeal was not coercion. Christie was not negligent in limiting the grounds of appeal. There was no basis on which to challenge the costs settlement. Banyay failed to prove that Christie had not accounted fully for the monies owed. There was no reason for Christie to pay the new lawyers' fees. Banyay failed to establish that Christie owed him a duty to pay Revenue Canada in response to the requirement to pay. Although Christie could have dealt with the property insurance claims more quickly than he did, his decision to focus on the personal injury claim did not result in any loss to Banyay and the resulting delay did not amount to a breach of the standard of care. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle (Insurance) Act.

**Counsel**

The plaintiff appeared in person. Allan A. MacDonald, for the defendant.

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| --- |
| **BAKER J.** |

**1**   Mr. Christie, who is a lawyer, acted as counsel for Mr. Banyay in a lawsuit for damages for personal injuries arising out of 3 motor vehicle accidents. Mr. Banyay also retained Mr. Christie to take over conduct of several lawsuits already underway against insurance brokers and an insurance company for compensation for property damage arising out of incidents on December 5, 1990, December 18, 1990 and February 13, 1991. Mr. Banyay alleges that Mr. Christie was negligent in the manner in which he pursued these claims, or breached the solicitor and client contract. Mr. Banyay also alleges that Mr. Christie breached his fiduciary duty to account for funds received by him in the course of his representation of Mr. Banyay.

THE PERSONAL INJURY ACTION CLAIM

FACTS

**2**  Gabriel Banyay was involved in three motor vehicle accidents that occurred on April 15, 1991, August 7, 1991 and June 26, 1991.

**3**  Mr. Banyay's claim for damages arising out of personal injuries sustained in the three accidents was heard by Justice Braidwood, then of the British Columbia Supreme Court, in Vancouver September 6 to 9 and 12 to 16, 1994. Liability was in issue in respect of two of the accidents, and contributory ***negligence*** was also alleged in relation to two of the accidents.

**4**  Justice Braidwood issued written Reasons for Judgment on September 28, 1994, [*[1994] B.C.J. No. 2133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S3D8-00000-00&context=). His Reasons set out the circumstances of the three accidents as he found them to be.

**5**  Justice Braidwood concluded that the defendants had negligently caused each of the accidents and that Mr. Banyay had been injured in all three accidents. He held, however, that almost all of Mr. Banyay's injuries and consequent losses were caused by the first of the three accidents.

**6**  One of the major issues in the trial was whether Mr. Banyay had suffered a closed head brain injury when his head struck the windshield in the first accident. Justice Braidwood accepted the expert opinion evidence tendered on behalf of Mr. Banyay, and concluded that Mr. Banyay had suffered a brain injury.

**7**  Justice Braidwood also concluded, however, that Mr. Banyay had exaggerated his symptoms during the trial. He made adverse credibility findings in relation to Mr. Banyay, including the following statement at paragraph 1 of the Reasons:

The evidence of Mr. Banyay must be viewed with the greatest of scepticism for in many instances he has given conflicting and inaccurate evidence and, as one of the doctors has said, he was a very poor historian. I am convinced in many instances his evidence has been exaggerated.

**8**  Justice Braidwood rejected most of Mr. Banyay's claims for past loss of income said to have arisen out of the failure of two businesses. Justice Braidwood concluded that one of Mr. Banyay's businesses, a hotel and restaurant owned by a company called Barzam Management Ltd., that Mr. Banyay owned jointly with his wife, failed for reasons unrelated to Mr. Banyay's injuries.

**9**  Justice Braidwood concluded that a second business - a restaurant known as the "Copper Kettle" in Cloverdale, B.C. - also failed for reasons unrelated to Mr. Banyay's motor vehicle injuries.

**10**  Justice Braidwood was subsequently asked and agreed to reconsider his decision with respect to the claim for a loss arising out of the failure of the Copper Kettle. In his original Reasons Justice Braidwood had referred to a 1989 fire in premises adjacent to the Copper Kettle, when in fact the fire had occurred in 1990. Having taken into account the correction in the facts, however, he nevertheless reaffirmed his conclusion that the loss of the Copper Kettle business was not causally related to Mr. Banyay's injuries.

**11**  In his Supplementary Reasons, [*[1994] B.C.J. No. 2588*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63NJ-00000-00&context=), Justice Braidwood again commented adversely on Mr. Banyay's credibility. He said:

This business was purchased in September 1989 for approximately $79,000. It had 120 seats and before the accident it had a gross income of approximately $1000 per day.

There is no doubt that the plaintiff did not have the energy and ability to concentrate and deal with problems that he had enjoyed prior to the fire but he had the assistance of his wife when the café re-opened. The plaintiff has not shown on the balance of probabilities that if his faculties had been as they were before the fire, he would have been able to salvage this operation. I reached this conclusion on the basis of the credibility of the plaintiff, his constant exaggerations as to his inabilities, my lack of confidence in his assertions, and on the evidence which leads me to conclude that after the fire his customers attended elsewhere and did not return such that immediately when the café re-opened, the income had dropped to a gross of $400 per day.

**12**  On the contributory ***negligence*** aspect of the first accident, Justice Braidwood rejected Mr. Banyay's trial testimony that he had not been wearing the shoulder restraint part of his seatbelt at the time the first accident occurred. He rejected Mr. Banyay's testimony for several reasons, including his assessment of the expert opinion evidence, and his preference for the evidence of a defence witness. However, one of his reasons for disbelieving Mr. Banyay's trial testimony was the fact that on Mr. Banyay's examination for discovery, the following exchange had taken place:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | What kind of a seatbelt was it? |  |
|  | A | I haven't got a clue. |  |
|  | Q | Was it across your lap and shoulder? |  |
|  | A | I haven't got a clue. |  |

Justice Braidwood held Mr. Banyay to be contributorily negligent and reduced the damage award by 20%.

**13**  In the result, Justice Braidwood awarded, after a deduction of 20% for contributory ***negligence***, a total of $130,350 for non-pecuniary damages, past and future income loss, special damages and cost of future care.

CREDIBILITY

**14**  Before turning to the specific allegations of ***negligence***/breach of contract in relation to the conduct of the personal injury claims, it is necessary to comment on the issue of credibility as it relates to this proceeding.

**15**  Many of the facts in this case are not in dispute. Others can be resolved by reference to Justice Braidwood's Reasons for Judgment, or the documents in evidence. However, there are some issues on which it is necessary to decide whether I accept the testimony of Mr. Banyay or Mr. Christie.

**16**  Mr. Banyay did, Justice Braidwood concluded, suffer a brain injury. The medical opinion evidence before Justice Braidwood, and the evidence of Drs. Coen and Kastrukoff, who testified before me, indicate that the brain injury has affected Mr. Banyay's cognitive abilities, including his judgment and his memory, and may also affect his ability to control his emotions and his mood. Mr. Banyay's behaviour is sometimes erratic and his emotions are labile.

**17**  In my view, Mr. Banyay is also prone to exaggeration. He has an ability to convince himself that what he wants to be true, must be true. He appeared, during trial, to have an almost obsessive fixation about certain matters, and a tendency to misinterpret or ignore information that contradicted his belief. He sometimes took positions that were logically inconsistent, without appearing to see the contradictions.

**18**  Whether the traits Mr. Banyay exhibits are the result of the brain injury, or simply aspects of his underlying personality, or a combination of the two, is probably immaterial. The result is that Mr. Banyay's credibility is adversely affected.

**19**  Mr. Christie sometimes appeared frustrated and fatigued by Mr. Banyay's cross-examination. He was not inclined to go out of his way to assist Mr. Banyay or the court by searching through the documentary exhibit books to find and refer to relevant documents during his cross-examination by Mr. Banyay. Nevertheless, he remained calm and was, for the most part, responsive in the face of a lengthy, unfocused and sometimes over-zealous cross-examination. Much of Mr. Christie's testimony is corroborated by the testimony of other witnesses including Mabel Eastwood, a solicitor Mr. Banyay hired to assist him in his accounting dispute with Mr. Christie. Mr. Christie's testimony is also corroborated, to a large extent, by documents in evidence.

**20**  In general, where the evidence of Mr. Banyay conflicts with that of Mr. Christie, I prefer the evidence of Mr. Christie.

THE ALLEGATIONS OF ***NEGLIGENCE***/BREACH OF CONTRACT IN THE CONDUCT OF THE PERSONAL INJURY LAWSUIT

**21**  I do not intend, in these Reasons, to deal with every complaint Mr. Banyay has about Mr. Christie's conduct of his personal injury claims. Several of them, even if proved, could not have caused a loss, and would result in no award of damages. For example, Mr. Banyay complains that Mr. Christie tried to secure funding through the Legal Services Society without Mr. Banyay's authority. Mr. Christie did send a letter to the Legal Services Society asking if the Society could assist Mr. Banyay by funding disbursements for his personal injury and property damage lawsuits. He notified Mr. Banyay that he had done so. Even if Mr. Christie acted without Mr. Banyay's specific authority in making this request, he had good intentions, and no loss to Mr. Banyay could or has resulted.

**22**  The following list includes the primary allegations of ***negligence*** and/or breach of contract raised by Mr. Banyay in his pleadings, in his testimony, in his cross-examination of Mr. Christie, in his letters to Mr. Christie, or in his submissions at this trial:

1. Mr. Christie should have obtained a trial by judge and jury.
2. Mr. Christie should not have allowed Mr. Banyay to testify at his trial.
3. Mr. Christie should have got expert medical advice about how to handle Mr. Banyay.
4. Mr. Christie presented too much expert evidence.
5. Mr. Christie should have called Mr. Kenneth Simon, who was Mr. Banyay's accountant, to testify and should not have retained Mr. Teasley as an expert accounting witness.
6. Mr. Christie should have stopped the defendants from putting the clinical records of Mr. Banyay's doctor, Dr. Lorenzo into evidence without requiring Dr. Lorenzo to testify.
7. Mr. Christie should have lead more evidence about special damages.
8. Mr. Christie should have presented more evidence about loss of future income.
9. Mr. Christie should have given Justice Braidwood Mr. Banyay's August 24, 1994 summary of damages.
10. Mr. Christie neglected to apply for benefits for Mr. Banyay under Part 7 of the Motor Vehicle (Insurance) Act.
11. Mr. Christie should not have discontinued the action to recover Part 7 benefits after Justice Braidwood's judgment was issued.
12. Mr. Christie should not have settled the issue of costs for less than the full amount of solicitor and own client costs.
13. Mr. Christie did not follow Mr. Banyay's instructions to argue the wage loss component of the trial decision on appeal.

I shall deal briefly with each of these allegations in my Reasons, although I have responded to some of the related issues in combination.

THE LAW

**23**  I begin with a brief review of relevant authorities. In Central Trust Co. v. Rafuse, [*(1986) 31 D.L.R. (4th) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=) (S.C.C.), at 523, the court said:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken...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...

At p. 525, the court said:

While the solicitor's duty of care has generally been stated, for obvious reasons, in the context of contractual liability as arising from an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and in tort are the same...

**24**  In Brenner v. Gregory, [*[1973] 1 O.R. 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0C6-00000-00&context=), [*30 D.L.R. (3d) 672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M0C6-00000-00&context=), at p. 677 of the latter report, Justice Brenner said:

In an action against the solicitor for ***negligence*** it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it...

To the same effect, see Graybriar Industries Ltd. v. Davis & Co. [*(1990), 46 B.C.L.R. (2d) 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0N4-00000-00&context=) (S.C.).

**25**  In Karpenko v. Paroian, Courey, Cohen & Houston, [*(1980), 117 D.L.R. (3d) 383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M4N7-00000-00&context=), (Ont. High Ct.), Justice Anderson held that a lawyer conducting a civil case is not immune from an action in ***negligence***. He also held, however, that the lawyer will not be held responsible for mere errors in judgment, and that an error must be egregious before a court will conclude that it is ***negligence***. In particular, he held that a decision by a lawyer to settle a case will be found to be ***negligence*** only in the case of some egregious error. He said this was so because:

What is relevant and material to the public interest in that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some Judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise...I can think of few areas where the difficult question of what constitutes ***negligence***, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. P. 10.

**26**  I note here that neither party presented expert opinion evidence concerning the standard of care of the reasonably prudent lawyer engaged in the conduct of a personal injury claim, or a property damage insurance claim.

THE ALLEGATIONS

ALLOWING MR. BANYAY TO TESTIFY

**27**  Paragraph 21 of the Amended Statement of Claim says:

The Defendant failed his professional responsibility by allowing the Plaintiff to give evidence while the Plaintiff was under heavy medication, overwhelming medical tests and treatment from so many physicians and medical practitioners.

**28**  I am satisfied that there was no reasonable alternative to allowing Mr. Banyay to testify at the trial of his motor vehicle accident actions. Had he not testified, it is more probable than not that adverse inferences would have been drawn by reason of his failure to testify and to make himself available for cross-examination. Justice Braidwood did draw an adverse inference as a result of Mr. Banyay's failure to cooperate with an assessment by one of the defendant's medical experts.

**29**  It was essential that Mr. Banyay testify about the symptoms he had experienced as a result of the various accident injuries. Without Mr. Banyay's testimony, the reports of his medical experts would have had to be disregarded or significantly discounted for lack of an evidentiary basis to support the opinions.

**30**  The evidence before me does not establish that Mr. Banyay was incompetent to testify at trial, or that he was impaired at trial by the medications he was taking. Mr. Banyay had testified on examination for discovery. In the months before trial, he had been interviewed by many doctors and other health care professionals and was apparently considered capable of providing historical information on which the physicians based their opinions.

**31**  None of the medical experts' opinions about Mr. Banyay's brain injury would have justified a decision by Mr. Banyay to refuse to testify at trial. Dr. Coen, a psychologist who testified on behalf of Mr. Banyay, described Mr. Banyay's brain injury as "mild to moderate".

**32**  Dr. Kastrukoff testified at this trial that in his opinion Mr. Banyay's brain injury likely does affect Mr. Banyay's ability to testify. However, he quite properly pointed out that he can't give a definitive opinion as to whether the impairment affects Mr. Banyay's legal position in relation to testifying. Dr. Kastrukoff did not say that he had advised against Mr. Banyay being a witness at the trial in September 1994. Dr. Kastrukoff wrote a letter "to whom it may concern" in January 1995 suggesting that further litigation should be postponed for six months, but that was many months after the trial before Justice Braidwood.

**33**  Dr. Coen testified at this trial about the effects of a brain injury. However, in his opinion, the brain injury Mr. Banyay suffered does not affect Mr. Banyay's ability to tell the truth.

**34**  A failure by Mr. Banyay to testify at the personal injury trial would likely have been fatal on the contributory ***negligence***/seatbelt defence issue, given his earlier testimony on examination for discovery. Without Mr. Banyay's evidence at trial, it is probable that he would also have been found contributorily negligent in respect of the August 7, 1991 accident.

**35**  Mr. Banyay submitted to this court that Justice Braidwood incorrectly concluded that Mr. Banyay was exaggerating the impact of his injuries. He submitted that any past or present tendency to exaggerate, and any inaccuracies in his testimony are due solely to his brain injury. I am unable to accept this submission. Justice Braidwood was well aware, as a result of the medical evidence presented at the trial, of the nature of Mr. Banyay's brain injury and its effect on him. It is clear that Justice Braidwood concluded that Mr. Banyay was intentionally, and not involuntarily, misrepresenting the nature and extent of his injuries and their impact on his life and his ability to earn income.

EXPERT EVIDENCE ON "HANDLING" MR. BANYAY

**36**  Mr. Banyay also complains that Mr. Christie did not get expert advice about how to "handle" Mr. Banyay as a witness. No evidence has been presented to support the suggestion that some unique method of eliciting Mr. Banyay's evidence in chief existed, or would have altered the outcome of the trial. Mr. Christie was familiar with the opinions and findings of Drs. Coen and Kastrukoff about Mr. Banyay's brain injury and its apparent effect on his memory and emotional liability. There was no way, in any event, to shelter Mr. Banyay from cross-examination.

**37**  I accept the evidence of Mr. Christie that he spent time with Mr. Banyay, when Mr. Banyay made himself available, preparing Mr. Banyay to testify at trial. I accept that he made efforts to diplomatically rein in Mr. Banyay's tendency to exaggeration and self-aggrandisement. At times, Mr. Banyay wrote rude, almost abusive letters to Mr. Christie. Many counsel would have terminated their retainer on receipt of only one of those letters. Mr. Christie tried to be understanding and soldiered on.

**38**  At one point, Mr. Christie became concerned that Mr. Banyay might have been abusing alcohol. He warned Mr. Banyay that he could not obtain instructions from him when he had been drinking.

**39**  In November 1994, Mr. Christie became concerned that Mr. Banyay was acting irrationally. He suggested, to Mr. Banyay and to Mrs. Banyay, that perhaps Mr. Banyay was incapable of managing his own affairs. Both Mr. and Mrs. Banyay reacted extremely negatively to this suggestion, viewing it as a threat to have Mr. Banyay involuntarily committed to a mental health facility. Mr. Christie withdrew the suggestion and apologized for having made it.

**40**  Mr. Christie tried to persuade Mr. Banyay to advance reasonable and supportable claims, and not to try Justice Braidwood's credulity and patience. Mr. Banyay resisted Mr. Christie's efforts. Having seen firsthand the tenacity with which Mr. Banyay, having once formed an opinion, clings to it despite any and all evidence to the contrary, I can see little more that Mr. Christie could have done to attempt to control his client's behaviour at trial.

**41**  Mr. Banyay has failed to prove, on a balance of probabilities, that Mr. Christie was negligent or in breach of contract in allowing Mr. Banyay to testify at the trial of the motor vehicle accidents.

EVIDENCE PRESENTED OR NOT PRESENTED AT TRIAL OF PERSONAL INJURY ACTION

**42**  Mr. Banyay has a number of complaints about decisions he says Mr. Christie made in relation to the presentation of evidence at trial. Mr. Banyay complains that Mr. Christie made the trial too complicated by calling too many witnesses. He also claims, however, that Mr. Christie should have required Dr. Lorenzo to testify and should have required Kenneth Simon, an accountant who had done work for Mr. Banyay, to testify.

**43**  Mr. Banyay argues that he was forced to see too many doctors and other specialists. When asked to list those he objected to, however, he mostly named the defendants' experts. I can see no way in which Mr. Christie could have prevented the defendants from requiring Mr. Banyay to attend for independent medical examinations by the defendants' experts. The brain injury issue was particularly difficult and complex, and it was necessary for Mr. Banyay to see specialists from several disciplines to attempt to fully explore this issue.

**44**  Mr. Banyay submits that Mr. Christie should not have permitted defendants' counsel to put Dr. Lorenzo's clinical records in evidence. Dr. Lorenzo had been Mr. Banyay's family physician following the first accident. I can think of no valid grounds on which Mr. Christie could have maintained an objection to the admission of Dr. Lorenzo's records about Mr. Banyay's condition when first examined after the accident. Had he succeeded in doing so, an adverse inference would probably have been drawn.

**45**  At the same time, Mr. Banyay submits that Dr. Lorenzo should have been required to come to trial to explain the entries in his clinical records. Mr. Banyay submits that Dr. Lorenzo would have been able to prove that Mr. Banyay was wearing the shoulder portion of his seatbelt at the time of the first accident. Dr. Lorenzo's notes of Mr. Banyay's first visit contain the statement "Wearing seatbelt". This statement, coming from Dr. Lorenzo, would, of course, be hearsay evidence. To the extent that the fact of the statement having been made to Dr. Lorenzo could be used to rebut any defence suggestion that Mr. Banyay's claim of seatbelt use was a "recent fabrication", the evidence of the note in the clinical records was sufficient.

**46**  Mr. Banyay suggests that Dr. Lorenzo would have been able to testify that Mr. Banyay had bruising across his shoulder and chest caused by the seatbelt retracting on impact. Mr. Banyay refers to notes made by Dr. Lorenzo:

Tender trapezius - both cervical paraspinal muscles

These are, however, the muscles usually implicated in a "whiplash" type injury, which was Dr. Lorenzo's diagnosis. There is no reference in Dr. Lorenzo's clinical records to bruising to Mr. Banyay's chest, or the front of his shoulder, which we would expect to see if there was injury caused by the retraction of the shoulder portion of the seatbelt. Dr. Lorenzo was not called to testify at the trial before me, and there is no evidence that Dr. Lorenzo's testimony would have supported Mr. Banyay's claim that he was wearing the shoulder portion of the seatbelt.

**47**  It appears from the documents that Mr. Christie had arranged for Dr. Lorenzo to be available to testify. However, on August 25, 1994, he wrote to Dr. Lorenzo advising him that his attendance at trial was no longer required. Mr. Christie testified that he had several reasons for deciding not to call evidence from Dr. Lorenzo. He believed that Dr. Lorenzo would be out of town, perhaps even out of the country at the time of trial, and did not wish to incur the expense of bringing him back for trial. He had also had conversations with Dr. Lorenzo that led him to believe that Dr. Lorenzo was not favourably disposed to Mr. Banyay's position and that his testimony would not be helpful to Mr. Banyay. In particular, Dr. Lorenzo indicated to Mr. Christie that he thought Mr. Banyay was exaggerating his symptoms.

**48**  There was a reference in Dr. Lorenzo's notes to "Smells of alcohol" made during one of Mr. Banyay's visits to Dr. Lorenzo's office. Mr. Christie says he wanted as little attention as possible drawn to this entry. Mr. and Mrs. Banyay testified in this trial that Mr. Banyay had not been drinking before the visit to Dr. Lorenzo's office - that Mr. Banyay may have smelled of alcohol because they were using it as a disinfectant on an open wound. Dr. Lorenzo was not called at this trial to explain his note. Neither Mr. nor Mrs. Banyay can testify as to the state of Dr. Lorenzo's mind when he made the note in his clinical record. It seems doubtful that Dr. Lorenzo would make a notation "Smells of alcohol" if the alcohol had been applied externally for medical purposes, and there's no reference to Mr. Banyay having an open wound in any of Dr. Lorenzo's notes.

**49**  In any event, Mr. Banyay agreed, as a matter of contract, that Mr. Christie would have the right to decide what witnesses should be called. The retainer agreement signed by Mr. Banyay and Mr. Christie, which is dated June 16, 1993, but was probably signed later in that month, includes a clause providing that:

Discretion is granted to Mr. Christie in the matter of which witnesses to call.

**50**  The discretion would have to be exercised reasonably, and I am satisfied that it was. I am not persuaded that the decision not to call Dr. Lorenzo as a witness was a mistake, let alone a breach of the standard of care. Decisions about which witnesses to call, and how much evidence to present, are matters of judgment. As the authorities referred to earlier indicate, the courts should not readily second-guess decisions of counsel about the presentation of evidence at trial.

**51**  Mr. Banyay also submitted that Mr. Christie should have retained Kenneth Simon, an accountant who had done work for Mr. Banyay's businesses, instead of retaining accountant Howard Teasley to prepare and give expert opinion evidence on the issues of past and future loss of income.

**52**  It is not clear when Mr. Banyay told Mr. Christie that he wanted Mr. Simon to be involved in the lawsuit. Certainly he was not always of the view that Mr. Simon was a necessary witness. On January 24, 1994, Irene Banyay, Mr. Banyay's wife, sent a facsimile message to Mr. Christie advising him that Mr. Banyay did not agree to the involvement of Kenneth Simon.

**53**  Mr. Christie testified that he did recall discussing with Mr. Banyay the possibility of having Kenneth Simon testify at trial. Mr. Christie spoke with Mr. Simon. However, he considered it preferable to retain an accounting expert who was also an actuary and could cover off several issues. In addition, Mr. Teasley had previous experience preparing reports for insurance claims, and had previously testified as an expert witness. Mr. Christie told Mr. Banyay his reasons for retaining Mr. Teasley. Mr. Christie's recollection is that Mr. Banyay did not insist on Mr. Simon.

**54**  Having read Justice Braidwood's Reasons, I am not persuaded that a different manner of presenting the evidence about the financial situation of Mr. Banyay's businesses would have altered the outcome. Although Justice Braidwood did not accept some of Mr. Teasley's opinions about Mr. Banyay's losses, there is no evidence indicating that Mr. Teasley did not do a competent and creditable job of presenting the loss of income claims in the most favourable light possible.

**55**  No witness could explain away Mr. Banyay's own personal tax returns, or the financial statements of the businesses, which Mr. Simon had prepared. The statements showed that the Fort St. James hotel/restaurant had been profitable. However, as noted above, the holder of the agreement for sale cancelled the agreement because Mr. Banyay did not pay the balance owing when due.

**56**  Mr. Banyay suggests that Mr. Simon could somehow have explained the financial statements he had prepared in a way that would make the apparently bleak financial picture of the Copper Kettle restaurant (it lost $24,000 in its first year of operation) look more promising. Mr. Simon did not testify at this trial, so I don't know what evidence he could or would have given at the trial before Justice Braidwood. There is no evidence before me that supports Mr. Banyay's claim that Mr. Simon's evidence would have persuaded Justice Braidwood to come to a different conclusion about past or future loss of income or the opportunity to earn income. Based on the financial statements Mr. Simon did prepare, there is no reason to believe he would have supported Mr. Banyay's calculation that he had lost income of $1.5 million as a result of his injuries.

MR. BANYAY'S SUMMARY OF DAMAGES

**57**  Mr. Banyay submits that Mr. Christie was negligent, or in breach of his retainer agreement, in failing to present to Justice Braidwood a "Summary of Damages" Mr. Banyay had prepared and presented to Mr. Christie.

**58**  Mr. Banyay wrote a letter to Mr. Christie dated August 24, 1994, which he delivered to Mr. Christie either during or just before the personal injury trial began. In the letter, Mr. Banyay set out the damages he wanted Mr. Christie to ask for at trial. Mr. Christie did not present this letter, or its contents, to Justice Braidwood. He prepared his own written summary, which he provided to the court during submissions. Mr. Banyay wrote to Mr. Christie after the trial, strenuously complaining about Mr. Christie's refusal to present Mr. Banyay's summary of damages to Justice Braidwood. Mr. Banyay says that his measure of damages in this trial, on this aspect of the lawsuit, should be the difference between the $1.5 million Mr. Christie should have obtained for him, and the amount actually awarded by Justice Braidwood.

**59**  Mr. Banyay's August 24, 1994 letter reveals that Mr. Banyay had grandiose and entirely unrealistic expectations of the possible, let alone likely, outcome of his personal injury litigation. I am satisfied that Mr. Banyay persisted in those expectations despite the information and advice he got from Mr. Christie. I am satisfied that Mr. Christie had, before August 24, 1994, and throughout the time he conducted the personal injury lawsuit, made valiant efforts to convince Mr. Banyay that there was no reasonable likelihood of recovery of damages in the quantum Mr. Banyay had in mind.

**60**  In Mr. Banyay's Summary of Damages, under the heading "Pain and Suffering", Mr. Banyay was seeking an award of $375,000, made up $75,000 for pain and suffering in the first year after the accident; $100,000 for the second year, and $200,000 for the third year. This sum approximates or even exceeds the maximum award for non-pecuniary loss available to only the most severely affected plaintiffs. Mr. Banyay's injuries did not, even on the evidence of his own expert medical witnesses, place him in that category.

**61**  Mr. Banyay wanted Mr. Christie to claim "Expenses out of pocket" of $15,317.60. Evidence at this trial has confirmed that most of the expenses Mr. Banyay wanted Mr. Christie to claim had never been incurred. For example, Mr. Banyay included a claim for $4200 for a housekeeper he had never employed. He was claiming $1000 for depreciation on a "scooter" he claimed to have borrowed from his mother. Depreciation is not an "out of pocket expense". More significantly, there was no medical evidence indicating Mr. Banyay required the use of a scooter as a result of his accident injuries, or at all.

**62**  Mr. Banyay valued his past and future business loss at $1,736,498, from which he was prepared to deduct $135,000 for the "mortgage" on the Barzam Management Ltd. hotel/restaurant business in Fort St. James, and $37,000 described as "outstanding litigation for Copper Kettle".

**63**  I have already referred to Justice Braidwood's findings concerning the fact that these enterprises, if they had ever been profitable, were, by the time of the first motor vehicle accident, already in financial jeopardy for reasons unrelated to the effects of Mr. Banyay's injuries.

**64**  Justice Braidwood found that the Fort St. James hotel and restaurant had been purchased in 1987 with no downpayment. Barzam Management Ltd. took over a pre-existing agreement for purchase and sale, and the vendor financed the rest of the sale price. When the amount owing under the agreement for purchase and sale came due, Barzam could not pay. After several months had passed, an action for cancellation was brought. The Petition alleged not only that there had been default of payments under the agreement for purchase and sale, but that property taxes were also outstanding and utilities had not been paid. Eventually a compromise was negotiated, but Barzam's failure to make a payment of $5000 owing to the vendor resulted in the loss of the settlement and, eventually, the loss of the property. No evidence was led in this trial to suggest that Mr. Christie had any tools at his disposal to refute this evidence.

**65**  Relying largely on Mr. Banyay's own tax returns and unaudited financial statements prepared by Kenneth Simon, Justice Braidwood concluded that the Copper Kettle restaurant had never been profitable.

**66**  Justice Braidwood referred in his Reasons to the evidence that Mr. Banyay had reported income from all sources of only $14,332 in 1990; he had reported no income in the three previous years. Nevertheless, Justice Braidwood made an award of $40,000 on the basis that Mr. Banyay should be compensated for loss of the opportunity to earn income from the date of the first accident to the date of trial.

**67**  Although never pleaded, Mr. Banyay also wanted Mr. Christie to pursue aggravated, exemplary and punitive damages. In the Summary of Damages, Mr. Banyay set out the following as "Reasons" for an award of punitive damages:

Denial of treatment by I.C.B.C. to pay the bill

Loss of self respect

Loss of self worth

Loss of dignity

Loss of memory

Loss of living standard

Loss of family accumulated wealth

Loss of drive

Loss of family unity

Loss of sexual enjoyment

Loss of patient with others

Loss of tolerance

Loss of direction for family

Loss of direction in the work place

Loss of tolerance

Loss of ability to guide family or business

Loss of ability to return to the work force in former

capacity

I see no grounds on which such claims, had they been pleaded, could have succeeded.

**68**  Mr. Christie testified before me that it became clear to him during the course of the personal injury trial that Justice Braidwood was not impressed with Mr. Banyay. He decided that in light of the adverse credibility rulings he was expecting, he should not press his client's luck by asking for damages he was not going to get, a decision I consider justified.

**69**  Mr. Christie prepared his own "Summary of Damages" and a written submission, dated September 14, 1994 and September 15, 1994, which he presented to Justice Braidwood during submissions at the end of the trial of the motor vehicle accident claims. In the Summary of Damages, Mr. Christie included a claim for $398,200 for past and future loss of income; $5,300 for special damages and $70,000 for non-pecuniary damages, all related to the first motor vehicle accident. He also sought awards of $4000 for the second accident, and $1500 for the third, for a total of $479,000.

**70**  I have already referred to Justice Braidwood's award. In my view, Mr. Christie was entirely correct in refusing to put Mr. Banyay's summary of damages before Justice Braidwood. There was no possibility that Justice Braidwood would have given Mr. Banyay the damages he has outlined in his summary and reading the summary would probably only have confirmed Justice Braidwood's view that Mr. Banyay was exaggerating his claim.

MORE EVIDENCE ABOUT SPECIAL DAMAGES

**71**  Mr. Banyay submits that Mr. Christie was negligent in not presenting more evidence about special damages, but Mr. Banyay has not proved that there was more evidence available to be presented. Most of the claims included in Mr. Banyay's summary of damages were purely fictional.

**72**  In evidence is a letter dated September 20, 1994, from Mr. Christie to Mr. and Mrs. Banyay, apparently sent in response to a fax from the Banyays dated September 14, 1994. With respect to special damages, the letter says:

You have given me various notes as to your damages, including various special damages, which notes were received after all the evidence was in. As explained to you, I cannot submit the claim unless it is substantiated, and, accordingly, we could only claim for those items for which we had firm evidence.

**73**  I am not persuaded that Mr. Christie ignored or failed to introduce into evidence any proof of special damages that was available to him. I am not persuaded that Mr. Banyay suffered more special damages than he proved at the trial before Justice Braidwood.

PART VII BENEFITS

**74**  The Amended Statement of Claim alleges that Mr. Christie failed to pursue no-fault benefits for Mr. Banyay, but the evidence establishes that Mr. Christie did commence an action for Part 7 benefits. That action was discontinued some time after Justice Braidwood's decision was issued.

**75**  It's not entirely clear that no no-fault benefits were provided to Mr. Banyay. He testified that someone had paid for some treatments that he had received. Correspondence to Mr. Banyay from his previous counsel, Lyle Harris, refers to interim payments having been made to Mr. Banyay by I.C.B.C.

**76**  It is unlikely, however, that Mr. Christie or any other counsel could have persuaded the Corporation to pay more. The position of counsel for the personal injury defendants, outlined at the start of the trial before Justice Braidwood, was that Mr. Banyay had suffered only soft tissue injuries to his neck and back. Their position was that he did not have a brain injury, or that if he did, it was not caused by the accidents. They also took the position he had suffered no income loss.

**77**  Following the accidents, Mr. Banyay had received medical treatment for his injuries, through the medical services plan. The first reference to forms of therapy that might not be covered under the medical insurance plan appears in Dr. Coen's report dated June 24, 1994, which was less than three months before trial. Dr. Coen recommended that Mr. Banyay receive psychotherapy, including individual and group treatment, for up to two years, and suggested the names of qualified service providers.

**78**  Dr. King suggested in his June 29, 1994 report that Mr. Banyay would benefit from a supervised physical exercise rehabilitation program. However, he also noted that Mr. Banyay had failed to engage in such a program when it had earlier been recommended to him.

**79**  Mr. Christie agreed to discontinue the Part 7 action some time after Justice Braidwood's decision was delivered. It was not unreasonable for him to have done so, since the issues that would arise in that action had already been decided by Justice Braidwood and could not be re-litigated in any subsequent action.

FAILURE TO CLAIM MORE FOR COST OF FUTURE CARE

**80**  There is no reference to a claim for future care costs in the written summary of damages Mr. Christie submitted to Justice Braidwood at trial. In Mr. Banyay's own Summary of Damages, dated August 24, 1994, which he submits Mr. Christie should have put before Justice Braidwood, there is also no claim for the cost of future care. I am not persuaded that Mr. Banyay specifically instructed Mr. Christie to pursue this claim in his submissions at trial.

**81**  At most, Mr. Christie's decision to emphasize other heads of damages may have been an error in judgment, but I am not persuaded that it was an error amounting to ***negligence***.

**82**  Dr. Coen's and Dr. King's future treatment recommendations were in evidence before Justice Braidwood and he did make an award for the cost of future care. In the "Summary" at the conclusion of his Reasons, Justice Braidwood said:

With respect to his claims for past income lost, loss of earning capacity, non-pecuniary damages, out-of-pocket expenses and future care, I award him a total of $154,500. (underlining added)

**83**  Justice Braidwood's order, entered on November 15, 1994, specified an award for cost of future care in the amount of $2000. Mr. Banyay has not proved that he was entitled to more.

NO JURY TRIAL

**84**  Mr. Banyay alleged in the Amended Statement of Claim that Mr. Christie failed to have the trial heard by a jury. In his testimony he said that Mr. Christie originally suggested trial by jury, before the claim became more complex, and that he was disappointed later to learn that the trial would be by judge alone. It's not clear that Mr. Banyay actually instructed Mr. Christie to file a jury notice. And, in any event, I am not persuaded that a jury would have been any more generous to Mr. Banyay. Indeed, Mr. Banyay's tendency to exaggerate his symptoms and his losses might have been received even less well by a jury. Mr. Banyay has failed to prove any loss arising out of the fact that his trial was not before a jury.

THE APPEAL

**85**  Mr. Banyay alleged that Mr. Christie "coerced" him into appealing Justice Braidwood's decision. At the same time, he alleges that Mr. Christie should have appealed more aspects of Justice Braidwood's decision - in particular, he submits that Mr. Christie should have appealed the wage loss aspects of the case, and also Justice Braidwood's credibility findings.

**86**  In cross-examination of Mr. Banyay it emerged that the "coercion" by Mr. Christie consisted of his advice to Mr. Banyay that he thought that Justice Braidwood had erred in certain aspects of his decision and that an appeal could be successful. That is the expression of an opinion, not coercion.

**87**  I consider it more probable than not that Mr. Banyay would have instructed Mr. Christie to appeal no matter what advice Mr. Christie gave. Mr. Banyay was very dissatisfied with Justice Braidwood's decision. He was particularly unhappy about the adverse credibility findings. Mr. Christie testified that he advised Mr. Banyay that an appeal from Justice Braidwood's assessment of credibility was unlikely to succeed, and in my opinion, his advice was correct.

**88**  Mr. Banyay instructed Mr. Christie to order transcripts. Mrs. Eastwood advised Mr. Banyay to get a second opinion about whether to appeal and he did so. The opinion of the lawyer he consulted did not differ significantly from that of Mr. Christie. Mr. Banyay decided to proceed with the appeal. He instructed Mrs. Eastwood to pay for the appeal books.

**89**  The Appeal on behalf of Mr. Banyay was heard in two stages. Some of the defendants cross-appealed, but eventually abandoned the cross-appeals. The Court of Appeal first heard submissions about three procedural matters on November 15, 1995. They issued Reasons disposing of those issues on January 10, 1996, [*[1996] B.C.J. No. 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2CJ-00000-00&context=). Two of these, Mr. Christie argued, should result in an order for a new trial.

**90**  On behalf of Mr. Banyay, Mr. Christie suggested that there was apprehension of bias on the part of Justice Braidwood because Justice Braidwood was acquainted with the parents of one of the defendant's counsel, and defendant's counsel had once been in Justice Braidwood's home. The Court of Appeal allowed fresh evidence on this issue, but dismissed the appeal.

**91**  The Court of Appeal also dealt with the issue of the claim for lost income related to the Copper Kettle restaurant. They acknowledged the error in the facts found by Justice Braidwood in his original Reasons concerning the timing of the fire. However, the Court of Appeal held that there was ample evidence to support the decision of Justice Braidwood about the lack of financial viability of the Copper Kettle business, and they refused to order a new trial on that issue. The Court of Appeal did, however, agree with Mr. Christie's submission that on the hearing of the appeal on its merits, Justice Braidwood's Supplementary Reasons on the point would not be considered.

**92**  Ultimately, only one aspect of Justice Braidwood's decision was heard on the further appeal - the ruling on contributory ***negligence*** arising out of the seatbelt defence. The Court of Appeal heard the appeal of that issue on May 17, 1996 and delivered their judgment on July 4, 1996, [*[1996] B.C.J. No. 1472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S20X-00000-00&context=). They held that it was open to Justice Braidwood to come to the conclusion he had on the evidence before him.

**93**  Mr. Christie explained his reasons for limiting the grounds of appeal, and I'm not persuaded that he was negligent in not challenging other aspects of Justice Braidwood's decision. In any event, Mr. Banyay had earlier agreed to allow Mr. Christie to decide the issues to be argued on appeal.

**94**  On April 22, 1995, Mr. Christie and Mr. Banyay settled all disputes then outstanding between them on terms set out in a letter of that date, signed by Mr. Christie and by Mabel Eastwood, who was by then acting on behalf of Mr. Banyay and Barzam Management Ltd.

**95**  One of the terms of the agreement included the following:

The contingent agreement of June 16, 1993 (with all necessary changes to comply with this letter) will apply to all three matters (the remaining items under the MVA trial file, the Zurich et al file and the Appeal. It is further agreed that on all three matters I have discretion (to be exercised professionally) as to manner and issues upon which your appeal and claims are advanced. (underlining added, the reference to "I" is a reference to Mr. Christie).

**96**  Mrs. Eastwood testified that she entered into this agreement on behalf of Mr. Banyay and his company after having explained the agreement to Mr. Banyay, and with his full authorization. Mr. Banyay did not contradict Mrs. Eastwood's evidence.

**97**  Mr. Banyay is bound by this agreement.

FAILURE TO RECOVER MORE COSTS AND DISBURSEMENTS

**98**  Mr. Banyay complains that Mr. Christie settled the quantum of party and party costs awarded to Mr. Banyay against the personal injury defendants for less than the amount Mr. Christie was entitled to be paid by Mr. Banyay under the retainer agreement. He also complains that he should not have had to pay for any disbursements that the defendants did not have to pay as taxable costs.

**99**  Under the terms of the retainer agreement between Mr. Banyay and Mr. Christie, Mr. Christie agreed to work on a contingency fee arrangement. Disbursements were to be paid by Mr. Banyay directly, or if paid by Mr. Christie, he was to be reimbursed by Mr. Banyay.

**100**  After Justice Braidwood's decision was issued, Mr. Christie prepared party and party bills of cost and delivered them to defendants' counsel. Following discussions among counsel, the tariff items to be included, and the number of units under the tariff, were agreed. The amount paid for party and party costs was less than the amount Mr. Christie was entitled to receive from Mr. Banyay under the terms of the retainer agreement.

**101**  Mr. Christie and defendants' counsel also agreed on most of the disbursements claimed on behalf of Mr. Banyay. The items on which they could not agree were taken before Master Patterson, sitting as a registrar. Master Patterson declined to award some of the disbursements Mr. Christie was claiming on behalf of Mr. Banyay. Mr. Banyay alleges that because the Master declined to award these items as party and party disbursements, he should not have had to pay them, or reimburse Mr. Christie for them.

**102**  This aspect of Mr. Banyay's claim is based on his refusal to accept that party and party costs rarely, if ever, provide a full indemnity for costs incurred on a solicitor and own client basis. In this case, Mr. Banyay had been found 20% liable for his losses, so any award of party and party costs would be reduced proportionately. Having reviewed the evidence about the settlement of the party and party costs, I am not persuaded that Mr. Christie would have succeeded in recovering a greater sum had he proceeded to a taxation of the bills of cost.

**103**  On the taxation of the disbursements involved in the personal injury trial, there were six items in issue. Master Patterson awarded the full cost of a report by Vocational Pacific Ltd. over the objections of counsel for the defendants. He disallowed a charge for a computer search of authorities, based on an earlier decision that it is unnecessary for a defendant to pay for work that is normally done by counsel.

**104**  Master Patterson considered the defendants' submission that the whole of the cost of Mr. Teasley's report should be disallowed on the basis that he had been given inaccurate information. Master Patterson noted that Mr. Teasley had already agreed to reduce his bill. Master Patterson discounted this disbursement somewhat. One of the items he reduced was for time that Mr. Teasley had spent with Mr. Banyay.

**105**  Master Patterson allowed Dr. Coen's bill less $500 on the basis that Dr. Coen had spent more time preparing his report than the Master considered necessary. Master Patterson rejected the defendants' submission that all of Dr. King's charges should be disallowed. He allowed one-half of the account.

**106**  Finally, Master Patterson disallowed a charge for the account of Dr. Limbert, a person with medical training who acted in an advisory capacity to Mr. Christie on the medical records and medical opinion evidence. With respect to the disbursement for Dr. Limbert's services, Master Patterson said:

Mr. Christie, on behalf of the plaintiffs said that it was essential in complicated medical matters to have an expert at your elbow. I don't disagree with that and again it is my view that this is quite likely a very appropriate disbursement as between the solicitor and his own client but it is an inappropriate disbursement on a party and party bill of costs and need not be paid by the defendants and consequently that bill is allowed at zero.

**107**  Mr. Banyay has many complaints about the disbursements incurred by Mr. Christie on his behalf. As he did in reference to fees, he regards the Master's disallowance of any disbursement on the party-party bill of costs as conclusive evidence that Mr. Christie ought not to have incurred the expense. As Master Patterson pointed out, however, there are expenses properly incurred by counsel, and properly payable by their clients, that are not proper disbursements on a party and party bill of costs.

**108**  Counsel in the conduct of litigation have to make difficult decisions about which experts, and how many, to retain. In complicated cases, involving medical evidence and conflicting medical opinions, counsel may well be entitled to charge their clients for the cost of advice from medically-trained persons, whether or not those persons are licensed to practice in British Columbia.

**109**  However, it is not necessary for me to deal with the contested disbursements, because the dispute over these charges was settled in the April 22, 1995 agreement referred to earlier. Mr. Christie and Mr. Banyay, with Mrs. Eastwood's assistance, negotiated and agreed to a resolution of the disagreements over Mr. Christie's fees and the disbursements in the personal injury lawsuit. Mr. Christie was able to obtain a reduction in some of the accounts rendered by some of the experts and he agreed to bear some of the disbursements himself. Mr. Christie has kept to the bargain he made and Mr. Banyay must do the same.

THE ACCOUNTING

**110**  Mr. Banyay has failed to prove, on a balance of probabilities, that Mr. Christie has failed to account to him for the full amount of funds received from the defendants in the personal injury action, or paid to Mr. Christie by Mr. Banyay. Mr. Banyay has had the accounting claim exhaustively investigated, first by Mrs. Eastwood, acting on his behalf, and also by the Law Society, to whom Mr. Banyay complained about Mr. Christie. Mrs. Eastwood and Mr. Christie prepared a summary of the accounting, which Mrs. Eastwood explained to Mr. Banyay. I have reviewed the summary and the underlying documents supporting it.

**111**  Like Mrs. Eastwood and the Law Society, I am satisfied that Mr. Banyay has received all of the monies owed to him, and has received a full explanation of the charges incurred and the disbursements paid, on his behalf. Mr. Christie has received no more than the fees to which he was entitled for his representation of Mr. Banyay.

**112**  The funds not yet disbursed are part of the proceeds of the settlement of the property damage insurance claims. As earlier agreed, Mrs. Eastwood is holding these funds in trust pending a resolution of the dispute over Mr. Christie's fees and disbursements in the property damage insurance matters. The only issue that remains in relation to those trust monies is whether they will ultimately be paid to Mr. Christie following the taxing of his accounts, or whether some or all of the funds will be returned to Mr. Banyay.

THE CLAIM FOR FEES PAID TO MRS. EASTWOOD

**113**  Mr. Banyay seeks to recover from Mr. Christie the sum of $4500 that he testified he paid to Mrs. Eastwood to assist him in obtaining the accounting from Mr. Christie. While I am satisfied that Mrs. Eastwood performed a valuable function for Mr. Banyay, and that her intervention also proved helpful to Mr. Christie, I am not persuaded that Mr. Christie should be ordered to pay her fees.

**114**  In my opinion, Mr. Banyay acted prematurely and unnecessarily in retaining Mrs. Eastwood. Mr. Christie was in the process of obtaining the judgment proceeds and settling the disbursements owed to experts and others who had agreed to wait to be paid until after trial. I am satisfied that Mrs. Eastwood's involvement helped to reduce the level of conflict and resulted in an earlier resolution of the dispute over fees and disbursements. However, I am not persuaded that but for her involvement, Mr. Christie would have failed or refused to account to Mr. Banyay for the monies he had received on his behalf. Mr. Christie having committed no wrongful act, it would not be just to burden him with the cost of Mrs. Eastwood's services.

THE REVENUE CANADA REQUIREMENT TO PAY

**115**  Mr. Banyay has alleged that Mr. Christie's failure to pay or to dispute a Revenue Canada Requirement to Pay, issued in respect of taxes owing by Mr. Banyay, resulted in penalties being assessed against Mr. Banyay in the amount of $221.67.

**116**  This allegation is unfounded. Mr. Banyay expressly instructed Mr. Christie not to pay in response to the Requirement to Pay. It is true that he wanted Mr. Christie to dispute the Requirement to Pay. However, he did not retain Mr. Christie to act on his behalf and Mr. Christie, quite understandably, was not prepared to embroil himself in any more disputes on behalf of Mr. Banyay without assurances he would be paid for his efforts. Furthermore, Mr. Christie considered that he lacked expertise in tax matters. A Requirement to Pay was also served on one of the defendants' counsel, who eventually paid the money out of the proceeds of the personal injury award owing to Mr. Banyay.

THE PROPERTY DAMAGE INSURANCE CLAIMS

**117**  On June 9, 1993, Mr. Banyay retained Mr. Christie to assist him with several actions already commenced against an insurance company and several insurance brokers arising out of three property damage insurance claims. The letter agreement dated June 9, 1993 sets out the original terms of the contract between Mr. Banyay and Mr. Christie.

**118**  Mr. Banyay had had more than one previous counsel representing him on some of these claims, although it appears that he may have commenced some of the actions himself. Mr. Banyay had actually received payments from the insurers in respect of some of his property damage claims, but he considered the amounts paid to be too low.

**119**  Mr. Banyay's previous counsel on the property damage claims and the personal injury claims had been Lyle Harris of the firm Harris, Atkinson, Brun. Mr. Harris had terminated the solicitor-client relationship with Mr. Banyay on March 25, 1992. In a letter of that date sent to Mr. Banyay, Mr. Harris pointed out that Mr. Banyay had missed several appointments, had failed to produce medical receipts, had not obtained necessary documents being held by Mr. Banyay's previous lawyers on a solicitors' lien, had made unreasonable demands, and had failed to execute releases in a timely fashion.

**120**  Mr. Banyay attempted to persuade Mr. Harris to reconsider, but he declined to continue to act for Mr. Banyay. Between March 1992 and June 1993, Mr. Banyay was self-represented. He then retained Mr. Christie to act on his behalf.

**121**  Mr. Christie proposed an amendment to the June 9, 1993 retainer agreement in September 1993, largely because Mr. and Mrs. Banyay had failed to pay the monthly instalment fee called for by the earlier agreement. In Mr. Christie's letter, dated September 14, 1993, setting out the terms he proposed for an amended retainer agreement, he pointed out the difficulties inherent in the property damage claims:

I have cautioned you that these claims have not, in my opinion, been properly prosecuted and there are a number of problems - any one of which could prove fatal. Some of these problems are as follows:

1. No writ was issued, naming the February 13, 1991 loss;
2. there may be a question as to whether Proofs of Loss were filed appropriately or within time;
3. there are other obligations upon the insured to provide information, etc. and through misunderstandings it may well be that these requirements were not met.

You should know that the claims are difficult ones and there is the possibility that you would be entitled to no more than a nominal sum or even that you lose the case. While that is possible, it would seem to me that the likely total figure for all three claims would be approximately $40,000. While I know that you do not like me to take such a view of your claims, I think it only right to advise you of my opinion in writing prior to confirming arrangements with you.

**122**  Mr. Christie and Mr. Banyay concluded a further agreement on December 6, 1993. This retainer agreement was eventually subsumed by the April 22, 1995 agreement, which contained, among other terms, the following:

1. Account Review No. J950156 (Claim against Zurich for three losses): My account is to be allowed less the sum of $500 ($7996.60) of which $5000.00 will be paid from the monies now available.
2. Insurance Claims henceforth: I will act on a 19% contingent fee. Mr. Banyay irrevocably agrees to settle for the sum of $40,000 all inclusive for all three insurance claims and any excess will be applied towards the balance of the current insurance account (namely $2,996.00) so that is $42,296.00 is paid the first $2,996.00 will be paid to myself for the outstanding Zurich bill and the balance will be applied to disbursements and the remaining balance will be divided 19% to myself and 81% to Mr. Banyay and his company.
3. On all Continuing Matters: The contingent agreement of June 16, 1993 (with all necessary changes to comply with this letter) will apply to all matters (the remaining items under the MVA trial file, the Zurich et all file and the Appeal). It is further agreed that on all three matters I have discretion (to be exercised professionally as to manner and issues upon which your appeal and claims are advanced...

Also implicit in our agreement is that any ongoing disbursements will continue to be paid...

**123**  This agreement was reached the day before Mr. Christie had scheduled appointments for the taxation of several of his accounts, including accounts rendered in accordance with the retainer agreement on the property damage insurance claims.

**124**  After this agreement was concluded, Mr. Christie continued to represent Mr. Banyay in the conduct of several actions against the insurers and brokers.

**125**  Mr. Banyay's major complaint in relation to Mr. Christie's handling of the property damage insurance claims is delay. Mr. Christie reported to Mr. Banyay early in 1994 that he had reserved a trial date for the property damage claims to be heard commencing December 5, 1994. It appears that this date was merely tentative. Mr. Christie did not file a trial certificate or a trial record, and the date was never confirmed. It could not have been confirmed because the pleadings had never been closed, and no application had been made for an order to have the actions heard at the same time, or consolidated.

**126**  However, Mr. Christie had decided, in any event, that it would be preferable to proceed with the personal injury suit trial first. The action for damages arising out of the February 13, 1991 loss was likely, through no fault of Mr. Christie's, brought out of time. Mr. Christie hoped that if it was determined at the trial of the personal injury claims that Mr. Banyay had a brain injury, that finding could be used to postpone the running of time under the Limitation Act.

**127**  It was not until the late fall of 1994, however, that Mr. Christie informed Mr. Banyay that the trial of the property damage insurance claims would not be proceeding in December, and that he proposed to attempt to mediate the claims instead.

**128**  Mr. Banyay was furious and demanded that Mr. Christie "reinstate" the December 5, 1994 trial date. It was impossible to do so. Mr. Christie reserved a trial date for November 1995, and Mr. Christie and opposing counsel discussed arrangements for mediation.

**129**  At about this time the dispute over Mr. Christie's conduct of the personal injury appeal, and the accounting for the personal injury judgment monies, escalated. Mr. Banyay was not paying Mr. Christie's bills, and Mr. Christie refused to carry on as counsel in the property damage insurance actions. Mr. Banyay filed notices of intention to act in person. Little progress was made until the April 22, 1995 agreement was reached. Mr. Christie resumed conduct of the property damage insurance actions, and negotiations with the defendants also resumed.

**130**  Following an all-day meeting at the offices of one of the defendants' lawyers, the defendants offered to pay Mr. Banyay $25,000 including costs for an immediate settlement of the property damage lawsuits. Mr. Banyay declined. He offered to settle for $28,000 plus costs.

**131**  However, on January 22, 1996, Mr. Banyay agreed to accept a payment of $26,000 including costs. Almost immediately, defendants' counsel sent Mr. Christie a cheque for $26,000, together with releases for signature by Mr. Banyay.

**132**  In the meantime, however, Mr. Banyay informed Mr. Christie that he was terminating his retainer and intended to finalize the settlement himself without any further involvement by Mr. Christie. He filed notices of intention to act in person. He contacted defendants' counsel and asked defendants' counsel to get the funds back from Mr. Christie and to pay them directly to Mr. Banyay instead.

**133**  Defendants' counsel was uncomfortable with what he saw as an attempt by Mr. Banyay to avoid paying Mr. Christie's fees. However, he asked Mr. Christie to return the settlement funds to him and told Mr. Banyay that he and Mrs. Banyay, as officers of Barzam Management Ltd., would have to come to his offices to sign the releases and other documents.

**134**  Mr. Christie returned the funds as requested, but put defendants' counsel on notice that he was claiming a lien over the funds to the extent of his unpaid fees and disbursements.

**135**  On February 13, 1996, Mr. and Mrs. Banyay went to the offices of defendants' counsel, executed the releases and were given a cheque for $16,396.40. The remaining $9,603.60 was held back to secure Mr. Christie's claim for a solicitor's lien. This is the sum, together with interest, that is being held in trust by Mrs. Eastwood.

**136**  Mr. Banyay has failed to prove that Mr. Christie breached the terms of the retainer agreement, as amended, in relation to his conduct of the property damage insurance claims. While Mr. Christie could have dealt with those claims more quickly than he did, I am not satisfied that the delay amounted to a breach of the standard of care. I am unable to conclude that Mr. Banyay suffered any loss as a result of Mr. Christie's decision to focus on the personal injury lawsuit in hopes of finding a way to get around the limitations defence on the February 13, 1991 property damage claim.

**137**  Ultimately, Mr. Banyay agreed to settle the property damage insurance claims, and he completed the settlement himself. He has not demonstrated that he was forced to do so by reason of anything done, or not done, by Mr. Christie, and he has not proved that he would or could have recovered more than he did but for Mr. Christie's actions. Accordingly, his claim for damages in respect of the property damage insurance claims must also be dismissed.

**138**  Mr. Christie eventually took out appointments to tax his accounts for fees and disbursements arising out of his representation of Mr. Banyay on the property damage insurance claims. Mr. Banyay then commenced this lawsuit. Mr. Christie attempted to proceed with the taxation before the Registrar, but the Registrar declined to deal with the taxation until this lawsuit had been heard and decided.

**139**  While it would have been more efficient, in my view, to have the assessment of Mr. Christie's outstanding bills dealt with at this trial, counsel for Mr. Christie asked that the taxation be left to the Registrar in the ordinary course. Mr. Banyay did not object to that suggestion. Accordingly, I refer the assessment of Mr. Christie's bills for fees and disbursements to the Registrar.

Summary:

**140**  Mr. Banyay has not proved that Mr. Christie breached the terms of the contract by which he was retained to represent Mr. Banyay in the conduct of his personal injury lawsuit. Mr. Banyay has not proved that Mr. Christie breached the standard of care owed by a reasonably competent lawyer in the conduct of that litigation.

**141**  Mr. Banyay has not proved that Mr. Christie breached the terms of the contract by which he was retained to represent Mr. Banyay and Mr. Banyay's company in the conduct of several lawsuits involving property damage insurance claims. Mr. Banyay has not proved that Mr. Christie breached the standard of care owed by a reasonably competent lawyer in the conduct of that litigation.

**142**  Mr. Banyay has failed to establish that Mr. Christie owed Mr. Banyay a duty to pay Revenue Canada in response to the Requirement to Pay served upon him.

**143**  Mr. Banyay has failed to prove that Mr. Christie breached any fiduciary duty owed to Mr. Banyay, that he has retained any funds belonging to Mr. Banyay, or that he wrongfully refused to account to Mr. Banyay for funds held in trust and disbursed on his behalf. Mr. Christie has fully accounted to Mr. Banyay for monies paid to him by, or on behalf of, Mr. Banyay.

**144**  Mr. Banyay's claims against Mr. Christie are dismissed.

COSTS

**145**  Counsel for Mr. Christie asked to defer submissions on costs until these Reasons for Judgment had been issued. Mr. Banyay and Mr. MacDonald may make submissions about costs in writing, or arrange with the trial coordinator to appear before me to make oral submissions on a date convenient to them and to the court.

BAKER J.

**End of Document**

[***Droszio v. Flather, [2016] B.C.J. No. 891***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JS5-N5Y1-JKPJ-G1NP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

J.L. Dorgan J.

Heard: November 16-18, 2015.

Judgment: May 2, 2016.

Docket: 14-4594

Registry: Victoria

**[2016] B.C.J. No. 891** | 2016 BCSC 786

Between G.J. Droszio and eGolfPro Technologies Inc., Plaintiffs, and David Flather, Defendant, and David Ermacora, Brad Edgett, and the Sidney and North Saanich, Memorial Park Society, Trustee of the Mary Winspear and Blue Heron Park Lands or Mary Winspear Centre, Defendants by Counterclaim

(111 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Plaintiffs' application to strike counterclaim allowed in part — Defendant's application to strike statement of claim dismissed — Defendant E's application to strike portions of counterclaim allowed — Litigation involved mutual allegations of breach of contract, *negligence* and defamation — Portion of counterclaim alleging defamation and intentional infliction of mental suffering could not be sustained and was struck — Remainder of claim alleging breach of contract and *negligence* could proceed with leave to amend deficiently pled portions — Allegations against defendant E could not be sustained and were struck in entirety — Plaintiffs' pleadings disclosed reasonable cause of action.**

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| Application by the plaintiffs, Droszio and eGolfPro, to strike the counterclaim by the defendant, Flather. Application by the defendant, Ermacora, to strike the claims advanced by Flather against him. Application by Flather to strike the claims by the plaintiffs and for summary judgment. The litigation involved a contract dispute arising from the sale of a business by Flather to eGolfPro. Droszio was the operating mind of eGolfPro. The business included original paintings, reproduction prints, digital files, and copyright to certain artworks. Relations deteriorated after the sale. The plaintiffs sought damages for breach of contract and defamation. They alleged Flather refused to transfer a related website included in the transaction and made malicious defamatory statements about Droszio to law enforcement and potential clients. Flather claimed he was in full compliance with the agreement. He alleged the plaintiffs attempted to unilaterally alter the agreement's terms by withholding scheduled payments and failing to make contemplated royalty payments. He claimed he was being intimidated and harassed by Droszio. He claimed they operated a parallel website with Ermacora's assistance in breach of the agreement. He claimed Ermacora was negligent, and made defamatory statements. The parties sought to strike one another's claims.  HELD: Plaintiffs' application allowed in part; Ermacora's application allowed; Flather's application dismissed.  Flather failed to properly plead a claim for intentional infliction of mental distress or defamation. These claims, even if the facts were taken as true, were bound to fail. Other aspects of the extensively pled counterclaim were not relevant to the allegations. The claims based on breach of contract and ***negligence*** were not bound to fail. Rather than strike the entire counterclaim, the offending portions were struck with leave to amend the impugned portions capable of supporting the breach of contract and ***negligence*** claims. Flather's claim against Ermacora was bound to fail and was struck in its entirety. Flather's request to strike the plaintiffs' pleadings was rejected. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, Rule 3-1(2), Rule 3-4(6), Rule 9-5(1), Rule 9-5(2),

**Counsel**

Counsel for the Plaintiffs: E.M. Regehr.

Counsel for the Defendant by Counterclaim.

David Ermacora: E.M. Regehr (as agent for K.P. Maki).

Appearing in Person: D. Flather.

**Reasons for Judgment**

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| **J.L. DORGAN J.** |

**INTRODUCTION**

**1**  Mr. Droszio and eGolfPro apply to strike Mr. Flather's Amended Counterclaim or in the alternative, significant portions of it.

**2**  Mr. Ermacora applies to strike the claims Mr. Flather advances against him.

**3**  Mr. Flather applies to strike Mr. Droszio and eGolfPro's claim against him, for summary judgment against them and for related relief.

**4**  In essence, the litigation involves a contract dispute arising from the sale of a business from the defendant David Flather to the plaintiffs G.J. Droszio and eGolfPro Technologies Inc. ("eGolfPro"). David Ermacora is named as a defendant in Mr. Flather's Counterclaim. A consent dismissal order was made in respect of the other defendants by Counterclaim.

**5**  Mr. Regehr stated in submissions that Mr. Droszio is the representative and operating mind of eGolfPro and the parties can be considered one and the same for the purposes of these proceedings.

**THE UNDERLYING LITIGATION**

**The Plaintiffs' Claim against Mr. Flather**

**6**  On December 1, 2015, the plaintiffs filed a Notice of Civil Claim against Mr. Flather. The plaintiffs make claims for damages as a result of a breach of contract between the parties and for defamation, libel or slander of the plaintiffs.

**7**  It does not appear to be a matter of controversy between the parties that Mr. Flather had been in the business of selling artworks of his deceased grandfather, Dr. Donald M. Flather, including original paintings, reproductions and other associated products (the "Flather Business").

**8**  The Notice of Claim alleges that sometime on or about April 13, 2012, Mr. Flather and the plaintiffs entered into contractual relations to transfer the assets and interests of the Flather Business to eGolfPro (the "Asset Purchase Agreement"), and for Mr. Flather to agree to a contract of non-competition, non-solicitation and confidentiality in regards to the arrangement, collectively, the "Agreement".

**9**  According to the Notice of Claim, the Asset Purchase Agreement provided for the sale and transfer to the plaintiffs of original paintings and reproduction prints, digital files, exclusive copyright to the artworks of Dr. Flather, the website domain name and proprietary page source coding to the website used for the business and the Flather Business goodwill in exchange for a purchase price of $195,000 to be paid in installments.

**10**  During argument, reference was made to payments to Mr. Flather in the form of royalties on the gross sale proceeds received by the plaintiffs for the sale of prints or paintings.

**11**  Not long after the parties entered the Agreement, relations between them began to deteriorate. In examining the pleadings, it is fair to say there is some dispute as to the terms of the Agreement, the subsequent events and actions and the interpretation of the Agreement.

**12**  The plaintiffs plead that eGolfPro made the first two $60,000 payments under the contract, but that Mr. Flather refused to transfer the Website and related technologies to the plaintiffs. They allege Mr. Flather "has taken active steps to deny eGolfPro access and control of the Website".

**13**  The plaintiffs plead that in or about August or September 2012, Mr. Flather unilaterally declared that the Agreement was null and void and is thereby in breach of the Agreement. The plaintiffs plead that Mr. Flather has failed to perform his obligations under the Agreement and has refused to return the $120,000 paid by eGolfPro.

**14**  The plaintiffs also plead that as a result of the soured business relationship and in an effort to prevent the plaintiffs from seeking lawful remedies for the breach of contract, Mr. Flather made various malicious, false and defamatory statements about Mr. Droszio to law enforcement officials, an employee and family member of the plaintiffs, and to members of the art community and potential clients of the Flather Business including:

Statements that the Plaintiff G.J. Droszio has threatened to physically harm the Defendant;

Statements that the Plaintiff G.J. Droszio has harassed the Defendant;

Statements that the Plaintiff G.J. Droszio has engaged disreputable conduct in relation to the Flather Business, the Website, and the negotiations following the execution of the Contracts.

**15**  As a result, the plaintiffs plead they have suffered and continue to suffer damages arising from losses associated with an employee leaving the employ of eGolfPro, loss of reputation in the community and loss of profits. The plaintiffs seek either rescission of the Agreement or special and general damages for breach of contract.

**16**  The plaintiffs seek special and punitive damages for defamation.

**Mr. Flather's Response**

**17**  Mr. Flather's Response was filed on January 30, 2015. I have attempted to articulate the essence of his pleadings and arguments below.

**18**  In his Response, Mr. Flather does not dispute the existence of an Agreement with the plaintiffs regarding the Flather Business, but pleads a very different take on the events that followed the signing of the Agreement. Mr. Flather pleads that he has been in full compliance with his obligations as set out in the Agreement and that the plaintiffs have attempted to materially alter the terms of the Agreement and are in breach of their obligations under the Agreement.

**19**  As for the payments due under the Agreement, Mr. Flather acknowledges receipt of the first $60,000 payment, but pleads the second $60,000 was late and that the plaintiffs attempted to unilaterally attach additional conditions to it which were not set out in the Agreement. He pleads that Mr. Droszio attempted to force Mr. Flather to forgo this payment and direct the funds instead into an alternate investment scheme controlled by the plaintiff.

**20**  Mr. Flather pleads that no further payments have been received to date and that the plaintiffs have said they will not make further payments. Mr. Flather argues the plaintiffs have breached the Agreement.

**21**  Mr. Flather pleads that the plaintiffs are in further breach of the contract for not having made royalty payments as contemplated, despite having sold numerous works. Mr. Flather pleads that at least one sale was concealed from him, and that the plaintiffs negligently sold an artwork for significantly less than its true value.

**22**  Furthermore, Mr. Flather pleads that despite having sold several assets transferred under the Agreement, the plaintiffs demand return of the full $120,000 paid to Mr. Flather so far.

**23**  Mr. Flather also pleads that the plaintiffs have refused to pay his invoice for services provided to them after the turnover period as contemplated in the Agreement.

**24**  In response to the plaintiffs' allegation that Mr. Flather has refused to transfer the Website and related technologies to eGolfPro, Mr. Flather pleads the plaintiffs have refused to provide the technical information required for Mr. Flather to comply with the transfer, despite his best efforts. Mr. Flather argues the plaintiffs' actions were deliberate, undertaken to put Mr. Flather in an apparent breach of the Agreement.

**25**  Mr. Flather pleads that not only has he fulfilled his obligations under the Agreement, he essentially has gone above and beyond its terms. He pleads that his additional efforts and services beyond the terms of the Agreement demonstrate he entered the Agreement in good faith.

**26**  In his Response, Mr. Flather pleads that through counsel he attempted to resolve the contractual dispute on numerous occasions. He also pleads he undertook efforts to find a third party investor to resolve the dispute.

**27**  What ensued, according to Mr. Flather's pleadings was intimidation and harassment of Mr. Flather and his lawyer by Mr. Droszio. In his response, he pleads that Mr. Droszio made threats against him including "hostile, intimidating, rage filled voice messages and personal insults" in addition to a death threat against him.

**Mr. Flather's Amended Counterclaim**

**28**  Mr. Flather filed a Counterclaim on January 30, 2015 and later an Amended Counterclaim on July 28, 2015. In the Amended Counterclaim, Mr. Flather named not only the plaintiffs of the original action as defendants, but also Mr. Ermacora and others. As noted, the actions against all parties named in the Amended Counterclaim except the plaintiffs and Mr. Ermacora have now been dismissed by consent.

**29**  The Amended Counterclaim is 64 pages long and is the subject of the application to strike in these proceedings. Much of the factual basis relayed in Mr. Flather's Response to the claim against him is repeated in the Amended Counterclaim, but with voluminous additional assertions.

**30**  In the Amended Counterclaim, Mr. Flather pleads that the plaintiffs established a parallel website with the help of Mr. Ermacora by copying the content of the original Website and that the new website has been operated negligently, thereby reducing sales. He pleads:

As a result, it is probable that the sales have not been maximised on the original website or the website set up at [...] which directly affects the Defendant's royalty payments owed at the end of each month.

**31**  Mr. Flather also pleads that an artwork was donated by Mr. Droszio that Mr. Flather claims to have had a monetary interest in under the Agreement. He also pleads that the devaluing of Dr. Flather's artwork is grossly negligent and that:

The resulting devaluation of original Donald Flather artworks has caused direct damage to the value of the artwork assets of the Asset Purchase Agreement as well as to the Defendant whom had an unrestricted ability to sell a collection of original Donald Flather paintings that were previously valued in excess of $1,000,000.

**32**  In his Amended Counterclaim, Mr. Flather alleges that Mr. Droszio deliberately withheld information in order to make false, fabricated allegations of breach of contract against Mr. Flather.

**33**  Mr. Flather pleads the withholding of payment to him caused him to agree to new/onerous conditions under severe duress. He also claims that Mr. Droszio was "grossly negligent" toward him by subjecting him to "hostility, intimidation, [and] verbal and mental abuse." He pleads that as a consequence, he suffered numerous physical and psychological effects including migraine headaches, nausea, panic attacks, among others. He further asserts that various of his family members have been adversely affected, suffering unnecessary stress, anxiety, and other serious effects as a result of the plaintiffs' actions.

**34**  Among other details, Mr. Flather includes statements that he suffers ongoing physical disabilities, suffers from Post-Traumatic Stress Disorder and has severe chronic pain. He also provides a detailed account of his attempts to get legal representation through various pro-bono agencies and programs, and pleads that he is financially and legally disadvantaged as a result of the actions of the plaintiffs.

**35**  Mr. Flather pleads that the plaintiffs were repeatedly in material breach of the Agreement and repudiated core terms of the Agreement, specifically by refusing to make the payments as required under the Agreement.

**36**  As I understand it, overall the Amended Counterclaim refers to claims against the plaintiffs for breach of contract, "intentional, wilful, infliction of nervous shock and of emotional distress," defamation of character and libel, and ***negligence***.

**37**  Mr. Flather seeks a variety of relief against the plaintiffs including immediate payment of the amount owing under the contract, for payment of his invoice for services provided to the plaintiff ($537.60), plus interest and late penalties, payment for costs incurred in the sum of $1,190 to $1,230 after accounting for estimated payments already made by the plaintiffs, and $30,000 for two months of unpaid work based on an estimated $15,000 per month income prior to entering the Agreement.

**38**  Mr. Flather seeks aggravated, special and punitive damages for the wilful infliction of nervous shock and emotional distress upon him and his family members, and damages relating to the loss of income and business losses and loss of future income arising from Mr. Droszio's interactions with potential clients and the damage to the reputation of Dr. Flather's artwork.

**39**  Mr. Flather seeks general and punitive damages and special costs for the plaintiffs' refusal to reschedule or adjourn a past hearing.

**40**  In the Amended Counterclaim, Mr. Flather seeks orders which include:

1. seizure of all assets and property referenced in the Asset Purchase Agreement;
2. a civil restraining order barring Mr. Droszio from having any contact with Mr. Flather or his relatives and preventing him from being within 500m of Mr. Flather, his residence or place of business;
3. labelling the plaintiffs as vexatious litigants;
4. that the claim against him by the plaintiffs be struck;
5. to have the file transferred to the Vancouver registry; and
6. an order requiring the plaintiffs to remove any websites or internet references owned by the plaintiffs or Mr. Flather that reference Dr. Flather or his artwork.

**41**  It should be noted there is overlap between these claims and the relief sought in Mr. Flather's application before the court.

**Mr. Flather's Claims against Mr. Ermacora**

**42**  In the Amended Counterclaim Mr. Flather makes claims against Mr. Ermacora in what he styles as ***negligence***, wilful infliction of nervous shock and emotional distress, negligent misrepresentation and defamation and libel against Mr. Ermacora.

**43**  Mr. Flather pleads that Mr. Ermacora was actively involved in the maintenance of the website and the marketing and sale of Dr. Flather's artwork over a significant period of time. In his Response, Mr. Ermacora pleads that he was hired and paid $136.60 by the plaintiffs to transfer the content of the original Website to a new domain name and nothing more.

**44**  Mr. Flather pleads in his Amended Counterclaim that since Mr. Ermacora was aware of some dispute between Mr. Flather and the plaintiffs that Mr. Ermacora owed him a duty of care and was negligent in setting up the alternate website for the plaintiffs. He alleges Mr. Ermacora ought to have known that what he was contracted to do by the plaintiffs was a clear attempt to do something improper. He pleads that Mr. Ermacora was involved in the marketing and sales of Dr. Flather's artwork through the website, thereby circumventing payments legitimately owed to Mr. Flather.

**45**  Mr. Flather pleads that the website has been negligently maintained by Mr. Ermacora and points to several flaws in the website that have not maximized sales of Dr. Flather's artwork and have, as a result, reduced royalty payments owed to him.

**46**  Mr. Flather further pleads that Mr. Ermacora was aware of the serious damages to reputation and psychological health the new website has caused Mr. Flather. He pleads that Mr. Ermacora's role damaged Mr. Flather's reputation through his involvement with the website.

**47**  He also alleges that Mr. Ermacora made negligent misrepresentations:

Mr. Ermacora has made false/unbelievable statements in Court documents and other evidence that can only be designed to mislead justice in this case and/or make it impossible to determine which party was responsible for reprehensible behaviour.

**48**  He seeks general and punitive damages for Mr. Ermacora's role in establishing and operating the website and for the unlawful entry of a courier onto his property, which courier was sent by Mr. Ermacora to serve documents on Mr. Flather, general damages for loss of income, and general, special and punitive damages for the "wilful infliction of nervous shock and emotional distress" caused by the "ongoing publication" of the website containing references to Mr. Flather.

**THE APPLICATIONS TO STRIKE**

**The Law**

**49**  The applicants rely on Rule 3-1(2) of the *Supreme Court Civil Rules* setting out the requirements for a Counterclaim through the operation of Rule 3-4(6). Rule 3-1(2) provides in part that a Claim/Counterclaim must:

1. set out a concise statement of the material facts giving rise to the claim;
2. set out the relief sought by the plaintiff against each named defendant; [and]
3. set out a concise summary of the legal basis for the relief sought;

**50**  The applications to strike are brought pursuant to Rule 9-5(1) of the *Rules* which provides:

1. At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
2. it discloses no reasonable claim or defence, as the case may be,
3. it is unnecessary, scandalous, frivolous or vexatious,
4. it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
5. it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**51**  Pursuant to Rule 9-5(2), no evidence is admissible on an application to strike under Rule 9-5(1).

**52**  The court in *Fowler v. Canada (Attorney General),* [*2012 BCSC 367*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-629C-00000-00&context=) noted at para. 17 that an applicant need only demonstrate one of the grounds listed in Rule 9-5(1) for the claim to be struck.

**53**  The test governing applications to strike pleadings is whether, assuming the facts as pleaded in the claim to be true, it is "plain and obvious", or "clear beyond doubt", that the pleadings do not disclose a reasonable cause of action: *McNaughton v. Baker* [*(1988), 25 B.C.L.R. (2d) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=) (C.A.); *Foote v. Hallen*, [*2014 BCSC 564*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-6209-00000-00&context=) at para. 17 and at para. 18, that the pleading in issue is "... unnecessary, scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the court." In other words, the test is whether, in the context of the law and the litigation process, the claim has no reasonable prospect of succeeding: *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. 25.

**54**  While a claimant need not articulate a particular cause of action in the pleadings, the claimant "must relate the material facts asserted to the cause of action relied on" (*Fowler*, at para. 18).

**55**  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: *Hunt v. Carey Canada Inc.,* *[1990] 2 S.C.R. 959*, at 15.

**56**  The court will not generally accede to the application if the pleading might, through the furnishing of particulars or through amendment, properly frame a cause of action: *Carr v. Cheng*, [*2007 BCSC 2043*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62G0-00000-00&context=).

**57**  Garson J. (as she then was) set out the requisite grounds on a motion to strike pleadings in *Dempsey et al. v. Envision Credit Union et al*., [*2006 BCSC 750*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B25Y-00000-00&context=) at para. 17. The onus on the applicant is to show that:

1. the pleadings are unintelligible, confusing and difficult to understand;
2. the pleadings do not establish a cause of action and do not advance a claim known in law;
3. the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time;
4. the pleadings are not *bona fides*, are oppressive and are designed to cause the Defendants anxiety, trouble and expense;
5. the action is brought for an improper purpose, particularly the harassment and oppression of the Defendants.

[citations omitted]

**58**  Where a claim or portion thereof is struck for being inadequately drafted, the court may grant leave to redraft the offending pleading. However, if it is plain and obvious that even if redrafted, a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation), a party will not be granted the opportunity to redraft: *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc*., at para. 40.

**APPLICATIONS TO STRIKE BROUGHT BY THE PLAINTIFFS AND MR. ERMACORA**

**59**  The plaintiffs apply to strike the entire Amended Counterclaim or in the alternative, certain portions other than those which go to claims of breach of contract and ***negligence***. Mr. Ermacora applies to strike all claims asserted against him in the Amended Counterclaim.

**60**  Mr. Flather opposes the applications brought by the plaintiffs and by Mr. Ermacora.

**61**  While Mr. Flather conceded in submissions that his pleadings likely do not follow a typical format and are more lengthy than usual, he submits that his Amended Counterclaim clearly lays out the causes of action against all parties and the material facts supporting his claims. Mr. Flather submits that the applications can only be described as deliberate attempts by the applicants to avoid facing his claims.

**62**  Mr. Flather submits that the Amended Counterclaim is well-organized and clear, and that any unintelligibility in the pleadings is as a result of the applicants' refusals to disclose documents and information relevant to his claims.

**63**  Essentially, Mr. Flather argues the applicants have not met the requisite onus, significant as it is, to strike his pleadings.

**The Plaintiffs: Mr. Droszio and eGolfPro**

**64**  The plaintiffs filed an application to strike Mr. Flather's Counterclaim in May 2015. That application was rendered moot when Mr. Flather filed an Amended Counterclaim. The plaintiffs filed the present application to strike the Amended Counterclaim on August 12, 2015.

**65**  The plaintiffs seek to strike the Amended Counterclaim in its entirety, without leave to further amend the Amended Counterclaim, and ask that the proceeding therein be stayed. In the alternative, the plaintiffs seek to strike all but the following portions of the Amended Counterclaim as described in their application:

Page 3, paragraph 3 to Page 6, paragraph 8;

Page 20, paragraph (2)(A)(1) to page 22, paragraph (4); and

Page 29, paragraph D to page 31, paragraph 7,

without leave to amend the remaining Amended Counterclaim.

The noted paragraphs are lengthy and need not be reproduced here.

**66**  The plaintiffs submit that the Amended Counterclaim "obscures rather than clarifies issues, is difficult to follow, and lacks sufficient lucidity and brevity to reasonably convey the basis" for the claims in a manner that would allow a meaningful response. I agree.

**67**  And further, they submit that the Amended Counterclaim has no coherent structure, and is of a rambling nature, making it difficult to parse out material facts or to ascertain the nature of the claim. It is pointed out that rather than simply pleading material facts to justify the relief sought, the Amended Counterclaim contains evidence, supposition and argument. I agree.

**68**  For example, at para. 5, Mr. Flather pleads that he has sold several businesses without experiencing any similar issues to these circumstances. The plaintiffs point out that Mr. Flather's track record is completely immaterial to the present litigation. I agree.

**69**  Where Mr. Flather pleads on p. 6 of the Amended Counterclaim that he made several offers to settle the dispute between the parties, the plaintiffs submit that not only does this disclose without prejudice communications, but is immaterial to the relief Mr. Flather seeks. I agree with that submission.

**70**  I agree with the plaintiffs' submission that references to Mr. Flather's financial situation, his efforts expended throughout this dispute, his rationale for taking certain actions and his attempts to get legal assistance are all immaterial to the relief sought.

**71**  The plaintiffs also point to claims for damages suffered by Mr. Flather's family members who are not named parties. A claim cannot be advanced by or on behalf of a non party.

**72**  In these circumstances, the plaintiffs argue that the best solution is to strike the entire Amended Counterclaim. They argue there is no utility in allowing Mr. Flather to redraft his claim noting that in amending his original Counterclaim, Mr. Flather compounded the issues identified in their initial application to strike, rather than addressing them. During submissions, the plaintiffs argued that if Mr. Flather is allowed to further amend his Counterclaim, the likely result would be that the parties end up back in court in the same position -- making an application to strike.

**73**  As for the tort of intentional infliction of mental distress, the plaintiffs broadly characterize Mr. Flather's pleadings as alleging the following:

attempting to alter the terms of the Agreements,

defaulting on payments under the Agreements,

being rude to third party suppliers,

failing to pay invoices rendered by [Mr. Flather],

using a disrespectful or hostile tone with [Mr. Flather],

making 15 phone calls [...] which [Mr. Flather] says were harassing,

the [plaintiffs'] conduct in the within legal proceedings, and

using [Mr. Flather's] name, photographs and stories on a website related to the subject artwork.

**74**  The plaintiffs submit these pleadings do not meet the test for a claim of intentional infliction of mental distress. See *Thibeault v. Canadian Airlines International Ltd. et al*, [*2000 BCSC 1191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22P4-00000-00&context=) at para. 11 where Warren J. writes such a tort refers to:

1. flagrant, extreme and outrageous conduct that is (2) plainly calculated to produce some effect of the kind produced, and (3) actual harm that is visible and provable.

**75**  The plaintiffs note that Mr. Flather does not plead the necessary causal connection between intent and harm, except in respect of the telephone calls by Mr. Droszio and in the plaintiffs' conduct in these proceedings. For all other alleged actions, Mr. Flather fails to plead those mandatory components. I agree.

**76**  In the submission of the plaintiffs, this is a narrowly defined tort; one which is meant to capture the most egregious conduct. The plaintiffs say that the allegations of Mr. Flather, even if taken as true, do not amount to such conduct. While Mr. Flather characterizes Mr. Droszio's behaviour as flagrant in his Amended Counterclaim, the plaintiffs argue that bare assertion does not rise to the level of scrutiny required to make a claim for this tort. While the plaintiffs acknowledge some unseemly conduct by Mr. Droszio in a heated business dispute, they submit that it simply does not give rise to this narrow tort. I agree with that submission.

**77**  As for Mr. Flather's claims for defamation, the plaintiffs submit that Mr. Flather takes issue with three types of communications:

1. Allegations the plaintiffs made about Mr. Flather to Mr. Flather himself or through counsel;
2. Allegations the plaintiffs made in their Notice of Civil Claim against Mr. Flather; and
3. Content on the website that includes Mr. Flather's name, stories referring to him and photos of him.

**78**  The plaintiffs submit that the noted instances do not and cannot ground a claim for defamation and accordingly are doomed to fail. With respect of the first claim, the plaintiffs argue it discloses no reasonable cause of action as Mr. Flather does not plead that the allegations were broadcast or disseminated to anyone outside of the parties or counsel. I accept that submission.

**79**  As for the second claim, the plaintiffs remind the court that allegations made in court proceedings are subject to absolute privilege and are thereby excluded from claims for defamation (*Caron v. A*., [*2015 BCCA 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4P0-00000-00&context=), at paras. 16-19). This submission is uncontroversial.

**80**  In respect to the third allegation, Mr. Flather pleads in his Amended Counterclaim that the content on the website is defamatory of him since it leaves the impression that he is somehow associated with the plaintiffs whom he characterizes as "perpetrator[s] of crimes". The plaintiffs plead that it is clear such a statement is insufficient as it does not assert specifics of the content and resultant negative image of Mr. Flather. Rather, it is simply Mr. Flather's suggestion that the content of the website is defamatory because, in Mr. Flather's opinion, the holder of the website is not reputable. Of course, opinion and supposition cannot ground this type of claim.

**81**  I agree with the submissions of the plaintiffs that even if facts pleaded are taken as true, there is no reasonable cause of action with respect to Mr. Flather's claims for the tort of intentional infliction of mental distress or for defamation and those claims are bound to fail. Mr. Regehr's submissions accord with the law and are sound in his applicability of it to the pleading in issue. The portions of Mr. Flather's Amended Counterclaim pertaining to these claims will be struck.

**82**  In their argument in the alternative, the plaintiffs' position is that the Amended Counterclaim arguably discloses a reasonable cause of action in its claims for damages for breach of contract and ***negligence*** as set out in the paragraphs earlier identified.

**83**  I am satisfied, with respect to the claims of breach of contract and ***negligence***, that Mr. Flather has pleaded sufficient material facts which, if assumed to be true, give rise to these claims; certainly, I cannot find the claims are bound to fail.

**84**  The pleadings in both the plaintiff's Notice of Civil Claim and Mr. Flather's Amended Counterclaim make it clear that there is a dispute between the parties regarding the contract; both the Asset Purchase Agreement aspect and the Agreement aspect of it as those terms are defined in para. 8 of these reasons. I conclude that the Amended Counterclaim discloses a reasonable claim for breach of contract and/or ***negligence***.

**85**  While Mr. Flather's pleadings are unconventional and contain content immaterial to the relief sought, I find those relating to breach of contract and ***negligence*** cannot be said to be "groundless, fanciful, 'trifles with the court' or wastes time": *Borsato v. Basra*, [*2000 BCSC 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TN-00000-00&context=), rev'd on other grounds, *Borsato v. Basra*, [*2000 BCSC 1898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X3SJ-00000-00&context=)).

**86**  The plaintiffs have not satisfied me that the entire Amended Counterclaim should be struck. The plaintiffs have satisfied me that the alternative relief they seek, namely, striking the earlier identified portions of Mr. Flather's Amended Counterclaim and allowing those which are capable of framing the causes of action of breach of contract and/or ***negligence***, is the appropriate order.

**87**  Furthermore, I also grant Mr. Flather leave to further amend his Amended Counterclaim to comply with the *Rules* and principles of pleadings in respect of only the claims for breach of contract and ***negligence***. Mr. Flather has 90 days to file that pleading. Mr. Flather would be well served to take note of the comments of McKay J. in *Kelly Lake Cree Nation v. Canada*, [*[1998] 2 F.C. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FJM6-60BB-00000-00&context=) (TD) and quoted with approval in *Fowler* at para. 55:

The rules governing pleadings establish the fundamental rule that a plaintiff is under an obligation to plead material facts that disclose a reasonable cause of action. This very basic rule of pleadings involves four separate elements. One, every pleading must state facts and not merely conclusions of law; two, it must include material facts; three, it must state facts and not the evidence by which they are to be proved; and, four, it must state facts concisely in a summary form.

**Mr. Ermacora**

**88**  Mr. Ermacora applies to strike the following portions of Mr. Flather's Amended Counterclaim that relate to him, namely:

Parts of paragraphs 3, 14, 26, 29 B beginning on page 31, 2A beginning on page 37, B beginning on page 38, C beginning on page 40, D beginning on page 41 and C beginning on page 41 of Part 1 of the Amended Counterclaim with respect to the Applicant.

Again, these paragraphs need not be reproduced here.

**89**  Counsel advised that Mr. Ermacora's takes the same position as the plaintiffs; namely that the pleading against him is unintelligible and confusing, contains a significant amount of opinion, and discloses no material facts supporting a cause of action against Mr. Ermacora.

**90**  In Mr. Ermacora's Response to the Amended Counterclaim, he states that he was hired on a one-time verbal contract by Mr. Droszio to provide technical assistance with the website at issue in exchange for $136.60 in compensation. Mr. Ermacora pleads that he has not assisted or conspired with the plaintiffs in any way with the marketing, promotion or sales of Dr. Flather's artwork as alleged in the Amended Counterclaim. He submits the case against him is made on the basis of a conspiracy theory, assumption and speculation and is therefore untenable.

**91**  Mr. Ermacora relies on *XY, LLC v. Zhu*, [*2013 BCCA 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B23D-00000-00&context=), at para. 43 where the circumstances under which the tort of civil conspiracy may arise are described as follows:

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.

**92**  Mr. Ermacora submits that Mr. Flather fails to set out material facts to show that Mr. Ermacora engaged in any unlawful behaviour, or that the predominant purpose of Mr. Ermacora's conduct was to cause injury to Mr. Flather.

**93**  Mr. Ermacora also rejects Mr. Flather's claims that Mr. Ermacora owed him a duty of care. Mr. Ermacora submits no facts capable of supporting a claim in ***negligence*** with the requisite duty of care, standard of care and a breach are pled.

**94**  Mr. Ermacora submits that there is no reasonable cause of action against him for defamation of Mr. Flather. Mr. Flather claims that Mr. Ermacora provided the plaintiffs with facts to ground the defamation claim against Mr. Flather. It is suggested by counsel that such may make Mr. Ermacora a witness in a trial, but is insufficient in disclosing a cause of action.

**95**  Finally, Mr. Ermacora takes the position that the Amended Counterclaim names him simply to cause him trouble, anxiety and expense, or for the improper purpose of gaining information from Mr. Ermacora and accordingly, seeks special costs.

**96**  In respect of Mr. Ermacora's application to strike the relevant portions of Mr. Flather's Amended Counterclaim, I agree that the pleadings disclose no reasonable cause of action as against Mr. Ermacora and are bound to fail.

**97**  Mr. Flather claims in ***negligence*** against Mr. Ermacora on the basis that he owed Mr. Flather a duty of care as a professional. Mr. Flather has failed to plead material facts establishing a nexus or relationship between the parties that could possibly give rise to an owed duty of care. I note that suspicions are insufficient to establish wrongdoing, let alone a duty to Mr. Flather.

**98**  I also find that Mr. Flather's claims of defamation, wilful infliction of nervous shock or emotional distress, negligent misrepresentation and civil conspiracy against Mr. Ermacora are bound to fail in that the material facts to support these claims are absent.

**99**  In the result, those portions of the Amended Counterclaim which reference claims agains Mr. Ermacora will be struck.

**Costs as between Mr. Ermacora and Mr. Flather**

**100**  Mr. Ermacora has been successful on his application and accordingly, is entitled to costs. I do not allow his claim for special costs as I am not convinced Mr. Flather's claims were advanced for an improper motive or that reprehensible conduct was demonstrated. See *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, [*2013 BCSC 1352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B24V-00000-00&context=).

**101**  Costs will be ordinary costs on Scale B.

**Mr. Flather's Application**

**102**  In his application filed on September 28, 2015, Mr. Flather seeks the following relief:

1. Pursuant to Rule 9-5(1) that the Notice of Claim by the Respondents G.J. Droszio and eGolfPro Technologies Inc. filed on December 11, 2014, be struck in its entirety and that the proceeding be stayed without leave to amend.
2. That the court order issue a Court Order to former Defendant by Counterclaim GoDaddy.com LLC. for the immediate removal from the Internet the website and all contents at the URL [...] and for the Court to ban the Plaintiffs and Defendant by Counterclaim David Ermacora from republishing this website or any website, blog or publication containing any reference to the Applicant David Flather, Dave Flather, D. Flather or DM Flather or containing the word "flather" in the domain name address.
3. That the court impose an immediate Civil Restraining Order against Respondents G.J. Droszio and eGolfPro Technologies Inc. barring any further direct or indirect contact with the Applicant David Flather in any form whatsoever. Furthermore, that against Respondents G.J. Droszio and eGolfPro Technologies Inc. a court order barring the Respondents from ever being within 500 meters of the Respondent's home, place of work or business or any other place that the Respondent may be.
4. That the court impose an immediate Civil Restraining Order against Respondents G.J. Droszio and eGolfPro Technologies Inc. barring any further direct or indirect contact in any form whatsoever with the Applicant's Family Members or person known to David Flather.
5. Pursuant to Rule 9-6 that the court order summary judgment for the immediate payment of all monies owed by/ in full default of by the Respondents to the Applicant in the amount of $165,000 plus interest owed from the Asset Ppurchase Agreement signed April 13, 2012.
6. That the court find the Respondents G.J. Droszio and eGolfPro Technologies Inc. to be vexatious litigants and require them to have leave of the court before filing any additional Applications or Civil Proceedings of any kind against the Applicant David Flather and for the court to review their existing Notice of Application set for November 16, 2015 at the Victoria Court.
7. That the court transfer this case and file to Vancouver Supreme Court based on the Applicant's fears for his personal safety from the Plaintiffs in this case whom have threatened him and unlawfully harassed him over an extended period of time. [...]
8. That the court give leave to the Applicant to further amend his Amended Counterclaim when the Applicant is able to retain legal counsel.
9. That the court investigate the Applicant's multiple allegations of misleading justice by the Respondents G.J. Droszio and eGolfPro Technologies Inc. (the Plaintiffs) and Defendant by Counterclaim David Ermacora through their pleadings and affidavits.
10. The Applicant requests that the Court also make a formal order under Rule 7-1(13) as well as any other applicable rules for the Respondents (Plaintiffs) to immediately provide the following information to the Applicant that has already been legally asked for in writing via Demands to Disclose Particulars dated May 19, 2015 and June 26, 2015 as follows from the Applicant's June 26, 2015 Demand to Disclose Particulars: [...]
11. Special costs, actual costs of travel and compensation for lost income in relation to the Plaintiffs and Defendant by Counterclaim David Ermacora's Notice of Application May 26, 2015 and June 30, 2015 that forced the Defendant to close his business for over 2 weeks, travel to attend Victoria Court May 26, 2015 at an expense the Defendant could not afford and other costs. [...]
12. Costs; and
13. That the court recognize the Applicant's legal disability and grant any other interim relief to the Applicant that it sees fit.

**103**  The plaintiffs oppose all of the relief sought by Mr. Flather.

**104**  During the hearing of this application, the relief sought in paras. 6, 7, 9 and 13 above was dismissed from the bench, while the application for the disclosure at number 10 was adjourned generally and without prejudice to the parties pending the outcome of the applications to strike.

**105**  I have already noted the heavy burden on an applicant on a motion to strike. Mr. Flather faces this burden where he seeks to have the plaintiffs Notice of Civil Claim struck in its entirety. For the reasons given earlier with respect to the plaintiffs' application, there is a dispute between the parties surrounding the Agreement for the sale of the Flather Business and related matters. Assuming the facts as pleaded are true, I cannot find the plaintiffs' pleadings "disclose no reasonable cause of action" or are vexatious, or may delay a trial or are otherwise an abuse of process in respect of the breach of contract and defamation claims. Accordingly, Mr. Flather's application to strike the Notice of Civil Claim is dismissed.

**106**  I dismiss the remainder of the outstanding relief sought by Mr. Flather on this application, save and except for leave to further amend his Amended Counterclaim, as granted in these Reasons.

**107**  On the application for the removal of the website operated by the plaintiffs, I find that any damages to Mr. Flather flowing from the operation of the website either in ***negligence*** or breach of contract are a matter to be proven at trial.

**108**  There is no evidentiary basis for any form of order restricting the plaintiffs' movements or communications.

**109**  As demonstrated by the finding that both the plaintiffs' Notice of Civil Claim and Mr. Flather's Amended Counterclaim disclose reasonable causes of action, there are genuine issues for trial. Those issues require rulings as to admissibility of evidence, weighing of conflicting evidence and findings of credibility. Without doubt, this case cannot be decided on a Summary Trial.

**Costs as between the Plaintiffs and Mr. Flather**

**110**  I decline to grant an order to either the plaintiffs or the defendant Mr. Flather for special costs as I do not find the parties have demonstrated reprehensible conduct deserving of rebuke in bringing them. Arguably, each of the plaintiffs and Mr. Flather have had some success. It is appropriate that the question of ordinary costs be in the cause.

**111**  In the result:

1. I dismiss the plaintiffs' application to strike the Amended Counterclaim in its entirety.
2. I accept the plaintiffs' alternative argument that all paragraphs of the Amended Counterclaim be struck without leave to redraft, except those paragraphs earlier described (in para. 65 of these Reasons) as relating to claims of breach of contract and ***negligence***.
3. Mr. Flather has leave to further amend those remaining paragraphs of his Amended Counterclaim. In order to do so, Mr. Flather must draft the proposed amended pleading within 90 days, seek agreement of the other parties; failing agreement, he must seek leave from the court.
4. Those paragraphs of the Amended Counterclaim asserting claims against Mr. Ermacora are struck with costs to Mr. Ermacora.
5. Mr. Flather's application is dismissed except the relief claimed in para. 8. The relief claimed in para. 10 has been adjourned generally.
6. Ordinary costs of the plaintiffs' application and that of Mr. Flather are in the cause.

J.L. DORGAN J.

**End of Document**

[***Hale v. MacEwen, [2011] B.C.J. No. 1958***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62GJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.S. Harvey J.

Heard: September 26-30, 2011.

Judgment: October 20, 2011.

Docket: M113649

Registry: New Westminster

**[2011] B.C.J. No. 1958** | 2011 BCSC 1404 | 21 M.V.R. (6th) 241 | 207 A.C.W.S. (3d) 603 | 2011 CarswellBC 2715

Between Eugene Larry Hale, Plaintiff, and Aaron Robert MacEwen, Gold Key Pontiac Buick (1984) Ltd. and Hiway Refrigeration Ltd., Defendants

(70 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Contributory *negligence* — Apportionment of liability — Proof of — Motor vehicles — Rules of the road — Action for damages in *negligence* dismissed — Plaintiff was injured when his motorcycle collided with defendant's oncoming van — Plaintiff acknowledged that forensic evidence suggested that the collision occurred wholly within the defendant's lane — Plaintiff sought to apportion liability equally on the ground that defendant unreasonably maintained a course of travel close to the centre of the roadway knowing the hairpin nature of the curve where the accident occurred — Requiring defendant to position his vehicle farther from the centre line in anticipation of plaintiff's *negligence* involved a standard of perfection rather than one of reasonableness — Plaintiff was wholly liable.**

|  |
| --- |
| Action by Hale for damages for personal injury. A collision occurred between a motorcycle driven by Hale and a van driven by the defendant MacEwen. Hale and his passenger sustained significant physical injuries as a result of the collision. Prior to setting out on his motorcycle, Hale consumed several beers and his blood alcohol level after the accident was twice the statutory limit set out in the Criminal Code. The forensic evidence pointed to the collision occurring in MacEwen's lane of the road. Despite that, Hale took the position that MacEwen was unreasonable in maintaining a course of travel so close to the centre of the roadway when negotiating a hairpin curve. Hale therefore submitted that both parties were to blame for the collision and that fault should be apportioned equally. In contrast, MacEwen took the position that fault for the collision rested solely with Hale.  HELD: Action dismissed.  According to the forensic evidence, the collision occurred wholly within MacEwen's lane. Therefore, Hale was negligent in failing to maintain his vehicle within his own lane. Requiring MacEwen to position his vehicle farther from the centre line in anticipation of Hale's ***negligence*** would require a standard of perfection rather than one of reasonableness. The collision occurred wholly as a result of Hale's ***negligence***. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=),

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 151*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0G8-00000-00&context=)(b)

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

**Counsel**

Counsel for Plaintiff: R. McNeney.

Counsel for Defendants: D. Nugent and K. Floe.

[Editor's note: A correction was released by the Court October 24, 2011; the change has been made to the text and the correction is appended to this document.]

**Reasons for Judgment**

|  |
| --- |
| **J.S. HARVEY J.** |

**1**   This action arises from a collision between a motorcycle driven by Mr. Hale, (the "plaintiff") and a cube van driven by Mr. MacEwen (the "defendant") which occurred July 17, 2006, in Maple Ridge, British Columbia. The plaintiff and his passenger, Ms. Diane Biwer, suffered significant physical injuries as a result of the collision.

**2**  The plaintiff was driving a Harley Davidson Heritage Softail motorcycle with his former common law wife, Ms. Biwer, as a passenger. The defendant was driving a cube van. The accident occurred at approximately 6:30 p.m. on a pleasant summer evening. Lighting was good and the roadway was dry. All agree road conditions played no role in the accident.

**3**  The singular issue I am to decide is liability for the collision.

**BACKGROUND**

**4**  The plaintiff is 54. Prior to his injuries, he was employed as a trucker. At the time of the accident, he had been living with Ms. Biwer for several years.

**5**  At the time of the accident he was an experienced motorcycle rider and had a history of owning and driving "cruisers" with an engine displacement in excess of 1000 cc.

**6**  There is no suggestion his 2004 Harley Davidson was other than in proper running order on the day of the accident. Nor is it suggested the defendant's van was mechanically deficient. As noted, weather conditions and road conditions played no role in the accident's happening.

**7**  On the day of the accident, the plaintiff arose at around 5:00 a.m. so as to be at work for 6:00 a.m. He worked uneventfully through the day and returned home at approximately 3:15 p.m.

**8**  Upon arriving at home he said that he had a beer. He said it tasted so good, "I had another". According to his testimony, he followed that with two to three more beer over the course of the next several hours in the company of Ms. Biwer. They departed at around 6:00 p.m. The intended destination was a workmate's residence approximately 15 minutes driving time away. The plaintiff and Ms. Biwer never made it there.

**9**  To reach their destination, the plaintiff chose a familiar route which took him from his residence on Hillside to Lougheed Highway and then onto 207th Avenue in Maple Ridge. He and his passenger proceeded southbound on 207th Avenue toward Maple Crescent. Maple Crescent intersects 207th Avenue at what has been described as a hairpin curve to the right when approaching from the north.

**10**  The roadway near the collision site has two lanes, one for travel in each direction. 207th Avenue runs essentially north-south. Maple Crescent runs essentially east-west. The roadway is divided by a solid yellow line.

**11**  The approach to the curve from 207th Avenue proceeds down a 3.5% grade. The plaintiff and Ms. Biwer were driving south on 207th Avenue as they approached the curve. The defendant was driving on Maple Crescent in a easterly direction in the cube van.

**12**  The plaintiff said he was going at or near the speed limit but geared down as he approached the curve and reduced his speed to between 20 and 25 kph. There is a road sign indicating the upcoming sharp curve with a posted speed limit of 30 kph. The plaintiff was familiar with the curvature of the road as he had travelled there numerous times before the accident.

**13**  The plaintiff testified he remained, at all times, within his lane of travel and, as he was in his turn, he noticed the defendant approaching and observed the defendant's vehicle was over the centre line. He said he entered the intersection high, meaning near the centre line, and was in full turn when he observed the defendant's vehicle some twenty feet away. He says he was fully within his lane when the collision occurred.

**14**  The time between impact and observation was described variously between 1-2 seconds and "in an instant". The plaintiff said he had no time to react and agreed with the suggestion in cross-examination that being in "full turn," he had no ability to steer his vehicle away from the impact even had time permitted. Heavy application of the brakes would have resulted in the bike dropping to the ground.

**15**  The plaintiff was unable to say what portion of his motorbike or his person contacted the van; only that the contact occurred in his lane of travel. Neither he nor Ms. Biwer mentioned coming into contact with the van's driver's side mirror.

**16**  Ms. Biwer was subpoenaed to testify by the plaintiff. She did not appear at the time noted in the subpoena and a warrant was issued for her arrest.

**17**  She was not located until the close of the evidence and, as a result, portions of her sworn testimony at her examination for discovery were read into evidence. Ms. Biwer commenced an action against both parties to this action and was accordingly examined for discovery by counsel for the defendant, Mr. MacEwen.

**18**  Her evidence concerning the happening of the accident conforms, by and large, with the plaintiff's version. Although short on details, the thrust of her evidence was that the collision occurred within the motorcycle's lane of travel. She confirmed the plaintiff had two or three beer in her presence and that she had two.

**19**  The plaintiff believes he was momentarily rendered unconscious following the collision. He recalls speaking to persons trying to render him aid and uttering, "What the fuck were you doing in my lane?" He also recalls being removed from the scene initially by ambulance and later transported to hospital by helicopter. He told the ambulance crew he'd had a "couple of beer".

**20**  Both he and his passenger sustained significant injuries to their left extremities. On arrival at Royal Columbian Hospital, blood was drawn, as is policy in motor vehicle related admissions, from both. His blood was analysed by a Beckman-Coulter CX 800. His blood content, at 7:35 p.m., was said to be 37.4mmol/L of alcohol in serum.

**21**  According to Carolyn Kirkwood, an acknowledged expert in the field of forensic toxicology, the equivalent blood alcohol concentration measured as grams of alcohol per 100 millilitres of blood is .172, twice the statutory level of impairment under the *Criminal Code*.

**22**  For Ms. Biwer, the equivalent reading from the hospital was 19.4 mmol/L of alcohol in serum. According to Mr. W.K. Jeffrey, a similarly qualified toxicologist, the equivalent blood alcohol concentration measured as grams of alcohol per 100 millilitres of blood is .091-.102. In addition, Ms. Biwer was taking 2-3 Percocet daily.

**23**  Mr Jeffrey opined that Percocet is an opioid analgesic with pharmacological effects similar to morphine. Its short-term use results in "euphoria, light-headedness, dizziness, drowsiness, some clouding of mental functions, blurred vision and nausea".

**24**  The plaintiff gave several statements concerning his alcohol consumption. At the accident scene, he advised ambulance attendants he had "a couple of beer". Later, to an ICBC adjuster, he stated he had "his customary two or three beers with Diane". At trial, he stated he'd had four or five beer over the course of the approximate three hours between his arrival home and his departure with Ms. Biwer.

**25**  Dr. Chiman Chow was called by the defendant to describe the protocols used for blood analysis at Royal Columbian Hospital in July 2006. He testified the Beckman-Coulter machine used for analysis is calibrated at least monthly and a quality control check is done every eight hours using a known sample to confirm the machine's accuracy. Dr. Chow played no role in the testing resulting in the readings obtained from the plaintiff or Ms. Biwer. No individual analyst was called.

**26**  In cross-examination, Dr. Chow conceded a margin of error of 5% and testified that contamination from the swab which precedes the drawing of blood is not done with ethanol but propanol. The use of propanol, as opposed to ethanol, eliminates to possibility of contaminating the sample.

**27**  The defendant testified that the accident occurred solely in his lane and that at all times, his cube van remained on his side of the yellow line. He acknowledged seeing the plaintiff's motorcycle some 25 to 50 feet prior to the collision but never perceived it as a threat.

**28**  He testified the collision was in his lane and that someone or something contacted the mirror extending from his driver's side door. The mirror, according to the defendant, extended some 10-12 inches from the outside of the van's box on the driver's side. This was so he could monitor traffic behind.

**29**  The driver's mirror was not damaged. Photographs taken by Staff Sergeant Alexander indicate that it had been rotated slightly upward from its original vertical position.

**30**  Following the accident, he stopped his vehicle and attempted to render aid to both the plaintiff and his passenger. He could not recall any exchange of conversation between him and the plaintiff.

**31**  He was challenged several times regarding inconsistencies between his testimony at trial and his answers at his discovery. In particular, he testified at trial that he had moved his vehicle from where it was following the accident to facilitate the arrival of emergency equipment. On discovery, he testified someone else moved it.

**32**  Each of the parties called experts in accident reconstruction to give opinion evidence as to the location of the impact. The plaintiff called Mr. Trevor Dinn. The defendant called Mr. William Cliff. Both were well qualified as accident reconstruction analysts. Their opinions were predicated, in the main, on photographs and measurements taken by the attending police officer within 40 minutes of the accident's happening.

**33**  Over a hundred pictures were taken by the investigating officer, Staff Sergeant Alexander. The final resting position of the plaintiff's motorbike is depicted from various angles as are scuff marks on the roadway indicating contact between the motorbike's frame rail. Photographs of what purport to be skid marks created by the defendant's left rear wheels depict the outer edge of the wheels as being 46 cm from the centre of the yellow lines dividing the two lanes.

**34**  Photograph 1378 depicts the centre line near the point of contact between the motorbike and van. It indicates two gouges in the yellow centre line which, in the opinion of both experts, were made by a bolt on the right side of the plaintiff's motorbike as he leaned into the corner. Both experts agreed that the gouge marks could only have occurred on the centre line if a part of the plaintiff's motorbike was in the lane occupied by the van.

**35**  Both experts opined, from the photographs and measurements prepared by Staff Sergeant Alexander, that the motorcycle crossed the centre line immediately before the collision. The major difference in the testimony of the two experts was their opinion as to the angle of the motorcycle and the extent of the intrusion into the defendant's lane.

**36**  Mr. Cliff, on behalf of the defendant, thought the angle to be as acute as 17 degrees but acknowledged it could be as low as 12 degrees. Mr. Dinn thought the angle to be less acute, between 6 degrees to 10 with a possible high of 12 degrees.

**37**  Neither expert viewed the cube van. Neither commented on the extended mirror off of the driver's side door. Neither commented on the distance of the driver's door from the centre line at the time of impact but each, for reasons I shall later reference, concluded the front of the van was more to the centre of the roadway than was the rear.

**38**  I pause to note each expert acknowledged problems with their respective reports. Mr. Dinn failed to measure the slide of the motorcycle's front forks resulting in an underestimation of the extent of the intrusion of the motorbike into the van's lane of travel by 4 cm. He further acknowledged the fork's slide length would have the effect of adding 5 cm to his estimate of distance between the rear of the van and the centre line.

**39**  Mr. Cliff's diagram of the accident places the truck box too close to the centre line when contrasted to his measurements. He noted the error but maintains the measurements, not the drawn image, is the basis of his opinion as to the van's location.

**40**  Both experts ultimately agreed that the left side of the van's box was 20 to 25 cm from the centre of the centre line. They agreed there was significantly more room between the right side of the van and southern most edge of the road as compared to the left side and the centre line.

**41**  Each provided diagrams as to their view of the alignment of the motorcycle and van and the point of impact. Mr. Cliff's diagram, as noted, places the van closer to the centre line than was the case using the actual opinions of measured distance.

**42**  Each of the figures prepared shows the front of the van is significantly farther away from the centre line than was the rear. This is accounted for by the trajectory of the curvature in the roadway at the point of impact. The truck, not being curved like the roadway, was more centred in the lane at its front end.

**POSITION OF THE PARTIES**

**43**  The claimant relies on the evidence of the plaintiff and Ms. Biwer but acknowledges that the forensic evidence points to the accident occurring within the defendant's portion of the laneway. Regardless, he says that the evidence also discloses that the defendant was unreasonable in maintaining a course of travel so close to the centre portion of the roadway knowing, as he did, the hairpin nature of the curve.

**44**  The claimant says both parties were to blame for the resultant collision and that fault should be apportioned equally pursuant to the provisions of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*.

**45**  The defendant notes the occurrence of the accident within the confines of the defendant's portion of the roadway and says fault for the accident rests solely with the claimant. The defendant says he had no chance to avoid the accident once the claimant crossed the centre line an instant before the collision occurred.

**ANALYSIS AND CONCLUSIONS**

**46**  The attending officer Staff Sergeant Alexander attended the scene within an hour of the accident and measured and photographed the roadway identifying debris or markings on the roadway. I am satisfied that he correctly attributed the roadway markings south of the centre line as being those left by the outer rear wheels on the left side of the defendant's cube van.

**47**  Relying on those markings, as did both Mr. Dinn and Mr. Cliff, I am satisfied that as close to the point of impact as can be estimated, the outer left side of the defendant's van was between 20-25 cm from the centre of the yellow line dividing the two lanes of travel.

**48**  Given the curvature of the roadway at the location of the accident, I am satisfied that the cab of the defendant's vehicle was more centred in the roadway than were his rear wheels. This would give some credence to the defendant's belief that he was centred in his lane of travel. He was not; I conclude, on the basis of the experts' opinions, there was more space to his right than there was between the van's rear and the centre line.

**49**  The resting location of the motorcycle, coupled with the location of debris from the motorcycle and the location of the gouge marks from the frame rail and bolt persuade me that the accident occurred wholly within the defendant's lane and that at no time did the defendant's vehicle, or any part of it, extend across the centre of the yellow dividing line.

**50**  I reject the evidence of the plaintiff, defendant, and Ms. Biwer, premised on the following: the physical evidence coupled with the opinion of two qualified experts; the fact that the evidence of all three participants in the accident had but an instant to observe the circumstances prior to the collision itself; the self interest of all three participants; and the fact I that conclude that both the plaintiff and Ms. Biwer were significantly impaired by alcohol.

**51**  I reject the notion that I should prefer their evidence concerning alcohol prior to the accident over the hospital test results and the opinions of the two experts who relied upon them to arrive at a different drinking pattern than that testified to. Whether the defendant's driving was as a result of impairment is not something I need decide. The fact of his impairment is relevant to his observations concerning the happening of the accident and his location both as to their reliability and credibility.

**52**  The same applies to Ms. Biwer.

**53**  The evidence of Dr. Chow, associate director of biochemistry at Royal Columbian Hospital, persuades me that all necessary safeguards were in place so as to make the test results of both the plaintiff and Ms. Biwer reliable and persuasive as to their blood alcohol content.

**54**  Section 151(b) of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318*, provides some insight as to the duty upon approaching drivers such as the plaintiff and defendant where, as here, the road is divided by a single yellow line. It reads:

Driving on laned roadway

151 A driver who is driving a vehicle on a laned roadway

1. must not drive it from one lane to another if that action necessitates crossing a solid line,

**55**  That prohibition, according to the plaintiff, does not end the matter. Relying on *Gates v. Hodgson,* [*[1945] 2 W.W.R. 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JSXV-G0YD-00000-00&context=) and *Watson v. Monfils,* [*1999 BCCA 312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G49M-00000-00&context=), he submits the defendant was too close to the centre line given the sharpness of the curve and the hazard that an approaching driver might minimally encroach into his lane at the curve. In doing so, he is said to have breached his duty of care to the plaintiff.

**56**  In *Watson*, the Court of Appeal considered a situation where the trial judge found, as a fact, the appellant's vehicle crossed into the respondent's lane of travel and that the collision occurred in the respondent's lane of travel. The trial judge concluded that ended the matter and dismissed the action. In *Watson,* the respondent was found to be 6 to 8 cm from the centre line at the time of impact. No explanation was tendered by the respondent to account for her positioning so close to the centre line when she had sight of the appellant's vehicle, a large truck, from a far distance away.

**57**  Beginning at para. 14, Esson J.A. reviewed the obligations of a reasonable driver in a situation such as that of the defendant here:

[14] Many cases were cited to us. One which is of some application to these facts is the decision of the Supreme Court of Canada in Lotholz v. Charlton, [*[1969] S.C.R. 692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22YB-00000-00&context=). That was a case of a collision on a gravel road in very dusty conditions. One of the drivers, who was killed in the accident, was well over on the wrong side of the road. The question for decision in the Supreme Court of Canada was whether the other driver was negligent at all, and if negligent, what percentage of fault should be assessed against him. At page 696, Hall J. said, referring to that second driver:

... The fact is that Lotholz was hugging the centre of the highway as he proceeded northward and he had no vision at all of what traffic might be coming southward on the west side of the highway.

...

The major responsibility for the collision must rest upon the driver of the Charlton automobile, but I cannot conclude that Lotholz was not also in a measure at fault. The classic definition of ***negligence*** is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. I do not think that a prudent and reasonable man would hug the centre of that highway, dust-covered as it was, and do so at a speed of 50 miles per hour without being aware that there was the likelihood that a southbound driver could also be driving at or near the centre, and that that driver might accidentally cross over or emerge from the dust too late for either driver to avoid meeting more or less head on.

Similarly, it is not reasonable or prudent to hug the solid line with knowledge that the rig was approaching and might fail in its duty to stay entirely on its side of the line.

[15] The basic principle was stated in the judgment of Ritchie J. in Adams v. Dias, [*[1968] S.C.R. 931*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22VH-00000-00&context=), 936:

It is true that a driver is in no way relieved from the liability which flows from a failure to take reasonable care simply because another user of the highway is driving in such a fashion as to violate the law, but in my opinion, no motorist is required to anticipate, and therefore keep on the look-out for, such an unusual and unexpected violation as was manifested by the appellant's course of conduct in the present case ...

[16] Here the violation cannot be said to have been unusual or unexpected. The overriding fact which emerges here is that, had the plaintiff been driving further from the solid line, and certainly if she had been driving in the centre of her lane or anywhere to the right of that, there would have been no collision. Reasonable prudence dictated that she not travel in proximity to the double line in the circumstances prevailing at that time. Why she did so is not something which we can determine definitely on the evidence and findings. There is some evidence that she may have been overcome with sleepiness. There is also the possibility, which emerges from the evidence of the passenger in the truck, that before the collision her head was turned apparently to talk to the rear seat passengers.

[17] However, there is no finding on these matters. The important factor is that there is no explanation for the imprudent conduct. On the basis of the authorities to which I have referred and many others to the same effect, I must conclude that the learned trial judge erred in not finding contributory ***negligence*** in this situation. As in the Lotholz case, I would find the greater degree of fault must be attributed to the defendants who were found to be in breach of their statutory duty to remain to the right of the centre line. I would, therefore, apportion fault 75% to the defendants and 25% to the plaintiff.

**58**  In *Gates*, the Court of Appeal split liability when it appeared the trial judge had not made findings of credibility sufficient to determine the location of the accident relative to the lanes of travel. The majority concluded both drivers were travelling unreasonably close to the centre line and failed to provide reasonable clearance to the other of them. Accordingly, liability was equally apportioned between the plaintiff and defendant.

**59**  Here I am able to say with some precision where the accident occurred and the distance of the defendant's container from the centre line. As noted, I am satisfied he was with in his lane of travel. The ***negligence*** of the plaintiff has been made out. He failed to maintain his vehicle within the travelled portion of the roadway for his direction of travel.

**60**  The remaining question is this: was the defendant so close, as was the case in *Watson*, as to make his actions unreasonable?

**61**  In concluding that he was not, I distinguish the situation from that which occurred in *Watson*, to the facts here. Here, the violation by the plaintiff was both unusual and unexpected.

**62**  Neither driver testified to a situation which should have caused the defendant to consider that the plaintiff would fail to negotiate the corner. His speed was not an issue and he seemingly, according to all witnesses, had control of his vehicle as he entered the curve.

**63**  As was stated in *Tucker (Guardian of) v. Asleson*, [*[1993] 6 W.W.R. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M387-00000-00&context=), [*102 D.L.R. (4th) 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M387-00000-00&context=) by Southin J.A.:

35 Having concluded that the answer to the question which I posed at page 19 is "yes", the next question is whether Mr. Asleson's response upon sighting the Tucker vehicle was a breach of his duty of care to Mrs. Tucker and the plaintiff.

**64**  A driver's conduct must be judged by the standards of normal persons and not by applying the standards of perfection: *Freedman v. City of Côte St. Luc*, [*[1972] S.C.R. 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B00Y-00000-00&context=).

**65**  A driver is bound to anticipate on the part of the other drivers, only those follies which according to the teachings of experience commonly occur: *Provincial Transport Co. v. Dozois*, [*[1954] S.C.R. 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0V2-00000-00&context=).

**66**  Nothing in the driving of the plaintiff forewarned the defendant of the possibility that he would fail to maintain his vehicle within his lane.

**67**  Here, unlike in *Watson*, the distance between the outer edge of the van and the centre line was 20-25 cm or 9-10 inches. The front of the van, while not perfectly centered within the defendant's lane, was set back from the centre line even further.

**68**  Whatever contact occurred between the defendant's mirror, the plaintiff, his passenger, and/or his vehicle, did not occur in the plaintiff's lane of travel.

**69**  To require the defendant to position his vehicle farther from the centre line in anticipation of the ***negligence*** of the plaintiff requires a standard of perfection, not reasonableness.

**70**  In the result I am satisfied that the accident occurred wholly as a result of the plaintiff's ***negligence***. The action is dismissed.

J.S. HARVEY J.

\* \* \* \* \*

Correction

Released: October 24, 2011

Reasons for Judgment of Mr. Justice Harvey dated October 20, 2011, have been corrected as follows:

On the front page K. Floe has been added as Counsel for the Defendants.

J.S. HARVEY J.

**End of Document**

[***Horvath v. Thring, [2003] B.C.J. No. 2522***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0HN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Ballance J.

Heard: May 5, 2003.

Judgment: October 31, 2003.

Vancouver Registry No. B950319

**[2003] B.C.J. No. 2522** | 2003 BCSC 1656 | 20 B.C.L.R. (4th) 370 | 38 C.C.P.B. 278 | 126 A.C.W.S. (3d) 730 | 2003 CarswellBC 2709

Between Ygola Horvath (also known as Jules Horvath) plaintiff, and Douglas Walter Thring and General Motors of Canada Limited, Reid Tate, Al Luelo, Bruce Askew, Her Majesty the Queen in Right of Canada, defendants

(48 paras.)

**Case Summary**

**Torts — Joint and concurrent tortfeasors — Concurrent tortfeasors — What constitutes concurrent tortfeasors — Liability of each for whole of damage.**

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| Application by Thring and General Motors of Canada for dismissal of the plaintiff Horvath's claim against them, or alternatively, that they be held severally liable for only 50 per cent of Horvath's damages. Horvath was an RCMP officer. He was seriously injured in a motorcycle accident while on duty. Thring was the driver of the truck with which Horvath collided, and General Motors was the owner of the truck. The trial judge apportioned joint and several liability equally between the Crown on the one hand, and Thring and General Motors on the other, with liability resting jointly and severally on all three. It was later determined, based on certain statutory provisions and the fact that Horvath had successfully applied for a disability pension, that the finding of liability against the Crown was unlawful.  HELD: Application dismissed.  Horvath's application for a pension award did not trigger the statutory bars that were tantamount to him granting a release to the Crown. The Crown, Thring and General Motors were not joint tortfeasors. The Crown's ***negligence*** related to conduct that was independent of the conduct forming the basis of Thring's and General Motors' ***negligence***. The three did not act in concert with each other in the commission of their respective torts. There was no principled basis to restrict the extent of Thring's and General Motors' liability to 50 per cent. To do so would deprive Horvath of his rights under section 4(2) of the ***Negligence*** Act. The protection of Horvath's entitlement to be fully compensated for the tortuous acts of all the defendants was the paramount consideration. |

**Statutes, Regulations and Rules Cited:**

Crown Liability and Proceedings Act, [*R.S.C. 1985, c. C-50, s. 9*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B7W1-JTGH-B015-00000-00&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=), 4(2).

Pension Act, [*R.S.C. 1985, c. P-6, ss. 25*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BB81-DYMS-61NN-00000-00&context=), 26, 111.

Royal Canadian Mounted Police Superannuation Act, [*R.S.C. 1985, c. R-11, s. 32*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBT1-JF75-M26Y-00000-00&context=)(1), 32(b).

**Counsel**

Albert M. Roos, for the plaintiff. Robert C. Brun, for the defendants, Douglas Walter Thring and General Motors of Canada Limited.

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| **BALLANCE J.** |

INTRODUCTION

**1**  The applicants, Douglas Walter Thring and General Motors of Canada Limited (individually, "Thring" and "General Motors" respectively, and together, "the Applicants") seek an order that the claim against them brought by the plaintiff, Constable Horvath, be dismissed with costs. Alternatively, they seek an order that they be held severally liable for only 50% of Constable Horvath's damages, and in the further alternative, if the Applicants are found to be jointly and severally liable for 100% of Constable Horvath's damages, that any pension monies received by him from the Crown ought to discharge the Applicants' liability to such an extent.

BACKGROUND

**2**  The factual matrix giving rise to this application is summarized below.

**3**  Constable Horvath is a member of the R.C.M.P. In April 1994 he was seriously injured in a motorcycle accident while on duty. The accident occurred on a portion of a highway outside Victoria, British Columbia that was supposed to be closed to regular traffic in order to facilitate the bicycle races of the 1994 Commonwealth Games.

**4**  Constable Horvath launched an action in ***negligence*** against Thring, who was the driver of the truck he collided with, General Motors, which owned the truck, three individual R.C.M.P. officers and the Crown on the basis it was vicariously liable in respect of the ***negligence*** of certain R.C.M.P. officers.

**5**  The trial judge apportioned joint and several liability equally between the Crown, on the one hand, and Thring and General Motors on the other. The pertinent portion of the trial judge's order reads as follows:

THIS COURT ORDERS that liability is apportioned equally between, on the one hand, the Defendant, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, and on the other hand, the Defendants, DOUGLAS WALTER THRING and GENERAL MOTORS OF CANADA LIMITED, with liability resting jointly and severally with these Defendants, and all of them;

**6**  Constable Horvath's damages were to be assessed at a later date.

**7**  Unanticipated post-trial developments came to light after the order had been entered and the time to appeal had elapsed. The Crown's new counsel discovered that Constable Horvath had applied for and been approved to receive a disability pension under the Royal Canadian Mounted Police Superannuation Act, [*R.S.C. 1985, c. R-11*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB11-JT99-207R-00000-00&context=). Section 32(b) of that Act provides that an award in accordance with the Pension Act, [*R.S.C. 1985, c. P-6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB71-JW5H-X1GN-00000-00&context=) shall be granted to a person who has served in the R.C.M.P. at any time after a specified date as a contributor and has suffered a disability arising out of or directly connected with his or her service in the force.

**8**  The significance of this discovery is found in section 111 of the Pension Act and section 9 of the Crown Liability and Proceedings Act, [*R.S.C. 1985, c. C-50*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB41-F22N-X4VK-00000-00&context=).

**9**  Section 111 of the Pension Act reads as follows:

No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect in any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other act in respect of the disability of death [emphasis added].

It should be noted that this was the wording of section 111 at the relevant time. Section 111 was subsequently amended effective October 27, 2000.

**10**  Similarly, section 9 of the Crown Liability and Proceedings Act states:

No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made [emphasis added].

**11**  In consequence of the above, the Crown applied in chambers to amend its Statement of Defence to plead, among other things, the above statutory bars. It also sought an order dismissing Constable Horvath's action as against the Crown.

**12**  The chambers judge properly refused both applications on the basis that he lacked the jurisdiction to vary the entered order of the trial judge.

**13**  The Crown next sought to appeal the portion of the trial judge's order, quoted above, and the chambers judge's dismissal of the Crown's applications.

**14**  Madam Justice Newbury, writing in this matter for the Court of Appeal (Horvath v. Thring [*(2001), 93 B.C.L.R. (3d) 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6115-00000-00&context=) (C.A.)), noted the distinction between "liability" and "fault" and held that the finding of "liability" on the part of the Crown in the face of the statutory bars was unlawful. In this respect, she stated at paras. 15 and 16:

In the final analysis, I find that as in the workers' compensation cases, the making of an order of liability in the face of the statutory bars was unlawful, even though no one at the time realized it. The evidence necessary for the raising of the issue was before the Court, which could properly have raised it of its own motion. It is unfortunate the bars were not brought to the Court's attention; but the fact that they were not, and that an order was entered, does not in my view validate an otherwise unlawful order. The statutes referred to above and the interests of justice require that the appeal be allowed from Hardinge J.'s order....

I would order that the first operative paragraph of Hardinge J.'s order be amended to read as follows:

THIS COURT ORDERS AND DECLARES that the defendant, Her Majesty the Queen in Right of Canada, is 50 percent at fault and that the defendants, DOUGLAS WALTER THRING and GENERAL MOTORS OF CANADA LIMITED, are 50 percent at fault for the accident referred to in the amended statement of claim;

**15**  In her reasons Madam Justice Newbury remarked that a good portion of the respondents' argument on appeal addressed the consequences which would flow to the parties if Constable Horvath's action against the Crown were dismissed. In that context, she cautioned:

...nothing in these Reasons should be taken as a comment one way or another on issues of liability (whether joint and several or otherwise), contribution or indemnity as between the Crown and its co-defendants or as between the plaintiff and any defendant.

ISSUES ON THIS APPLICATION

**16**  Put simply, the issues on this application are whether, as a result of the decision of the Court of Appeal, the Applicants are liable to Constable Horvath and, if they are, the extent and nature of their liability.

**17**  The main argument advanced by the Applicants has two components.

**18**  First, they contend that the statutory bars against suit contained in section 111 of the Pension Act and section 9 of the Crown Liability and Proceedings Act do not apply unless a pension or compensation is "paid or payable" to Constable Horvath. The Applicants point out that the Pension Act stipulates that in order for a pension award to be "payable", an application for the pension benefit must be made. They assert that from this it follows that the statutory bars were not operative at the time of the accident but were triggered subsequently when Constable Horvath made an application for pension benefits in relation to his injuries sustained in the accident. In effect, they say that Constable Horvath's actions caused the statutory bars to become operative. The Applicants go on to argue that the act of Constable Horvath applying for a pension award is equivalent to his having executed a release of liability in favour of the Crown in exchange for Crown compensation in the form of a disability pension. Alternatively, they say that Constable Horvath agreed as a statutory term of his employment, to release the Crown from tort liability in exchange for his entitlement to such benefits.

**19**  The second feature of the Applicants' chief argument is that the Crown, Thring and General Motors were joint tort-feasors as distinct from several concurrent tortfeasors. It is a well-established principle and not disputed in this case that the release of one joint tortfeasor releases all other joint tortfeasors. The underlying rationale is that where there is a joint tort, there exists only one indivisible cause of action and therefore a release of one joint tortfeasor constitutes a release of all. The Applicants assert that Constable Horvath's alleged release of one joint tortfeasor, i.e. the Crown, extinguished the liability of all the joint tortfeasors, including the Applicants. It should be noted that the consequence which flows from the execution of a release in circumstances where there are joint tortfeasors does not flow where there are several concurrent tortfeasors. The release of one of several concurrent tortfeasors is not a release of all. (See e.g. Dixon v. British Columbia [*(1980), 128 D.L.R. (3d) 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1BM-00000-00&context=) (B.C.C.A)).

**20**  I will first address the Applicants' assertion concerning Constable Horvath's alleged release of the Crown.

**21**  Under the Pension Act, a pension award is not said to be "payable" unless an application for it has been made. However, the application can be made either by the individual or by another on his or her behalf. Thus, the Pension Act expressly contemplates a pension becoming "payable" where the applicant does not actually make the application. In the context of the Applicants' argument, this would mean that the statutory bars could conceivably apply without any overt conduct being carried out by the pension applicant. Moreover, the Pension Act is clear that there are two pre-requisites that must be satisfied in order for a pension award to become payable. First, an application must be made by or on behalf of the applicant as mentioned above and second, the application must then be reviewed and approved by the appropriate committee established under the statutory scheme. It is only at that stage that a pension award becomes "payable" under the Pension Act.

**22**  The key resulting points are that a pension may become payable even where a pension applicant has himself or herself taken no steps to apply for it and an applicant's actions in and of themselves would never be sufficient to render the pension award "payable" for the purposes of the Pension Act. As well, it is important not to lose sight of the fact that the notion of a pension being "payable" is not embodied in section 111 of the Pension Act. The statutory bar under section 111 applies where a pension "is or may be awarded" as distinct from section 9 of the Crown Liability and Proceedings Act which applies when a pension "has been paid or is payable".

**23**  In any event, the pension application process set out in the Pension Act is largely procedural and, in my view, is not intended to establish the substantive qualifications which are to be met in order to receive a pension award. The substantive qualifications are found in section 32(1) of the Royal Canadian Mounted Police Superannuation Act. As mentioned earlier, that Act stipulates that an award in accordance with the Pension Act "shall be granted to or in respect of" a member of the R.C.M.P. who has suffered a disability where the injury resulting in a disability arose out of or was directly connected with that individual's service in the force. Madam Justice Newbury articulated entitlement this way:

Once it is shown the plaintiff was or is a member of the R.C.M.P. and has been injured, he is entitled, or "may be entitled" in future to an award, and the statutory bar operates.

**24**  It follows that upon the occurrence of the accident it could be said that a pension "may be awarded" to Constable Horvath for the purposes of section 111 of the Pension Act.

**25**  Based on the foregoing, I find the contention that Constable Horvath's act of applying for a pension award had the effect of making the pension "payable" and thereby triggered the statutory bars which, in turn, was tantamount to his granting a release, to be ill-conceived. In a similar vein, I find that Constable Horvath cannot be said to have given a release to the Crown by virtue of the statutory terms of his employment contract.

**26**  I would add that there is a fundamental conceptual distinction between an individual negotiating a bargain in which he agrees to give a release of his legal rights and the application of statutory immunity from legal action. The applicable sections of the Crown Liability and Proceedings Act and the Pension Act do not speak of an individual releasing the Crown; they stipulate that "no action lies" against the Crown. To my mind, these statutory bars against suit are more analogous to Constable Horvath giving a covenant not to sue than they are to his granting a release. This distinction is recognized as a legitimate one at common law and is asserted because, unlike a release, the effect of a covenant not to sue one joint tortfeasor did not operate to extinguish the joint cause of action and therefore did not extinguish the liability of the other joint tortfeasors.

**27**  Even if it could be said that Constable Horvath had released the Crown, that finding would not have the effect of extinguishing the Applicants' liability. That is because I have concluded that the Crown, Thring and General Motors were not joint tortfeasors in any event.

**28**  There are three situations which may give rise to a joint tort:

1. where one is the principal of or is vicariously liable for the other;
2. where a duty imposed jointly is not performed; or
3. where there is a concerted action between two or more individuals to a common end.

It is this third variety that the Applicants say is applicable in the case at bar.

**29**  In describing the third category of joint tort John G. Fleming, in The Law of Torts, (8th ed., Sydney: Law Book Company Limited, (1992) writes at 255:

The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of common design... Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise they are committing a tort.

Cited with approval in Botiuk v. Toronto Free Press Publications Ltd. [*(1995), 126 D.L.R. (4th) 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K6-00000-00&context=) (S.C.C.).

**30**  One approach to assessing whether individuals are joint tortfeasors, is to see whether the cause of action against each tortfeasor is the same. If the same evidence would support an action against each, they are joint tortfeasors. (See Scarmar Construction Ltd. v. Geddes Contracting Ltd. [*(1989), 61 D.L.R. (4th) 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B07K-00000-00&context=) (B.C.C.A.)).

**31**  In the case of joint tortfeasors there is only one tortious act, omission or course of conduct; it is committed by one tortfeasor on behalf of or in concert with another(s). Both concurrency in causation and an element of common enterprise are needed. The common enterprise often involves illegality although that is not an essential ingredient. The concept of a "concerted action" between two or more tortfeasors indicates that the action or enterprise has been planned, arranged or agreed upon between the parties acting together pursuant to some design.

**32**  In this case, the Crown's ***negligence*** is founded on conduct independent of the conduct forming the basis of the Applicants' ***negligence***. Entirely different allegations of ***negligence*** were made against Thring than those alleged against the R.C.M.P. officers and, vicariously, the Crown. More importantly, the trial judge found that the Crown on the one hand and the Applicants on the other were responsible for separate torts although those torts did combine to create the same damage. I find that the same evidence would not have supported Constable Horvath's action against both the Crown, Thring, and General Motors. I find also that the defendants in this case did not act in concert with each other in the commission of their respective torts. I conclude therefore that the Crown and the Applicants were not joint tortfeasors.

**33**  Accordingly, the Applicants' primary argument fails on both grounds.

**34**  The Appellants' alternate argument is that by "releasing" the Crown from liability, Constable Horvath thereby precluded the Applicants from being able to obtain contribution from the Crown and that he therefore ought not to be entitled to look to the Applicants for the portion of the damages caused by the fault of the Crown. They assert that Constable Horvath should only be permitted to recover from them 50% of the damages.

**35**  In the further alternative, they contend that any monies received by Constable Horvath as disability pension benefits on account of his injuries suffered in this accident, ought to discharge the Applicants' liability to such an extent.

**36**  In the course of this aspect of their argument, the Appellants state that the Crown has taken the position that the Applicants have no right to contribution from the Crown in respect of any portion of the damages. The Applicants' reasoning concerning the contribution point was not fully articulated in their argument, but I surmise that it is based on the premise that in order for one tortfeasor to obtain contribution from another tortfeasor, the tortfeasor in respect of whom contribution is sought must be liable to the plaintiff. The issue of the Applicants' entitlement to seek contribution from the Crown was not before me, and so far as I am aware, has not been resolved.

**37**  A logical starting point in addressing the Applicants' alternative arguments is Section 4(2) of the ***Negligence*** Act, *R.S.B.C. 1996, c. 333*. It provides:

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

**38**  Where a tortfeasor who is found to be partially at fault for a plaintiff's loss is immune from suit by operation of statute, the liability of the remaining tortfeasors remains joint and several. In Parkland (County) No. 31 v. Stetar, [*[1975] 2 S.C.R. 884*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0DW-00000-00&context=), the Supreme Court of Canada held that a plaintiff whose injuries were caused 25% by a municipal defendant which was immune from suit by virtue of a limitation period, was entitled to recover 100% of his damages against the remaining defendant despite the fact that the remaining defendant had no right of contribution from the immune tortfeasor. The rationale was explained by Dickson J. this way at 899:

It is fundamental, however, to tort law that a plaintiff can proceed against any one of a number of joint or several tortfeasors; there is no duty upon him to sue all those whom he believes contributed to his hurt. He may elect to recover the full amount of his damage from a tort-feasor only partly to blame and that tort-feasor, prior to the enactment of Section 4 (1)(c) of the Tort-Feasors Act, had no right of contribution from any other person. Section 4 (1)(c) and its counterpart in other jurisdictions have ameliorated the common law in that the right to contribution has now been recognized; **however, even in those cases in which for some reason the right to contribution does not exist, the victim retains the right of full recovery from the tortfeasor whom he has sued** [citations omitted; emphasis added]; (pp. 898-899)

**39**  The Appellants rely in part on Tucker (Guardian ad Litem of) v. Asleson [*(1993), 102 D.L.R. (4th) 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M387-00000-00&context=) (B.C.C.A.). One of the issues before the Court in Tucker was whether the plaintiff's pre-trial settlement with one of the defendants (and their insurers) severed the joint and several liability otherwise imposed on the remaining defendants by section 4 of the ***Negligence*** Act. In Tucker it was argued by one of the remaining defendants that the plaintiff's release meant that the plaintiff could only claim against such remaining defendant the portion of the judgment attributable to it. This is along the lines of the argument advanced by the Applicants in the case at bar. That argument was rejected by the Court in Tucker at both levels. Madam Justice Southin, speaking for the majority, writes at 575-76:

In my opinion, s. 4 is a "stand alone" section.

Bearing in mind that true joint tortfeasors are a rare occurrence, I ask whether the legislature could have intended that the right of contribution among several concurrent tortfeasors would be dependent upon the plaintiff's decision to sue or release one of them or was simply dependent on what the court, in proceedings to which the several concurrent tortfeasors were parties, found as their respective faults.

To hold the former would mean that after the word "but" should be implied some such words as "if the person suffering the damage or loss has a cause of action against both" and to add to it at the end "but if the person suffering the damage or loss has released his cause of action against one, that one is not liable to contribute to the other".

To my mind that does not make sense. I think the right of contribution and indemnity among several concurrent tortfeasors is independent of what the injured person does if, in fact, damage or loss has been caused by the fault of two or more. A finding in an action between the person suffering the loss and one of the several concurrent tortfeasors that the latter has caused some part of the damage by his fault, makes that person liable to the person suffering the loss for the whole of the loss, **subject to deduction for what that person has received from the released tortfeasor**, but does not prevent the tortfeasor who was sued from maintaining his claim for contribution, whether in that action or a separate action. In the first action, it is quite unnecessary for the court to make any division of fault but in the proceedings for contribution it must do so in order to implement the statute.

If one accepts these propositions, then in this case the act of the plaintiff in releasing the Tuckers did not affect in any way the right of the defendant to claim over against them [emphasis added].

**40**  The Applicants assert that based on the reasoning in Tucker and in particular the portion given emphasis in the above quotation of Madam Justice Southin, they are entitled to a deduction equal in value to the pension benefits to be paid to Constable Horvath by the Crown.

**41**  At the heart of the Applicants' argument is the unpopular spectre of over compensation or even double recovery on the part of Constable Horvath which the Applicants contend would result if he were to receive his pension benefits as well as his damages in full from the Applicants. The Applicants say that in order to prevent the prospect of double or over compensation, the extent of their liability ought to be discharged by the amount that Constable Horvath receives from the Crown by way of a pension or the extent of their liability should be limited to 50% of the damages only. They assert that the latter outcome is also justified on the ground that it was Constable Horvath's actions which effectively "released" the Crown from liability. I have already rejected the Applicants' characterization of Constable Horvath having released the Crown and need not revisit the matter further other than to say that in Tucker the Court of Appeal approved the trial judge's finding that there was no distinction between a plaintiff losing his right to sue due to a statutory limitation bar and a plaintiff losing his right to sue by settling with or releasing a tortfeasor.

**42**  The Applicants seek to distinguish the Parkland case on the basis that there the plaintiff did not receive compensation from the immune tortfeasor whereas in the case at bar, Constable Horvath may receive pension benefits from the Crown. In this regard it is significant that the Court in Tucker found that the plaintiff's settlement and release did not sever the joint and several liability imposed on the defendants under the ***Negligence*** Act nor did it reduce the extent of the remaining defendants' liability to something less than 100%. I do not consider there to be a legitimate basis to distinguish Parkland in this case. Nor do I find there to be a principled basis to restrict the extent of the Applicants' liability to 50%. To do so would deprive Constable Horvath of his rights under section 4(2) of the ***Negligence*** Act. Even if it were determined that the Applicants have no right of contribution against the Crown, they remain liable to Constable Horvath for the entirety of the damages.

**43**  In general terms, an injustice would occur if a plaintiff were to receive settlement funds from one tortfeasor and those funds were not taken into account in relation to the remaining tortfeasor's payment of damages so that the plaintiff ultimately received more than the quantum of damages to which he is entitled. As a matter of equity, such an outcome is ordinarily offensive. However, in this case Constable Horvath has not received any pension monies and payment of his pension will not materialize until he is released from service. The contention that a contingent future entitlement to disability pension benefits is in the character of the payment of a portion of damages or settlement funds has obvious conceptual difficulties. It is also the significant distinguishing factual feature between this case and Tucker. The extensive jurisprudence which would be relevant about whether Constable Horvath's pension benefits are properly deductible from his damages was not argued on this application and both parties appeared content to leave that issue to the trial judge on the determination of damages.

**44**  Moreover, in this case there is considerable doubt about whether Constable Horvath stands to recover anything more than the damages he is awarded even though he may receive disability pension benefits. This is because sections 25 and 26 of the Pension Act have incorporated a mechanism to address the prospect of overcompensation. The combined effect of these sections is to reduce the amount of a claimant's disability pension where such claimant collects damages in an action in respect of the same injuries.

**45**  Constable Horvath's counsel submitted that under the Pension Act, Constable Horvath's pension would be deducted dollar for dollar by the amount of damages: that was not disputed by counsel for the Applicants. If that were the case, then Constable Horvath could receive full compensation for his loss only by receiving 100% of his damages from the Applicants.

**46**  The Applicants complain that at the end of the day the Crown may not pay any form of compensation to Constable Horvath even though it was 50% at fault. While that may not appear to be a fair result from the perspective of the Applicants, from the stand point of overall fairness, the protection of Constable Horvath's entitlement to be fully compensated for the tortious acts of the defendants must be the paramount consideration.

**47**  In conclusion, I find that the Applicants are jointly and severally liable to Constable Horvath for 100% of the damages to be assessed in this matter. It remains open for the parties to argue before the trial judge assessing damages whether the nature of Constable Horvath's pension is such that a credit or deduction ought to be made in the event that the pension amount is not reduced dollar for dollar by the damages he is ultimately awarded.

**48**  Constable Horvath is entitled to the costs of this application at scale 3.

BALLANCE J.

**End of Document**

[***Hunt (Guardian ad litem of) v. Szirmay-Kalos, [2005] B.C.J. No. 737***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0DX-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Martinson J.

Heard: October 13 - 15, 18 - 22 and 25 - 28, and

November 25 - 26, 2004.

Judgment: April 5, 2005.

Vancouver Registry No. C996293

**[2005] B.C.J. No. 737** | 2005 BCSC 496 | 138 A.C.W.S. (3d) 380

Between Angel Marie Hunt, an infant, by her mother and Guardian ad Litem, Angela Christine Hunt and the said Angela Christine Hunt, plaintiffs, and Dr. Tibor Szirmay-Kalos, defendant

(197 paras.)

**Case Summary**

**Health law — Health care professionals — Particular professions — Doctors — Liability (malpractice) — *Negligence* — Failure to provide care — Failure to inform — Administration and prescription of drugs — Causation — Standard of care — Professional responsibility — Professions — Health care — Doctors — Professional duties — Duties of care — Tort law — *Negligence* — Duty of care — Causation — Causal connection — Evidence and proof.**

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| Action by Hunt for damages against the defendant obstetrician Szirmay-Kalos for medical malpractice. Hunt had surgery to remove a portion of her colon on May 1, 1997 when she was 31 weeks pregnant. The colon perforated during surgery. The surgeon asked Kalos to assess the situation and he decided, in consultation with a specialist, not to deliver. On the morning of May 2 a fetal heart monitor strip showed signs of fetal distress. Kalos decided again not to deliver after he consulted with the same specialist. The baby was delivered on May 4 by cesarean section and was born with a catastrophic brain injury. Hunt claimed that Kalos, who performed the cesarean section, caused or contributed to the injury. She submitted that Kalos should have performed the delivery on May 2 because of the severity of the baby's condition, as disclosed by the monitor. The second claim was that, once Kalos decided not to deliver, he failed to take steps that would have improved the baby's condition. He should have told the specialists who looked after Hunt's health about the severity of the baby's condition. They could have improved her health by using a human protein solution known as albumin earlier. That would have improved the baby's condition and lessened her injury.  HELD: Action dismissed.  Hunt did not succeed on either branch of her first claim in ***negligence***. Kalos recognized the seriousness of the baby's condition. He was faced with a very difficult and unusual situation. He sought a second opinion from an expert perinatologist. Kalos considered the feasibility of proceeding with a cesarean section when faced with the strip on May 2. Based on information that was available to him at the time he concluded that performing this procedure was not a viable option given his assessment of the risk to Hunt. He appropriately exercised his clinical judgment. He balanced the risk to the mother against the risk to the baby and took into account the general obstetrical practice of not to endanger the mother's life forthat of the baby. Kalos was therefore not negligent when he decided not to perform the cesarean section on May 2. As for the second claim Kalos did not fail to communicate the seriousness of the baby's condition. Hunt did not adduce sufficient evidence to support an inference of causation. The doctors who treated her used treatment that was intended to stabilize her. They did not initially use albumin due to concerns about the use of a human blood product due to her condition. There was no causal connection between the timing of the use of the albumin and the baby's condition at birth. |

**Counsel**

Counsel for the Plaintiffs: N.H. Smith, Q.C.

Counsel for the Defendant: K.J. Jakeman and S.M. Denholm

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| **MARTINSON J.** |

INTRODUCTION

**1**  Angela Hunt's daughter, Angel Hunt, was born with a catastrophic brain injury on May 4, 1997 at the Prince George Regional Hospital. She claims on her behalf and on behalf of her daughter ("the plaintiffs") that the ***negligence*** of Dr. Szirmay-Kalos ("the defendant"), the obstetrician who performed the caesarean section, caused or contributed to the injury.

**2**  In summary, Ms. Hunt had surgery on May 1st to remove a portion of her colon when she was 31 weeks pregnant. The colon perforated during the surgery. The surgeon asked Dr. Kalos to assess the situation, and in consultation with a specialist at B.C. Women's Hospital, Dr. Kalos decided not to deliver the baby. On the morning of May 2nd, a fetal heart monitor strip ("the strip") showed signs of fetal distress. Dr. Kalos again decided not to deliver the baby after consulting with the same specialist. The baby was delivered by caesarean section on May 4th.

**3**  In order to prove ***negligence*** the plaintiffs must prove that Dr. Kalos owed a duty of care to them (which is admitted), that there was a breach of that duty and that the breach caused or materially contributed to Angel's injury. Ms. Hunt originally alleged that Dr. Kalos was negligent in not delivering the baby on May 1st, at the time of the colon surgery; that allegation was not pursued at trial. Rather, she advanced two separate bases for the finding of ***negligence***.

**4**  The first (Claim One) is that Dr. Kalos should have performed a caesarean section on the morning of May 2nd. The plaintiffs acknowledge that Dr. Kalos had to balance the risks to the mother and the risks to the baby and that, in obstetrics, the mother's life should never be risked for that of the baby. However, the plaintiffs argue that here Dr. Kalos totally missed the severity of the condition of the baby as evidenced by the fetal heart monitor and that he should have performed a caesarean section as Ms. Hunt was not too sick to tolerate that surgery.

**5**  With respect to that claim, Dr. Kalos says that he properly exercised his clinical judgment. He had an expertise in interpreting fetal heart monitor strips and knew the significance of this strip. He appropriately sought a second opinion from specialists throughout the process because of the highly unusual nature of the case. He followed their advice. Dr. Kalos felt that Ms. Hunt was critically ill and that doing a caesarean section would put her at a prohibitive risk of dying.

**6**  The second claim (Claim Two) is that even after the decision was taken not to perform the caesarean section, Dr. Kalos negligently failed to take steps that would likely have improved the baby's condition. That is, he should have told the specialists who were looking after the mother's health about the severity of the baby's condition. They could have improved the mother's health earlier by administering albumin (a human protein solution). That would have improved the baby's condition and avoided or lessened her injury.

**7**  With respect to Claim Two, Dr. Kalos says that he did communicate the baby's condition to other specialists. Even if he had not done so, there is no causal link between that failure and the injury to the baby.

**8**  It is tragic that Angel Hunt suffered this catastrophic injury. This injury has also caused great and continuing difficulty for her mother, Ms. Hunt, who loves her daughter very much. However, I am not satisfied that Dr. Kalos was negligent.

**9**  I did not come to this decision lightly. As the Court said in Smith v. Grace, [*[2004] B.C.J. No. 583*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=), [*2004 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=), one of the hardest tasks of a judge is to dismiss the claim of an innocent, brain-injured child. The mystery of birth and its complications will continue to perplex medical professionals, judges and lay people alike. It is only when the complications are caused by the fault of the attending medical professional that the courts can intervene to provide compensation.

**10**  I will explain my reasons for concluding that the plaintiffs' claims must be dismissed under the following headings:

1. THE CIRCUMSTANCES
2. THE CLAIMS
3. CLAIM ONE
4. RISK TO ANGEL HUNT - ARGUMENTS OF THE PLAINTIFFS AND DEFENDANT
5. The Fetal Heart Monitoring Strip
6. Communications with Dr. Farquharson
7. Communications with Other Professionals
8. Dr. Kalos' Description of the Baby's Condition
9. Communications with Ms. Hunt
10. RISK TO ANGELA HUNT - ARGUMENTS OF THE PLAINTIFFS AND DEFENDANT
11. Overview
12. The Evidence

i) Extent of the Risk

ii) Clinical Situation

a) Infection

b) Haemodynamic Stability

c) Clotting

d) Adult Respiratory Distress Syndrome (ARDS)

1. ANALYSIS
2. Legal Principles
3. Application of the Legal Principles i) Did Dr. Kalos recognize the seriousness of the baby's condition?

ii) Could Ms. Hunt have undergone a caesarean section on the morning of May 2nd?

1. Conclusion
2. CLAIM TWO
3. The Plaintiffs' Position
4. The Defendant's Position
5. Conclusion
6. THE RESULT
7. THE CIRCUMSTANCES

**11**  Ms. Hunt, then 20 years old and about 31 weeks pregnant, was suffering from a rare and serious bowel disorder. As a result she had a number of difficulties during her pregnancy. She was admitted to the hospital on April 28, 1997 with a grossly swollen abdomen. On May 1st her doctor decided that she should undergo an urgent colectomy, which involved having a large portion of her colon removed.

**12**  The colon was so thinned that during the surgery it fell apart when handled by the surgeon. The entire abdominal cavity was contaminated with stool, and feces spilled over the surgical drapes and onto the floor. The fecal contamination had to be cleaned up before the operation could continue. It was at this point that the surgeon consulted Dr. Kalos.

**13**  Dr. Kalos had never been faced with such a situation and decided to consult with a specialist in perinatology at B.C. Women's Hospital in Vancouver. Perinatology is a sub-specialty of obstetrics and gynaecology and deals with maternal/fetal medicine. B.C. Women's Hospital is a tertiary care centre for very high risk pregnancies and very high risk diseases. Dr. Kalos discussed the matter with Dr. Farquharson, a perinatologist.

**14**  Dr. Kalos and Dr. Farquharson decided not to remove the baby by caesarean section. Ms. Hunt was then placed in the intensive care unit. Dr. Kalos directed the use of a fetal heart monitor to monitor the baby's condition. Doing so involves placing two belts over the mother's abdomen, one where the fetal heart is best heard, and the other one close to where the uterus is best recorded. Because there is a connection between the fetal heart and fetal brain, changes in the heart pattern may indicate problems relating to the brain.

**15**  The initial fetal heart monitoring was reassuring, or at least any non-reassuring features could be attributed to other factors such as medication, rather than fetal distress. There was a change for the worse on the morning of May 2nd, with the onset of fetal heart decelerations. There were recurrent late decelerations that got worse until what is known as an undulating pattern emerged.

**16**  Dr. Kalos was called in to assess the situation and arrived at the hospital at about 7:10 a.m. He analyzed the strip. He called Dr. Farquharson after monitoring the situation for a period of time. They again decided not to deliver the baby. They say Ms. Hunt was in critical condition and it would have been too dangerous to do so.

**17**  Dr. Farquharson advised Dr. Kalos to discontinue the fetal monitoring that morning. Instead, the fetal heart was monitored by intermittent auscultation, which involves listening to the baby's heart periodically without electronic assistance. The results of that monitoring showed that the baby's heart rate was in the normal range.

**18**  During the colectomy the treating anesthesiologist, Dr. Macpherson, noted unusual elevations of Ms. Hunt's heart rate and blood pressure. She had difficulty waking her up after the surgery. Ms. Hunt had a very low white blood count, 2.8, following the surgery. The normal range is 4 to 10.

**19**  After the colectomy surgery Dr. Kalos ordered a vaginal examination every two hours and the administration of magnesium sulphate to prevent pre-mature labour. The administration of magnesium sulphate was to be stopped if her urine output was low, below 30 CCs an hour, because low urine output indicates poor tissue perfusion. Poor tissue perfusion means that there is poor blood circulation - with the oxygen and nutrients the blood contains - to the tissues. The brain is preferred and if there is not enough to go around, other organs, such as the kidneys, will shut down.

**20**  The magnesium sulphate was stopped at 2:00 a.m. for that reason. When Dr. Macpherson saw Ms. Hunt at 4:00 a.m. she noted the poor perfusion and began to increase her volume by giving her boluses (large amounts) of crystalloid fluid. She needed this volume to perfuse her brain, heart, kidneys and the baby's placenta. At 5:00 a.m. Ms. Hunt reported the highest level of pain imaginable but still had low blood pressure and a high heart rate. At 8:30 a.m. Ms. Hunt's blood pressure dropped and she was given more fluid.

**21**  Shortly after 5:00 p.m. on May 2nd Ms. Hunt's central venous pressure was zero. She still had poor urine output. At about 6:00 p.m. Dr. Macpherson gave albumin to Ms. Hunt. This was because her albumin level was 13, which is very low. She described albumin as a human protein solution that is given to try to help retain fluid in the blood vessels. It is collected from human donors and prepared, bottled and infused into the patient.

**22**  Ms. Hunt's situation, including her perfusion, improved. By 9:55 p.m. her fluid status was much improved; she had a central venous pressure of 12 and her urine output was hundreds of CCs an hour.

**23**  That same evening the doctors discovered that the baby was in a footling breech position, meaning that the baby would pass through the birth canal feet first. Dr. Kalos again consulted with a perinatologist at B.C. Women's Hospital.

**24**  On May 3rd Ms. Hunt was found to be what is described as volume overloaded and a chest x-ray showed evidence of early pulmonary edema, meaning that there is a build-up of fluid in the lungs. Ms. Hunt's situation was monitored until Dr. Kalos, again in consultation with B.C. Women's Hospital, decided to deliver the baby by caesarean section on May 4th. At that time her cervix was opening up more than before and there was evidence that the membranes, which cover the baby when the baby is inside with the amniotic fluid, were bulging. This is a sign that Ms. Hunt was "getting more and more into labour."

1. THE CLAIMS
2. CLAIM ONE
3. RISK TO ANGEL HUNT - ARGUMENTS OF THE PLAINTIFFS AND DEFENDANT

**25**  The plaintiffs say that there are several factors that support their assertion that the severity of the baby's condition was totally missed by Dr. Kalos. They are: the severity of the strip itself; non communication of the severity of the strip to Dr. Farquharson; Dr. Kalos' positive description of the baby's condition; non communication of the severity of the strip to other specialists; and his dealings with Ms. Hunt.

1. The Fetal Heart Monitoring Strip

The Plaintiffs' Position

**26**  Dr. Dansereau testified on behalf of the plaintiffs. He has been a perinatologist since 1989. He works in Victoria and has a number of positions with the Capital Heath Region: Director of Perinatology; staff obstetrician-gynaecologist; Acting Chief, Department of Obstetrics and Gynaecology; and Medical Director, Child/Youth & Maternal Health Program. He is also a clinical associate professor of obstetrics and gynaecology at the University of British Columbia and a consultant in maternal/fetal medicine with the Children and Women's Hospital in Vancouver.

**27**  He testified that the baby's heart rate was initially good. However, as uterine activity continued to be abnormal, the fetal heart became more and more worrisome. By 6:00 a.m. on May 2nd it was alarming. There were recurrent late decelerations that got worse until an undulating pattern emerged between 7:00 a.m. and 8:00 a.m. The pattern got worse until the monitor was turned off. Dr. Dansereau testified that this pattern is seen in severely compromised babies, often those who are about to die:

... This fetus is under major stress, and that is turning into a degree of distress where the baby is not able to cope with that level of stress anymore and slowly will decompensate progressively if nothing is done to change the situation.

**28**  With respect to the standard of care expected, Dr. Dansereau said that an obstetrician should have recognized that the pattern was abnormal and very worrisome. Failure to do so is below the standard of care expected from an obstetrician. He said the problem is that, in exercising clinical judgment, the doctor has to have all of the right information:

... the doctors who had to make that decision and who had to balance the pros and cons and the benefits of the baby versus the risk to the mother, did not have all the elements at hand to make that decision. So hence, it could not be a balanced judgment or assessment of the pros and cons. It could not be. And the reason they didn't have that is that they completely missed the fetal distress that this baby had. And this, in my opinion, is totally unacceptable.

**29**  In Dr. Dansereau's opinion, if the full extent of the gravity of the fetal condition could not be completely understood, Dr. Kalos should have been alarmed enough to fax the strip to the perinatologist.

**30**  The plaintiffs say that Dr. Dansereau's view about the strip is supported by the defence experts, Dr. Hudson, an obstetrician, and Dr. Liston, a perinatologist. Both these doctors said that in a normal obstetrical setting, with a strip like this, the obstetrician should consider delivering the baby. Dr. Liston said the strip was "very worrying."

The Defendant's Position

**31**  Dr. Kalos graduated from medical school in Hungary in 1987. He came to Canada to complete his residency in obstetrics and gynaecology and obtained his fellowship in 1995. From 1995 until 2000, he was a consultant obstetrician and gynaecologist in Prince George. He now practices in another province. He testified that he has had significant experience in reading strips. He had extensive experience in his residency, seeing some 20 strips a day. When he was on call he would see even more. Prince George Regional Hospital is a secondary centre for the Province and abnormal fetal heart rates would be referred to the hospital. He would call himself an expert in interpreting fetal heart rates.

**32**  Dr. Kalos emphasized the importance of looking at the whole strip, not just isolated portions of it. He said that reading strips is not an exact science. He testified that in reading strips the whole clinical situation must be taken into account. All of the expert evidence, including that of Dr. Dansereau, supported this view.

**33**  Dr. Kalos said that in interpreting a strip one must ask why the baby is showing the signs that were observed. Changes in fetal heart rate could be related to other factors. For example, certain medications can cause lack of variability because the baby is sleeping or on medication for pain or under a general anaesthesia. Dr. Kalos noted that certain medications like magnesium sulphate, which Ms. Hunt had been given, can cause that type of variation. What is going on with the mother must be considered in interpreting the strip.

**34**  He decided, based on his extensive experience, to put Ms. Hunt on electronic fetal heart monitoring. He saw her at 11:00 p.m. on May 1st and noted some variability in fetal heart rate. He felt that this was "concerning" but just made a mental note of it. He thought that the baby could have been asleep. He felt this was acceptable because of all the medications the mother was on - magnesium sulphate, demorral for pain as well as a sedative - were still circulating in Ms. Hunt's body which can affect the baby and "kind of make the baby sleep." This is not usually a sign of fetal distress. He said that in retrospect, it could be related to the footling breech position.

**35**  When he was called to the hospital on the morning of May 2nd, Dr. Kalos went through all the strips. The earlier strips he felt could be from the magnesium sulphate, coming off the anaesthetics, pain medication and that the baby was still sleeping.

**36**  He did not think that the strip was perfectly normal. However, he had to take the entire clinical scenario into account. He made a decision that he would like to look a little longer and see where they were going. He wrote in his clinical notes on the morning of May 2nd: "Fetal heart rate, poor variability, frequent decelerations. Plan, reassess in a couple of hours."

**37**  While Dr. Kalos said the strip was concerning, he said it was not so concerning that he would risk a caesarean section. He wanted to see if they could help Ms. Hunt's condition by increasing her blood pressure and giving her more fluids to see if this would in turn make the baby's heart recover.

**38**  Dr. Kalos returned long before two hours and saw that the strip indicated the baby's condition was worsening. He called Dr. Farquharson at that time because he was concerned about the fetal heart rate. He emphasized that he did not phone because he did not know what a fetal heart rate looks like. He wanted to make sure that even if this were a definite problem of fetal distress, that there was nothing else, other than improving Ms. Hunt's condition, that could be done to save the baby. He said that this was the only situation in which he has ever phoned for a second opinion.

**39**  Dr. Hudson gave evidence on behalf of Dr. Kalos. He has been an obstetrician-gynaecologist since 1989. He is an assistant professor in the Department of Obstetrics and Gynaecology at the University of British Columbia. He has a special interest in high risk obstetrics.

**40**  Dr. Hudson said that Dr. Kalos met the required standard of care. In reviewing the data he did not think there was any evidence that Dr. Kalos did not consider the baby. He said that the easiest thing that an obstetrician can do is just deliver the baby. In his words, this is "almost a cop-out sometimes." The baby is delivered and the problems are handed over to the intensivist, the anesthetist and the pediatricians. It can be, in his opinion, much more difficult to make a decision to not deliver the baby.

**41**  Dr. Hudson said that the strip, unlike diagnostic tools such as ultrasound or x-ray, is not 100% certain, testifying that:

... fetal monitoring is not an exact science, and we do the best that we can to use fetal monitoring in the whole clinical scenario to decide what is happening in order to make a judgment to make a clinical decision but it is just one piece of the puzzle.

**42**  Dr. Money testified on behalf of Mr. Kalos. She is an assistant professor in the Department of Obstetrics and Gynaecology at the University of British Columbia and is the Division Head of Maternal/Fetal Medicine. She has been an obstetrician since 1993. She also has Fellowship training in infectious diseases and her practice and research focuses on infectious disease complications in obstetrics and gynaecology. She is associated with B.C. Women's Hospital.

**43**  Dr. Money said that at B.C. Women's Hospital they would not have had the fetal heart monitor on in the first place. They would be focusing on maternal resuscitation and would not want to be side tracked by information that is not temporally related. She stated:

... you really have to figure out how you get that mom in her best volume status and haemodynamic status, and fetal heart rate is often not necessarily helpful in sorting that out.

**44**  Dr. Farquharson testified on behalf of Dr. Kalos. He has been a perinatologist since 1982, having completed a Fellowship in Maternal/Fetal medicine. He is an associate professor at the University of British Columbia. He is now the Medical Director of Maternal/Fetal Medicine in the Simon Fraser Health Region. He also practices at B.C. Women's Hospital.

**45**  He gave evidence with respect to the strip as it was on the morning of May 2nd, though he did not look at it until later. He said that it is virtually uninterpretable. He said he found it very difficult to accept any interpretation of the fetal heart rate pattern as being truly indicative of a baby who would require immediate intervention. Dr. Farquharson gave two reasons. First, fetal heart monitoring is primarily designed to monitor at full term and it is significantly more difficult to monitor patterns in a pre-term fetus. Second, this fetus was under heavy sedation as was the mother and keys to fetal health involve assessment of fetal heart rate variability. He said that the fetal heart rate variability is controlled by the central brain structures in the fetus which would have been obtunded (dulled) by the effect of the narcotics and other sedatives Ms. Hunt required. Dr. Farquharson stated:

So I found it very difficult to accept any interpretation of the fetal heart rate pattern as being truly indicative of a baby that would require immediate intervention.

**46**  Dr. Farquharson confirmed that he told Dr. Kalos to turn off the fetal heart monitor.

1. Communications with Dr. Farquharson

The Plaintiffs' Position

**47**  Dr. Dansereau said that there is nothing in the clinical notes to show that Dr. Kalos communicated to Dr. Farquharson the significance of the strip. He said that a competent perinatologist would not likely have advised waiting to deliver the baby if he or she knew how bad the strip really was. He also said that Dr. Kalos should have told Dr. Farquharson that the fetus was dying.

The Defendant's Position

**48**  Dr. Kalos said that he told Dr. Farquharson that he was concerned about the fetal heart rate. He said there was a decreased variability and some decelerations. Dr. Kalos did not recall exactly what else he said to Dr. Farquharson. He tried to convey the concern that "even if the strip related to ... fetal distress, was there anything else they could do."

**49**  Dr. Kalos and Dr. Farquharson concluded there were certain things they had to consider. First, variation in fetal heart rate is not necessarily showing fetal distress. It could be related to other things like maternal conditions, such as the drugs being received. Second, even if the strip did relate to fetal distress, they concluded there was nothing that could be done in the circumstances as it was just too dangerous for the mother to undergo the caesarean section, six to eight hours after she had the previous surgery. In Dr. Kalos' words:

... we decided even so, ... this could be an alarming sign. The best thing to do is - because we can't do anything about it - turn the heart monitor strip off and monitor the baby intermittently, which means that we just listen to the baby, every half hour to an hour ...

**50**  Dr. Farquharson was asked if he recalled any of the information that was exchanged between him and Dr. Kalos. He said that it is difficult to recall it all, but it was such an outstanding case, certainly in his track record and those of his colleagues, that it brought back many memories, probably more than the five years that have gone by would usually permit. He stated:

But I certainly recall discussing with Dr. Kalos that the likeliest diagnosis in this mother was that of septic shock. I certainly recall him saying that the fetal heart rate pattern was non-reassuring and I certainly recall saying to him that in the face of ongoing maternal septicaemia and now compromise to her coagulation, that she was still not an operative candidate and therefore would not recommend intervention for the fetus.

**51**  Dr. Farquharson said that he himself understood the seriousness of the situation. He said that various practitioners differ in terms of their ability to relate a patient's history and clearly it is difficult over the phone to always grasp the total scenario. He however has learned to ask the right questions:

But having been in the business for long enough you learn to ask the right questions: what is that patient's blood pressure; what is her pulse rate; what is the - you know, the fetal heart rate; what is the status of the bowel; have they totally cleansed out her abdomen; what antibiotics is she on. I actually felt very comfortable that Dr. Kalos was able to answer all my questions, certainly to my satisfaction.

**52**  Dr. Farquharson disagreed with Dr. Dansereau's view that Dr. Kalos should have told him the baby was dying. He said it would not have made any difference. His advice was that Ms. Hunt was "undergoing sepsis and coagulation disturbance and probably an operative intervention would have killed her." His evidence was that he has only seen a similar situation once in his career and in that case the mother died.

**53**  Dr. Liston testified on behalf of Dr. Kalos. He completed his Fellowship in Maternal/Fetal Medicine in 1980. He is an associate professor at the University of British Columbia and is the Head of the Department of Obstetrics and Gynaecology.

**54**  He did not think that it was necessary for Dr. Kalos to fax the strip to Dr. Farquharson.

1. Communications with Other Professionals

The Plaintiffs' Position

**55**  The plaintiffs say that the seriousness of the strip should have been communicated to other professionals but it was not. This shows that Dr. Kalos did not recognize the seriousness of the strip.

**56**  They note that Dr. Farquharson agreed that it is reasonable that any interpretation of the strip or any consideration of what it might mean should be communicated to the other physicians for whatever use they may wish to make of that information.

**57**  The plaintiffs note that Dr. Macpherson's progress notes indicate that she believed the fetal heart was still reassuring at 5:00 a.m. on the morning of May 2nd. There is no evidence that anything different was communicated to her.

The Defendant's Position

**58**  Dr. Kalos says that he did communicate through the clinical records. In addition, there were numerous discussions that were not recorded. The plaintiffs own expert, Dr. Dansereau, agreed that unrecorded discussions of this sort do happen.

1. Dr. Kalos' Description of the Baby's Condition

The Plaintiffs' Position

**59**  Dr. Kalos, in the clinical records, described the baby as "stable". The clinical note on May 4th says that the "baby's heart rate during this three day period was quite good." At his examination for discovery he said that before the May 4th delivery he did not expect the baby to have anything wrong with him or her.

**60**  At trial, Dr. Kalos was asked if he was concerned, but did not think that the baby's condition would be that bad. He said: "if you are asking whether I was 100% sure, then my answer is no." The plaintiffs submit that this is something less than the level of concern that Dr. Kalos should have had.

The Defendant's Position

**61**  Dr. Kalos explained his evidence as to what he expected by describing the reassuring heart rate before the caesarean section was performed on May 4th:

... in the previous three days before the caesarean section, after the first postoperative period, the baby's heart was quite well. Most of the time a baby has an insult and ... it's so substantial that it's going to cause an abnormality, most of those babies actually will die if you don't do anything about it. This did not happen, and the rest of the time the baby's heart rate was actually quite good, as much as we can say that by just intermittent listening ...

**62**  By saying that the baby was stable, Dr. Kalos stated that he meant that the fetal heart rate during those times when they were listening was in the normal range of 120 to 160. He said that it should be kept in mind that electronic fetal heart monitoring is not an exact science. However, at that point, he was referring to the previous three days during the auscultation period.

1. Communications with Ms. Hunt

The Plaintiffs' Position

**63**  The plaintiffs submit that if Dr. Kalos had recognized the seriousness of the situation he would have communicated his concern to Ms. Hunt. He did not. The only time that Dr. Kalos discussed the question of risk was when it was determined that the baby was in a footling breech position. That discussion concerned the risk associated with that complication. Dr. Kalos agreed that a patient has to have relevant information about the health of her baby.

The Defendant's Position

**64**  Dr. Kalos said that, with respect to the morning of May 2nd, he is not sure exactly what he said to Ms. Hunt. He would not tell her that the baby was dying unless he was 100% sure because of her medical condition. He was not 100% sure, though he was certainly concerned enough about the heart rate to call for a second opinion. Dr. Kalos stated that the situation and the extent of the risk at the time of the footling breech were clear and that was why he did raise it with Ms. Hunt at that time.

1. RISK TO ANGELA HUNT - ARGUMENTS OF THE PLAINTIFFS AND DEFENDANT
2. Overview

**65**  There were different points of view expressed both with respect to the nature of the clinical situation Dr. Kalos faced and the extent of the risk that Ms. Hunt faced. I will provide an overview of the evidence and arguments of each party before turning to a review of the specific evidence relied on by each.

The Plaintiffs' Position

**66**  Dr. Dansereau said that Ms. Hunt was likely able to undergo a caesarean section. He says that there was an increased risk of mortality but not a prohibitive risk. He put the risk at 1, 2 or 3%. He added that at the very least, that decision is one that requires the input of at least one of the other specialists involved in the case. Those specialists would be the internist, the general surgeon and the anesthesiologist.

**67**  The plaintiffs say that when the reasons for not doing the surgery either on May 1st or May 2nd are examined, they do not support the conclusion that the risk to the mother was too high. They note that on the morning of May 2nd, Dr. Kalos wrote in the clinical notes that Ms. Hunt was stable. They say that his evidence as to what happened is a revisionist history taking into account what was known at the time and later.

**68**  The plaintiffs say that the primary reason advanced for not proceeding with a caesarean section earlier than May 4th was Ms. Hunt's haemodynamic status, as evidenced by her low blood pressure and poor urine output. This was, in fact, corrected on the evening of May 2nd by administering albumin and could have been corrected by giving her albumin sooner. Furthermore, the plaintiffs submit that Dr. Hayashi, a well qualified general surgeon, thought Ms. Hunt was stable enough for surgery on May 2nd.

**69**  The defence relied upon evidence of a blood coagulation disorder, or DIC. That is, Ms. Hunt could bleed to death if surgery were attempted. In fact, Ms. Hunt had abnormal blood coagulation test results on May 4th, when the caesarean section was performed and these were improved from the previous day. On May 2nd there was no evidence of a coagulation problem. To the extent that Ms. Hunt's blood coagulation profile was relevant in assessing the risk associated with a caesarean section, it was actually worse on May 4th, when a caesarean section was performed, than it was on May 2nd, when the defendant says it would have been too dangerous to proceed with a caesarean section.

**70**  Defence experts also rely on the evidence of infection, particularly the low white blood count noted immediately after surgery on May 1st. However, when the caesarean section was performed on May 4th, the risk of infection was also present.

**71**  Dr. Macpherson's report also refers to pulmonary edema, a lung complication, but this did not appear until May 3rd. On May 2nd, Ms. Hunt was breathing normally.

**72**  Dr. Kalos was obviously prepared to run the risk on May 4th when he was concerned about the danger of vaginal delivery of a footling breech presentation. The plaintiffs submit that the evidence simply does not support his assertion that the risk would have been much greater on May 2nd. The fact that he did not run the risk on May 2nd is most consistent with the conclusion that Dr. Kalos did not fully recognize the severity of the baby's condition at that time. Dr. Kalos' failure to recognize the severity of the baby's condition was negligent and caused or contributed to her injury.

The Defendant's Position

**73**  Dr. Kalos says that there was a high risk that Ms. Hunt could die. After the colectomy she was considered critically ill, at high risk for severe sepsis, DIC, and Adult Respiratory Distress Syndrome, ("ARDS"), which can cause suffocation. Dr. Kalos explained ARDS this way:

... the lung is - is unable to oxygenate, unable to exchange the oxygen to the - to the other air particles, and unable to oxygenate the entire body. And what happens is that the patient is just going to suffocate. Even if you put a tube down through the breathing pipe and try to ventilate the patient, you are unable to press the oxygen through ... the adult can die.

**74**  They were concerned that Ms. Hunt could decompensate, or "crash" because her defence mechanisms had been so compromised. On May 2nd he was sure that she was infected. The concerns present on May 1st also existed on the morning of May 2nd.

**75**  The defence says that the evidence shows that Ms. Hunt was haemodynamically unstable.

**76**  Dr. Kalos sought and received the advice of Dr. Farquharson that the risks were too great to intervene. While some test results may not show abnormalities, they represent just a snapshot, rather than the big picture, which Dr. Kalos submits was ominous. Dr. Kalos said that his note that Ms. Hunt was stable meant stable within the context that she was critically ill in the intensive care unit.

**77**  Dr. Kalos did consult with one of the other specialists involved in the case. That was the anesthesiologist, Dr. Macpherson.

**78**  On May 4th the risk of surgical intervention was not as high. Ms. Hunt had been on triple antibiotics for three days which gave the antibiotics time to work. As well, Dr. Macpherson thought that Ms. Hunt showed clinical signs of improvement and would be more likely to tolerate an anesthetic on May 4th. Dr. Macpherson testified that Ms. Hunt would have been less likely to tolerate an anesthetic on May 2nd.

**79**  The defence submits that Dr. Hayashi, the plaintiffs' expert surgeon, did not say that surgery was appropriate on the morning of May 2nd. In any event, both Dr. Farquharson and Dr. Dansereau said that they would not rely on the opinion of a surgeon to determine whether a caesarean section was appropriate.

**80**  All the defence experts say the risk of death was prohibitive. Dr. Macpherson placed the risk of mortality at 30%. Dr. Farquharson put it at 50%. Dr. Money thought the risk was 20% to 30%. This means that there is a reasonable school of thought that says intervention was too risky and another school of thought that it was not. Dr. Dansereau agreed that this is so.

1. The Evidence
2. Extent of the Risk

The Plaintiffs' Position

**81**  Dr. Dansereau testified that Ms. Hunt's condition did not preclude a caesarean section. He said that while she was sicker than the average patient, doctors do caesarean sections all the time in the face of very sick women. He used the example of a woman who has an abruption or placenta previa - both different obstetrical complications that cause the mother to be in a very serious predicament - and bleeds massively. He said that doctors do caesarean sections with a very low risk of complications. The risk of maternal death in those situations is substantially less than 1 percent. He said this:

So I'm conservative by saying that yes, the risk might have been 1, 2 or 3 percent, but it was not 20 or 50 or 80 percent. It was not that kind of high risk of maternal death to a point where any surgery or any intervention would be totally prohibitive.

**82**  Dr. Dansereau was referred to the view of the defence experts that the mother could have died. He said that he could not agree:

I cannot see anywhere in the chart that she was so sick. She was sicker than the average person. The average person going through a caesarean section has a small risk of death. It's probably, it's less than 1 in 1000; it's probably one in many thousands. This patient had a greater risk. It could have been 1%, it could have been 2%, maybe 3%. So it was not 50% or 90%. It's not like something that for sure would have killed the woman. It's a small risk. It's an additional risk ... but it was not, in my opinion, a prohibitive risk.

**83**  Dr. Dansereau agreed in cross-examination that it is not common to do caesarean sections on women in Ms. Hunt's condition. He also agreed that the basis of his opinion was the documents given to him. They were the records of the baby, (including the strip) and Ms. Hunt from the Prince George hospital, the Vernon hospital (where Ms. Hunt resided before moving to Prince George) and the B.C. Children's Hospital. He agreed that in complicated cases on grand rounds (groups of doctors reviewing patients' status) physicians can explain their involvement and not everything will be recorded in the records. He also agreed that records are open to interpretation. He agreed he did not have Dr. Kalos' interpretation of the facts.

**84**  Dr. Dansereau agreed that this is an extraordinary case, but added that if you focus on what happened on May 2nd, it is not so extraordinary. He agreed that while the bowel falling apart can happen with a colectomy, especially with a distended colon, it was the degree that was extreme. He agreed that Ms. Hunt's actual bowel condition was very out of the ordinary. He agreed that the situation Dr. Kalos faced when called in after the bowel ruptured was a "very difficult situation."

**85**  Dr. Dansereau was asked questions about clinical judgment. He agreed that clinical judgment is something gained from education, training and experience. One has to assess individual patients based on their clinical presentation and do a diagnosis and a treatment plan. He agreed that he has had the benefit of looking at this case in retrospect and that it is always easier to consider a case after the fact.

**86**  Dr. Dansereau testified about differing schools of thought on whether to proceed with a caesarean section. He agreed that in obstetrics there are different ways of doing things in many cases and that there are different opinions among the experts:

1. And you'd agree with me in obstetrics, there's often more than one school of thought with respect to the appropriate approach in a case?
2. There are different ways of doing things in many times, in many cases.
3. And you'd agree with me that looking at this case as an example of that, you have told Her Ladyship about what you would do, your school of thought in this circumstance?
4. But this is not where the school of thoughts are equivalent and you can do this or you can do that or plan A, B or C and they are pretty much all equivalent. This is a different situation.
5. Well, I'm going to suggest to you that although you would have proceeded with delivering that infant on the morning of May 2nd, there's a group of respectable perinatologists that would not have. That's what you've seen by looking at these reports, right?
6. That is what I have seen.
7. So what we're talking about is your school of thought and a different school of thought presented by other perinatologists; correct?
8. You may say that.
9. Well you agree with me?
10. Of what?
11. That you're presenting a school of thought, that you think that this approach should have been to deliver that baby on the morning of May 2nd, but there's another group who have a different school of thought that you've seen in the reports?
12. I would agree with you that there are different opinions here among different experts, for sure.

**87**  Dr. Hayashi completed his General Surgery Fellowship in 1988 and a Paediatric Surgery Fellowship in 1990. He is the Head of Division of General Surgery for the Vancouver Island Heath Authority. His evidence was that from the records available Ms. Hunt appeared to remain haemodynamically stable following the colectomy. From a general surgical point of view he saw "no absolute contra-indications" for Ms. Hunt not to be able to withstand a caesarean section later on May 2nd or May 3rd if the obstetrician, Dr. Kalos, had indicated that it was warranted.

The Defendant's Position

**88**  Dr. Kalos testified that taking the risk of septic shock, DIC and ARDS together, at the time of the colectomy, the safest approach was to complete the surgical procedure and then take the mother to the intensive care unit, rather than risk a caesarean section.

**89**  In considering her condition on May 2nd, he said that as a result of all the stresses on Ms. Hunt she could decompensate were a caesarean section attempted. By that he meant that because of all the toxins and bacteria getting into her system, in a patient like Ms. Hunt, who was sick for some time prior to surgery, the immune system is not up to the standard of a 20 year old. Her immune system would fail with the added stress of undergoing a caesarean section.

**90**  Dr. Kalos said that Ms. Hunt had the blood and brain of a relatively healthy body defending against a number of dangers. Looking at the numbers for the heart rate and blood pressure Dr. Kalos stated that one could:

... actually make a conclusion that, yes, that that patient is doing great ... this patient is actually stable. At this point the blood pressure is still not 40 on 20 or something; it still has blood pressure; still the brain is working; you can have a conversation. But you know on the basis of all those things that the patient has a very healthy body which is defending against all those things, but you know that the patient is very close to the edge. If you push the patient a little bit more [the patient] can die because it can decompensate ... eventually you will use everything up and then there is nothing to go by ... and then the patient dies.

**91**  He agreed in cross-examination that the risk of opening up the uterus was still there on May 4th, but he said that the risk was substantially decreased. He agreed that Ms. Hunt did not have an infected uterus requiring a hysterectomy on May 4th even though she had been warned of that possibility. He acknowledged that tissue samples taken after the caesarean section confirmed that contamination was still present in the abdominal cavity. However, Dr. Kalos says that on May 4th Ms. Hunt had been on antibiotics for three days and they take time to work.

**92**  He also emphasized that it is not the specific measurements of, for example, blood pressure, coagulation time or urine output at any given time that are necessarily determinative of the safety of undertaking a caesarean section at that time:

[It] is not necessarily the numbers at any time which you look, the knowledge what you have to know what is going to come. Sometimes numbers take a little longer to show up. So generally you would expect something to happen, but that might not show up on paper [until] a day or so later.

**93**  He used the evidence that on the second morning Ms. Hunt's clotting time was starting to get worse as an example. On the third morning it was substantially worse. He said that this shows that one of the concerns they had, that she might have problems with clotting and bleeding, especially concerning a future surgery, was already starting to show up.

**94**  Dr. Kalos testified that when he said that Ms. Hunt was doing well, he meant that she was doing well considering that she was critically ill and in an intensive care unit setting. She comprehended. Her brain was oxygenated well. Her vital signs were better and her blood pressure was stabilized.

**95**  Dr. Liston disagreed with Dr. Dansereau's view that the risk of death on May 1st was 1, 2 or 3%. He said it is not often that a doctor is faced with doing a caesarean section in such a complex and difficult situation as this. He estimated the risk of death as in the region of 20% to 30%.

**96**  Dr. Liston also disagreed with Dr. Dansereau's view that at B.C. Women's perinatologists do caesarean sections in fields that are more grossly infected than that facing Dr. Kalos. He said that while they do operate in the presence of infection localized to the uterus or the lining of the uterus, in his 35 years of practice he has never been faced with the gross fecal contamination that this situation presented. He referred to it as "absolutely massive compared to what we see even on rare occasions."

**97**  Dr. Macpherson testified on behalf of Dr. Kalos. She has been an anesthesiologist since 1992. Before that she spent two years as a surgical resident and one year as an internal medicine resident. She said that if at any time between May 1st and 3rd, the advice had been to proceed with a caesarean section, Ms. Hunt might have survived, but would have been very unstable, with rocky intra- and post-operative courses. She testified that there was a significant risk of overwhelming sepsis with such potential after-effects as ARDS and multisystem organ failure.

**98**  She said that administering and maintaining anaesthesia would have been potentially dangerous for both Ms. Hunt and the baby. Ms. Hunt would not have tolerated a standard anesthetic, not even a standard obstetrical one, because of volume depletion. Without adequate volume resuscitation Ms. Hunt was relying on her own ability to keep as much blood pressure as possible. Administering an anesthetic would have reduced her ability to do that and her blood pressure would have dropped precipitously. If that happened, placental perfusion would diminish, with consequent risk to the baby.

**99**  She said that Ms. Hunt would probably not have tolerated high concentrations of inhaled anaesthetics, exposing her to the risk of intraoperative awareness. Dr. Macpherson said that in addition there was a very real risk of developing an infection in the uterus that could potentially have left Ms. Hunt unable to bear more children.

**100**  Dr. Macpherson testified that she would say the mother had a 100% chance of developing a major complication and probably a 30% risk of mortality. She said this is because there were various things going wrong. There were many problems which would interrelate, a situation upon which drugs used in the operating room would impact negatively. Dr. Macpherson also noted that due to Ms. Hunt's fragile condition, a further insult could well have pushed her "even further down the slope."

**101**  She said in cross-examination that if there had been surgery before May 4th pulmonary edema "might well have happened in the operating room given what [her] drugs were going to do to [the mother's] heart's ability to contract properly." Dr. Macpherson testified that that would be the worst time for it to happen.

**102**  Dr. Farquharson said that in this particular case he was so concerned with what Dr. Kalos had described that he felt every effort should be made to save Ms. Hunt's life and not further compromise her condition. From that perspective the fetal condition was of "significantly less concern with an unstable mother on the operating table."

**103**  His concern for Ms. Hunt was that she had a significant risk of losing her life. He said that from the perspective of the fetus, his only thinking was that the mother could live another day to have another baby but they were not going to be able to operate in the kind of environment present without compromising her health further. Dr. Farquharson said that the fetal health was not of particular concern as even if there were indications that the fetus was becoming compromised there was nothing that could be done at that point.

**104**  Dr. Farquharson agreed in cross-examination that on May 1st his primary concern was infection and its consequences. From the fecal contamination that had taken place and the instability of the patient in the operating room there was a suggestion that Ms. Hunt was developing septic shock.

**105**  Dr. Money's opinion was that Dr. Kalos acted appropriately. There were significant risks to Ms. Hunt's health inherent in proceeding with delivery either on the night of May 1st or the morning of May 2nd. Ms. Hunt was in critical condition with sepsis and haemodynamic instability and ran the risk of developing ARDS.

**106**  Dr. Money was asked to comment on Dr. Dansereau's evidence that the risk was 2% to 3%. Dr. Money said that while, in each and every individual case it's obviously a judgment call, she thought the risk of mortality was 20% to 30%, a prohibitive risk. She stated:

... but I think that this woman was at very significant risk related to an additional surgical procedure. She seemed to be unstable haemodynamically. Her blood pressure, her circulation was unstable. She had a significant bacterial exposure which was well beyond normal, and to go back in surgically was something that was extremely worrisome even at the time when they went in. It's hard to put an exact number on it. I think when you look, if you sort of put it together, probably 20 to 30 percent mortality related to going back in.

**107**  Dr. Money noted that they are always trying their best to minimize any maternal risk, stating:

... there is at some point some cut-off where there's some risk you put a mother to in order for a fetal rescue, so to speak, but if a mom is in that grave a situation we would almost always defer to the mother when we're left with those horrible choices.

1. Clinical Situation
2. Infection

The Plaintiffs' Position

**108**  Dr. Dansereau said that while there was a risk of infection at the time of the colectomy, it was not so serious as to prevent intervention. There would have been an increased risk of infection because the abdominal cavity has been contaminated by stool when the bowel perforated. He felt, though, that the risk of infection to the uterus was overstated:

... oddly again, almost every week we do caesarean section in fields that are even more contaminated than that, who are grossly infected with pus coming through, and we do that all the time. When patients have intrauterine infections, there's pus and we do surgery in the middle of pus, and still the risk of infection to the mother is very low, 5 percent or less with antibiotics. So it's - again, it seems to be an acceptable risk ...

I think it's very much overrated the risk to the mother of an infection to the uterus.

**109**  The same reasoning applies to the clinical situation on May 2nd. Dr. Dansereau said that there was also a risk of infection on May 4th when the caesarean section was actually performed.

**110**  Dr. Dansereau said in his report that Ms. Hunt was not septic.

**111**  Dr. Macpherson agreed that on May 4th, when the caesarean section was done, there was bacteria in the abdominal cavity which could have potentially caused infection. She noted that the microbiology culture samples taken from Ms. Hunt's peritoneal cavity - a space between layers of tissue lining the abdomen - at the time of her caesarean section grew pseudomonas aeruginosa, a virulent bacteria often resistant to antibiotics and difficult to treat.

**112**  The defendant submits that a low white blood cell count can indicate a danger of infection. While the count was low, 2.8 after the colectomy, it was 4.1 the next morning. Dr. Kalos and Dr. Macpherson agree that it was within the normal range.

The Defendant's Position

**113**  Dr. Kalos testified that at the time of the colectomy surgery the baby was not delivered as Ms. Hunt's abdomen was full of toxins and bacteria. No matter how many times the abdomen was rinsed there would still have been a substantial number of toxins present. Dr. Kalos was worried about the possibility of septic shock.

**114**  Dr. Kalos said that by opening up the womb, a vascular organ, small and larger vessels are opened up which can introduce the toxins and bacteria present in the abdomen right into the blood stream. This can cause septic shock. Dr. Kalos described the process and effect as follows:

... there is such a huge amount of toxin that the body is unable to cope with it, and eventually all the blood vessels will just dilate up, the blood pressure drops, and not infrequently, the mother actually can die from that.

**115**  Dr. Kalos said that on the morning of May 2nd he was still concerned that though as much bacteria as possible had been washed out, there was still some of it covering the lining of the abdominal cavity. While he agreed that by May 2nd, the white blood count was 4.1, within the normal range of 4 to 10, he said that one cannot really look at six hours after the surgery was done and conclude that as the white blood cell count is normal that Ms. Hunt did not have an infection. Dr. Kalos stated that he "knew absolutely" on the morning of May 2nd that Ms. Hunt had an infection because "if somebody has [sic] full of feces in the abdominal cavity, by definition, without any doubt, I don't even have to look at the blood work, that patient has an infection."

**116**  On the question of whether Ms. Hunt was septic, Dr. Macpherson testified that early sepsis was indicated by the "marked left shift on the [post-colectomy] blood smear, with elevated neutrophils and bands." She said that this indicates that a higher percentage of the white blood cells than usual are new, immature forms that are being released rather than cells that have been circulating for awhile. It means that the body is trying to recruit white cells to fight an infection. When it was suggested to Dr. Macpherson that a "left shift" is a fairly non-specific finding, she said, "Yes. It's a sign of stress." She agreed it is something you might see in any patient who has just undergone major surgery.

**117**  She said that the white blood count was "just barely" within the normal range. When she saw Ms. Hunt at around 5:00 p.m. on May 2nd she saw and relied upon the clinical note of the internal medicine resident who wrote:

This unfortunate 21 year old lady is at significant risk of ARDS and sepsis (especially considering post-op WBC [White Blood Count] 2.8). We will follow closely and intervene ASAP with any signs of trouble. The prognosis is guarded and only time will tell.

**118**  Dr. Hudson strongly disagreed with Dr. Dansereau's view that Ms. Hunt was not septic:

Well, she had a ruptured bowel and therefore peritonitis as a result of that. And she was on high dose antibiotics. Having a ruptured bowel is like rupturing a huge abscess in your abdomen. I mean, to say that she wasn't infected as a result of that is - forgive me, is ridiculous. If she hadn't received high dose antibiotics from that type of procedure she almost certainly would have developed a life threatening peritonitis.

**119**  Dr. Money was asked to respond to Dr. Dansereau's evidence that Ms. Hunt was never septic. She said she thinks that there was evidence of sepsis syndrome:

I think that she had evidence of sepsis syndrome in that perioperative period in the first few days both before and after - right before surgery and after surgery for a few days. Although she didn't spike a temperature, she had low white blood count, she had poor urine output, evidence of poor perfusion, which even in the absence of cultured organisms is still consistent with sepsis syndrome, although it's not fully fitting classic definitions.

**120**  Dr. Farquharson was concerned about septic shock on the morning of May 2nd. He thought that a white blood count of 4.1 was highly abnormal for a patient who has had surgery and is pregnant.

**121**  In response to the suggestion that there was also a risk of infection on May 4th, Dr. Kalos testified that by May 4th Ms. Hunt had been on antibiotics for three days. He explained that in a case of real gross contamination, before one can say that things are under control, even without looking at the vital signs, one would want at least 24 to 48 hours or longer, using intravenous antibiotics, so as to give the antibiotics some time to work. On the morning of May 4th, Ms. Hunt's temperature stayed stable and other vital signs also stabilized. Dr. Kalos took these as signs of her stability.

**122**  In addition, when he assessed Ms. Hunt on the morning of May 4th, her cervix was opening up more than before. There was evidence that the membranes, which cover the baby, were bulging, which was a sign that Ms. Hunt was beginning labour. Dr. Kalos thought her cervix was about 3 or 4 centimetres dilated and that there was a substantial risk of the membrane rupturing. Delivery would then be imminent.

**123**  Dr. Macpherson stated that on May 4th, Ms. Hunt showed clinical signs of improvement and would be more likely to tolerate an anesthetic.

1. Haemodynamic Stability

The Plaintiffs' Position

**124**  Dr. Dansereau, in his expert report, said that during Ms. Hunt's stay in hospital she never had an abnormally low blood pressure, nor was she otherwise haemodynamically compromised.

**125**  The plaintiffs submit that if Ms. Hunt were haemodynamically compromised, her haemodynamic status could have been improved earlier with the administration of albumin. This is described in more detail in the discussion of Claim Two, below.

The Defendant's Position

**126**  Dr. Kalos testified that Ms. Hunt's blood pressure was depressed between 7:00 a.m. and 8:00 a.m. on May 2nd. It was 80 over 40 and in a healthy mother of Ms. Hunt's age it would be 120 over 60. Ms. Hunt's heart rate was around 130 to 140 beats per minute. The average rate for a healthy 20 year old's heart is 50 to 60, so Ms. Hunt's was two and a half times higher. Dr. Kalos stated that this means that a healthy body is trying to circulate as much blood as possible.

**127**  He said that despite all of these things there was no urine output and under perfusion even though Ms. Hunt was receiving boluses of fluid. Dr. Kalos testified that the baby's heart rate would certainly reflect what is going on with the mother.

**128**  Dr. Macpherson testified that overall on May 2nd, the main concern was that Ms. Hunt needed volume to keep her blood pressure up. Dr. Macpherson saw the mother at 4:00 a.m. on May 2nd and ordered a 500 CC bolus (amount) of fluid. Ms. Hunt's pain level was 5 out of 5, the worst pain anyone could imagine. She only had a systolic blood pressure of 102 at that time. Dr. Macpherson testified that a young healthy 20 year old should be able to develop a systolic blood pressure of 140 to 150. The fact that it was not that high was quite concerning. Dr. Macpherson stated that the primary reason for the low blood pressure was that Ms. Hunt was still volume depleted. This is important because Ms. Hunt required volume to perfuse her brain, her heart, her kidneys, and the placenta. Dr. Macpherson also stated that blood pressure itself is a number and does not say how well the organs are being perfused.

**129**  At 5:10 a.m. the pain level had improved and Ms. Hunt's blood pressure dropped. Ms. Hunt required more volume and Dr. Macpherson topped her up. There is a note that the fetal heart was good and variability was good. However, there was still poor urine output.

**130**  Poor urine output means the kidneys are not perfused well enough so Ms. Hunt was still volume depleted. Dr. Macpherson noted that she would not use Dopamine, which is used to keep blood pressure up, while the fetal heart rate was good.

**131**  Also at 5:10 a.m. Ms. Hunt's heart rate was up. At 8:30 a.m. on May 2nd Dr. Macpherson says that Ms. Hunt's blood pressure was now 84 Systolic and she ordered another bolus of fluid. On May 2nd Ms. Hunt's central venous pressure was measured at zero.

**132**  Finally, Dr. Macpherson testified that on May 2nd Ms. Hunt's platelet level was normal.

1. Clotting

The Plaintiffs' Position

**133**  Dr. Dansereau said in his report that Ms. Hunt's bloodwork showed evidence of coagulation disorders and "she was thought to have developed disseminated intravascular coagulation." The plaintiffs submit however that there is no evidence of a coagulation problem on May 2nd when Dr. Kalos decided not to perform a caesarean section.

**134**  Dr. Macpherson agreed that on the morning of May 2nd there were no lab results available and there was no clinical evidence of coagulopathy. She also notes that Ms. Hunt's prothrombin time, a measure of the time it takes blood to clot, was normal at that time.

The Defendant's Position

**135**  Dr. Kalos testified that at the time of the colectomy there was a risk of DIC. DIC can result from an introduction of toxins into the blood stream which Dr. Kalos felt was a possibility following the colectomy on May 1st.

**136**  He said that on May 2nd there was still a concern that Ms. Hunt could develop DIC. tests, which are used to assess a patient's clotting ability, were taken at that time. Dr. Kalos noted that on the evening of May 2nd, when the APTT tests from the morning were checked, the level was high, indicating that Ms. Hunt's blood took longer to clot than that of the average healthy patient. The longer clotting takes, the higher the risk of developing DIC. However, Dr. Kalos did not rely on that on the morning of May 2nd when he chose not to perform a caesarean section as the information was not yet available.

**137**  Dr. Macpherson said that there was an evolving coagulopathy from May 1st to 3rd, as indicated by the drop in platelets, the elevated fibrin degradation products, and the prolonged prothrombin-time and APTT. Taken together these mean that the patient is not going to be able to clot properly.

**138**  Dr. Macpherson stated that this was a concern for two reasons. The first was the potential for surgical bleeding. The other was that Ms. Hunt had an epidural in her back and there was a danger of Ms. Hunt developing a blood clot around the spinal cord. There is the potential for permanent neurological complications from that type of clot.

**139**  Dr. Macpherson said that coagulopathy is not something that is reflected immediately when one measures the numbers. It is an evolving situation. She stated that "usually you see markers start to go a little bit abnormal before eventually everything become very abnormal."

**140**  While Dr. Macpherson agreed that there was no clinical evidence of coagulopathy on the morning of May 2nd, she stated that coagulopathy needs to be gross in order to see clinically.

1. Adult Respiratory Distress Syndrome (ARDS)

The Plaintiffs' Position

**141**  The plaintiffs say that Ms. Hunt never did develop ARDS and that on May 2nd, the critical time, her chest x-ray was normal and she was breathing normally.

The Defendant's Position

**142**  Dr. Kalos said that the introduction of toxins and bacteria into the blood stream can affect the lungs and ARDS can develop. He felt this was a significant danger for Ms. Hunt after the colectomy.

**143**  While Ms. Hunt was breathing normally on the morning of May 2nd and the chest x-ray did not indicate a problem, Dr. Kalos stated that with lung conditions, it takes time to develop concerns. In eight hours one would not see evidence of it. He still felt there was a concern about ARDS developing, which would not respond to fluid removal as is the case with pulmonary edema. He agreed though that Ms. Hunt did not ever develop ARDS.

**144**  Dr. Macpherson did not give any evidence with respect to ARDS. Her concern was pulmonary edema.

1. ANALYSIS
2. Legal Principles

**145**  The parties agree as to the general legal principles that apply. They do not agree on the legal principles relating to schools of thought, the consequences of consulting with a specialist, and whether a "super-specialist" can testify as to the standard of care applicable to a specialist.

1. General Principles

**146**  The plaintiffs must establish that Dr. Kalos failed to meet the standard of care of an ordinary, competent obstetrician in the same circumstances. A physician must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar circumstances: Wilson v. Swanson, [*[1956] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) at p. 817; ter Neuzen v. Korn, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) at para. 46. When a doctor acts in accordance with a recognized and respectable standard of the profession, the doctor will not be found negligent as courts do not generally have the expertise to tell professionals that they are not behaving appropriately in their field: ter Neuzen at para. 51.

**147**  ***Negligence*** follows where a doctor has made an error that no like doctor acting with reasonable skill would have made: Dudas v. Munro, [*[1997] B.C.J. No. 774*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0S9-00000-00&context=) (S.C.) at para. 4, citing Maynard v. West Midlands Regional Health Authority (1984), [1985] 1 All E.R. 635.

**148**  This Court must determine whether Dr. Kalos acted in accordance with the appropriate standard of care. In determining what standard against which a doctor's conduct will be measured a court will often look to expert evidence from other physicians, which is offered as evidence of a recognized professional standard. If a doctor acts in accordance with a recognized professional standard, then ***negligence*** will not follow.

1. Schools of Thought

**149**  Counsel for Dr. Kalos argued that where there are multiple viable schools of thought on the appropriate course of action to take in a given situation, and if a doctor acts in accordance with one of those schools of thought, that doctor cannot be found to have been negligent: Brimacombe v. Mathews [*(2001), 87 B.C.L.R. (3d) 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2N3-00000-00&context=) (C.A.); Stubbins v. Johnson, [*[1995] B.C.J. No. 2137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1WG-00000-00&context=) (S.C.); Fairley v. Waterman, [*[2002] B.C.J. No. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-6198-00000-00&context=), [*2002 BCSC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-6198-00000-00&context=), and Smith v. Grace, [*2004 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=). Counsel submits that as Dr. Kalos followed a school of thought supported by expert evidence he cannot be said to have been negligent.

**150**  Counsel for Ms. Hunt submits that the trier of fact must resolve disputes in the expert evidence upon which the standard of care will be based. A conflict between expert opinions does not automatically mean that the plaintiffs cannot succeed: Stubbins; Brain v. Mador [*(1985), 32 C.C.L.T. 157*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-F60C-X36T-00000-00&context=) (Ont. C.A.); Cope v. Leyden, [*[1984] A.J. No. 175*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9301-JS0R-20GH-00000-00&context=) (C.A); Kehler v. Myles (1988), [*64 Alta. L.R. (2d) 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9301-JFDC-X1MR-00000-00&context=) (C.A.); and Crawford v. Penney, [*[2003] O.J. No. 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDH1-JCJ5-249M-00000-00&context=) (S.C.J.). Where there is a difference in the expert evidence offered by the parties, the court must resolve this difference.

**151**  The essential difference between the positions of the defence and the plaintiffs is that the defence proposes that so long as Dr. Kalos acted in a way that other like professionals would have, given a particular clinical situation, a finding of ***negligence*** cannot follow. The plaintiffs argue that the mere presence of conflicting expert opinions cannot lead to a dismissal of the plaintiffs' case. They argue that in the final analysis the court must weigh the evidence.

**152**  In considering these arguments the following comments made by Lacourciere J.A. in Brain, at paras. 6 and 7, are helpful:

[6] ... The House of Lords dismissed an appeal from the Court of Appeal which had reversed the Judge's finding of ***negligence***. Lord Scarman said at p. 639 [W.L.R., p. 639 All E.R.]:

My Lords, even before considering the reasons given by the majority of the Court of Appeal for reversing the findings of ***negligence***, I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish ***negligence*** in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment ***negligence*** is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary.

[7] The last sentence quoted is consistent with the test applied in Canada in medical malpractice cases where ***negligence*** is established by proof that the specialist failed to possess or to exercise the reasonable degree of learning and skill possessed by the average specialist in the field: see Wilson v. Swanson, [*[1956] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) at 817, [*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.). Professional opinions expressed have an important bearing on the latter test but, in my view, it is for the trier of fact to weigh the conflicting testimony and ultimately assess the weight to be given to the evidence.

**153**  The decision of the Ontario Court of Appeal in Brain was cited with approval by Boyd J. in Stubbins. The Brain decision is not inconsistent with the decision of the Supreme Court of Canada in ter Neuzen or the Court of Appeal of this Province in Brimacombe. Both conclude that there must be an analysis by the court to determine whether the doctor in fact exercised the ordinary skill of a like doctor.

**154**  In many school of thought cases the clinical situation facing the doctor is clear and the question is what the doctor should do about that situation. Where, as in this case, there is a dispute about the factual underpinnings of the opinion, the usual principles with respect to the admissibility of expert evidence apply. Where the factual assumptions or bases on which an expert opinion is based are not supported or only partially supported by the findings of fact made, the weight to be attached to the opinion will be affected.

1. Duty to Consult

**155**  Counsel for Dr. Kalos argued that a doctor cannot be found negligent if he or she consulted a specialist and followed the advice of that specialist. Counsel for Ms. Hunt says that the conduct of the doctor must still be assessed to determine if the doctor is negligent.

**156**  Defence counsel referred to a case that said a doctor can be negligent in certain circumstances for failing to consult: Cranwill (next friend of) v. James, [*[1994] A.J. No. 1009*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9341-FBV7-B0DV-00000-00&context=) (Q.B.), aff'd [*[1997] A.J. No. 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JN6B-S1BD-00000-00&context=) (C.A.), citing Picard J., Legal Liability of Doctors and Hospitals in Canada, 2nd ed. (Toronto: Carswell, 1984). Picard J. said at pp. 210-211:

There is no absolute test to ascertain when a doctor should consult (or refer) but the cases suggest it is appropriate when:

1. the doctor has a duty to guard against his or her own inexperience (eg. a student doctor.)

There should be at least a consultation where one feels oneself approaching the bounds of one's own competence or professional experience. There may be ***negligence*** where a physician fails to recognize their own inexperience, such as where an intern failed to consult a skilled radiologist: Fraser Estate v. Vancouver General Hospital, [*[1952] 2 S.C.R. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M0NW-00000-00&context=).

**157**  The defence has pointed to no case which supports the position that consultation alone will result in a finding that a doctor has not been negligent. I conclude that it is not enough to simply consult. The general principles relating to the standard of care must still be applied. Again, there must be an analysis of whether the doctor in fact exercised the ordinary skill of a like doctor: Brimacombe citing ter Neuzen.

1. Expert Evidence on the Standard of Care

**158**  The defence argued that a perinatologist cannot give evidence on the standard of care appropriate for an obstetrician. That argument was rejected in Phillips v. Central Cariboo Chilcotin Council, [*[2002] B.C.J. No. 1245*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2MT-00000-00&context=) (S.C.). There is no general rule that a "super-specialist" cannot offer an opinion as to the applicable standard of care governing medical care by a specialist. Nor should there be such a general rule. The super-specialist has experience in the specialty. If the evidence meets all the criteria for admissibility, the weight attached to the opinion will depend on the nature of the super-specialist's training and experience.

1. Application of the Legal Principles
2. Did Dr. Kalos recognize the seriousness of the baby's condition?

**159**  I am satisfied that Dr. Kalos recognized the seriousness of the baby's condition. I have reached that conclusion for the following reasons.

**160**  The strip viewed by Dr. Kalos on the morning of May 2nd was undoubtedly worrisome. Its actual significance is less clear. All of the expert evidence supports the conclusion that interpreting a strip is not an exact science. It should be viewed in the context of the entire clinical situation. The results can confuse rather than assist in making a diagnosis. It is significant that the doctors at B.C. Women's Hospital would not have used a strip in the first place because of the potential for confusion. Dr. Farquharson actually recommended turning this one off.

**161**  Dr. Kalos had at the time developed an expertise in interpreting fetal heart strips and knew their limitations. He viewed this strip in the context of the clinical situation with which he was faced. He knew that the strip was concerning. He made a note to this effect in the chart. I accept his evidence that he phoned Dr. Farquharson because he was concerned about the strip. He had never phoned for a consultation of this kind before and there was no other reason to phone. Both Dr. Kalos and Dr. Farquharson testified that Dr. Kalos told Dr. Farquharson about the strip and that it was concerning. It was not necessary in the circumstances that he fax a copy of the strip to Dr. Farquharson. Nor was he required to tell Dr. Farquharson that the baby was dying.

**162**  I accept that Ms. Hunt was not told about any problems with her baby on the morning of May 2nd and had no input into the decision not to deliver her baby on that morning. While Dr. Kalos does not recall specifically what he said to Ms. Hunt, I accept his evidence that he would not tell her that the baby was dying unless he was 100% certain. There is no evidence to contradict the appropriateness of that view. He was not 100% certain, nor could he have been, given the information available.

**163**  Dr. Kalos provided a reasonable explanation as to why his clinical notes said the baby was doing quite well. What he said is consistent with the inconclusive nature of the strip together with the reassuring results of the intermittent auscultation.

**164**  Dr. Kalos communicated with the other professionals through the clinical records. I am satisfied that there were discussions that were not recorded. The evidence shows that doing so is not uncommon.

**165**  In reaching this decision I have taken into account the fact that Dr. Macpherson did not say that she was aware of the seriousness of the strip. She may not have been aware of the seriousness of the strip. She was at home in bed at the time Dr. Kalos made his decision not to intervene. By the time she returned to the hospital the fetal heart monitor had been turned off, and the decision not to perform a caesarean section on the morning of May 2nd had already been made by Dr. Kalos, in consultation with Dr. Farquharson. The focus of her discussions with Dr. Kalos was on Ms. Hunt's wellbeing.

**166**  It does not follow that this means that Dr. Kalos did not know the significance of the strip. This focus on the wellbeing of Ms. Hunt is consistent with the evidence of Dr. Kalos that while he knew the significance of the strip, the only thing that could be done was to try to improve the mother's health.

1. Could Ms. Hunt have undergone a caesarean section on the morning of May 2nd?

**167**  By any measure, when Dr. Kalos saw the strip on the morning of May 2nd it was worrisome enough that consideration had to be given to delivering the baby. The experts for the plaintiffs and the defendant had differing opinions as to the degree of risk related to performing a caesarean section on the morning of May 2nd. Dr. Dansereau was of the view that while there was an increased risk, the risk was not prohibitive and Dr. Kalos should have performed a caesarean section. Drs. Farquharson, Hudson, Liston, Macpherson and Money were of the opinion that the risk was prohibitive and it was appropriate that he did not do so. The differences may be viewed as differing schools of thought.

**168**  In this case the opinion of the experts as to the degree of the risk to some extent depends on their view of the clinical situation Dr. Kalos actually faced. It is appropriate for the court to assess the evidence in that respect. Doing so is of course not a "numbers game." It is the quality of the evidence and not the quantity of the evidence that matters.

**169**  Dr. Dansereau recognized that there was an increased risk of sepsis but said the risk was small and acceptable. I am satisfied that there was a high and unacceptable risk. The fecal contamination was so significant that all but one of the professionals had never seen or heard of such a situation in a pregnancy. In the one with which Dr. Farquharson was familiar, the mother died.

**170**  The clinical situation with which Dr. Kalos was confronted was referred to as an obstetrical disaster. Dr. Liston, whose evidence I accept, said that in his 35 years of practice he had never been faced with the gross fecal contamination that this situation presented.

**171**  Dr. Dansereau said in his report that there was in fact no sepsis. However, I am satisfied that there was evidence of sepsis. The white blood count was low, given the circumstances. There was evidence of a "left shift" in Ms. Hunt's white blood cell analysis. Dr. Macpherson said there was developing sepsis as evidenced by the left shift. Dr. Money's evidence is that this is consistent with sepsis syndrome.

**172**  Ms. Hunt's haemodynamic status was unstable. During the colectomy her heart rate and blood pressure were very elevated for no apparent reasons. On the morning of May 2nd her blood pressure had dropped and her heart rate was up. She had poor perfusion, indicating that she was volume depleted. The evidence of Dr. Hayashi is of little assistance as he based his opinion on the fact that there was not evidence that she was haemodynamically unstable. Both Dr. Dansereau and Dr. Farquharson said that they would not, in these circumstances, rely on the opinion of a general surgeon that surgery was appropriate.

**173**  There was a risk of bleeding to death as a result of blood clotting problems. While there was no actual evidence of a coagulation problem on May 2nd, there were legitimate concerns that a problem was developing. There was also a risk of developing ARDS, though Ms. Hunt never did develop this condition.

**174**  Therefore, many of the assumptions upon which Dr. Dansereau formed his opinion as to the risk of death are not consistent with the findings made by the Court and as a result his opinion is of limited value. He was asked to give an opinion based on the clinical records and that is what he did. He did not have the benefit of considering much of the evidence heard by the Court, including the evidence of Dr. Kalos.

**175**  The opinions of the other doctors that there was a prohibitive risk of mortality are entitled to significant weight as the assumptions upon which they are based are supported by the evidence.

1. Conclusion

**176**  The plaintiffs have not succeeded on either branch of their first claim in ***negligence***.

**177**  Dr. Kalos recognized the seriousness of the baby's condition. He was faced with a very difficult and unusual situation. He sought a second opinion from an expert perinatologist. He considered the feasibility of proceeding with a caesarean section when faced with the strip on the morning of May 2nd. Based on the information available to him at that time he concluded that performing a caesarean section was not a viable option given his assessment of the risk to Ms. Hunt.

**178**  He exercised his clinical judgment and did so appropriately. He properly assessed the risk to Ms. Hunt. He balanced the risk to the mother against the risk to the baby, taking into account the general obstetrical practice of not endangering the mother's life for that of the baby.

**179**  He was therefore not negligent when he decided not to perform a caesarean section on the morning of May 2nd.

B. CLAIM TWO

1. The Plaintiffs' Position

**180**  The second basis for the claim in ***negligence*** is that there was a negligent failure to take steps that would likely have improved the baby's condition. The basis of the claim is that Dr. Kalos' failure to tell other specialists about the danger to the baby put her at a continued materially increased risk for the injury she suffered.

**181**  Dr. Kalos should, the plaintiffs submit, have spoken to the other specialists to make sure that everything possible was being done to improve the baby's condition and minimize damage. The defence experts agreed that such communication should take place. Yet, the plaintiffs submit, those vital conversations never took place.

**182**  The plaintiffs say that there is a causal connection between the lack of communication and the injury to the baby. At some point there was a partial recovery from the hypoxia, or at least an end to the hypoxic insult. Otherwise the baby would have died by May 4th. They submit that if correcting the mother's poor perfusion would also improve the baby's hypoxic state, the most reasonable inference to be drawn is that correction of Ms. Hunt's poor perfusion also corrected the hypoxia, but the damage had already been done. It follows, they argue, that correction at an earlier stage would likely have interrupted the process of brain damage before it was complete. The absence of full communication with other doctors prevented the earlier administration of albumin however and thus the correction of poor perfusion and hypoxia at an earlier time.

**183**  The plaintiffs say that there is evidence showing that the administration of albumin would help the hypoxia. Dr. Hudson, an obstetrician gynaecologist called by the defence, testified that low blood pressure and low urine output indicates a lack of tissue perfusion and that would also affect the placenta and the oxygen supply to the fetus. Albumin was ordered at 5:00 p.m. on May 2nd, and when administered at approximately 6:00 p.m. it dramatically improved the mother's condition and could have been used earlier. Doing so would have also helped the fetus.

**184**  Dr. Macpherson says that while albumin is used sparingly, it could have been used earlier. Albumin could have been available within one half hour of ordering it. The plaintiffs say that there was no reason for Dr. Macpherson to give albumin earlier because she did not know there was an immediate crisis affecting the baby.

1. The Defendant's Position

**185**  This theory was advanced for the first time at trial and it has no basis in the evidence. Dr. Dansereau was not critical of Dr. Kalos in this respect and there is no evidence to suggest that Dr. Kalos did not talk to the anesthesiologist at the hospital and/or the internal medicine specialist about the concerning heart rate pattern. Dr. Kalos was not cross-examined about this and Dr. Macpherson was not the anesthesiologist at the hospital at the time the fetal heart rate dropped.

**186**  Dr. Kalos did communicate with other doctors through the clinical records by recording his concern about the fetal heart rate. It was there for all the specialists to review. How those specialists use that information in treating the mother was not in Dr. Kalos' domain.

**187**  All experts who were asked about this issue testified that anesthesiologists and internal medicine specialists are trained to manage a patient's haemodynamic status and all of the issues related to it. Ms. Hunt received excellent care from her anesthesiologist, Dr. Macpherson, and her internal medicine specialist. They were considering her perfusion and the need for albumin. Both Dr. Farquharson and Dr. Money said that the anesthetic care given to Ms. Hunt was superb.

**188**  Dr. Macpherson, as noted under the discussion of the mother's health, was asked if for any reason she had been concerned about getting Ms. Hunt haemodynamically stabilized as quickly as possible there was any reason why she could not have used albumin at an earlier stage. She said there was no reason. However, she said that usually crystalloid is sufficient. She testified:

We usually don't use a lot of albumin, especially in this time period, we are very concerned about using a human product in a patient. And we would sort of use it not as a last resort but we would be very cautious before giving a human protein solution to a patient.

**189**  Dr. Money said that albumin would not be used until absolutely necessary.

**190**  Dr. Farquharson said that albumin is a fairly last ditch effort and the fact that it was used shows they were very concerned that Ms. Hunt was critically ill at that point. It is a blood product and carries with it the risks of transfusion. He was asked if she should have been given albumin a few hours earlier and said "not unless her condition was considered to be grave at that point."

**191**  Dr. Hudson said it takes time, not just treatment, to recover from volume depletion. It is not just a matter of giving albumin.

**192**  Albumin was not the only factor in the recovery of Ms. Hunt as she needed to recover blood volume as well. In any event, the fetal heart rate returned to normal baseline hours before the albumin was given so there can be no inference that the albumin ended the hypoxia. The albumin was administered at about 6:00 p.m. on May 2nd while the fetal heart rate remained constant from about 1:00 p.m. until well after the albumin was administered.

1. Conclusion

**193**  The crux of the plaintiffs' argument is that Dr. Kalos did not communicate the danger the baby faced. There is expert evidence that this information should be communicated. The plaintiffs must prove that Dr. Kalos failed to communicate the seriousness of the baby's condition. The plaintiffs must also prove that failure to communicate the seriousness of the baby's condition was a material contributing cause of the injury sustained. With respect to this causal connection the plaintiffs must demonstrate two things. First, they must prove that albumin would have been used earlier and second, that with the earlier use of albumin, the baby would not have been compromised, or as seriously compromised as she was.

**194**  I am not satisfied that Dr. Kalos failed to communicate the seriousness of the baby's condition. Dr. Kalos noted in the clinical records that the fetal heart rate had poor variability and that there were frequent decelerations.

**195**  Furthermore, I am not satisfied that the plaintiffs have adduced sufficient evidence to support an inference of causation: 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=) (S.C.C.). I am not satisfied that albumin would have been used earlier. The doctors treating Ms. Hunt embarked on a course of treatment with the goal of stabilizing Ms. Hunt. They did not initially use albumin due to their concerns with respect to the use of a human blood product in a patient in Ms. Hunt's condition. Rather, they used fluid boluses, crystalloid, on a regular basis in an attempt to increase blood volume and blood pressure, and thereby improve perfusion of Ms. Hunt's organs, including the placenta.

**196**  Nor am I satisfied that there is a causal connection between the timing of the use of the albumin and the baby's condition at birth. That is, I am not satisfied that failure to communicate the baby's condition materially increased the risk of injury. The uncontradicted evidence is that the fetal heart rate returned to the normal range before the albumin was administered.

1. THE RESULT

**197**  The claims against Dr. Kalos are dismissed. He is entitled to his costs, subject to the Rules of Court.

MARTINSON J.

**End of Document**

[***Jensen v. Ross, [2015] B.C.J. No. 2449***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HDT-KH51-JS5Y-B2M4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.F. Kelleher J.

Heard: July 13-17, 2015.

Judgment: November 10, 2015.

Docket: 20551

Registry: Fort St. John

**[2015] B.C.J. No. 2449** | 2015 BCSC 2065

Between Cynthia Jane Jensen, Plaintiff, and Margaret Ross, Dr. Kirstie Overhill, Her Majesty the Queen in Right of British Columbia, Polly Powley, Janice Pentland-Smith, Paul McKibben, Donald E. Fairweather, Blaire Hagedorn, Henrietta Hagedorn, Harnick Holdings Ltd. doing business as Super-Valu, Dr. Ruth Campling, Vancouver Coastal Health Authority, and The Minister of Justice, Defendants

(147 paras.)

**Case Summary**

**Civil litigation — Limitation of actions — Extension, interruption, suspension and inapplicability — Disability — Application by seven defendants to dismiss plaintiff's claim allowed — Plaintiff commenced action for damages in 2011 relating to birth of her daughter in 1988 and daughter's apprehension in 1989 — Claims against defendants were outside limitation period — No compelling circumstances impeded plaintiff's ability to bring action at appropriate time — Postponement of limitation period was not available — Plaintiff was not under disability capable of extending limitation period — Limitation Act, ss. 6, 7.**

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| --- |
| Application by seven defendants to dismiss the plaintiff's claim based on limitation defences. The plaintiff commenced her action for damages in 2011 relating to the birth of her daughter in 1988 and the daughter's apprehension for 11 days by the Ministry of Social Services and Housing in 1989. She alleged fraudulent and false reports by various defendants had led to her daughter's apprehension. Her claims included fraud, ***negligence***, and defamation. The plaintiff was represented at the court hearing regarding the apprehension of her daughter. She had sought legal advice regarding the apprehension before 1995. She had no physical illness and no diagnosed mental disability.  HELD: Application allowed.  All of the claims against the defendants were outside the limitation period. The plaintiff had knowledge of the identity of all defendants prior to the expiry of the limitation period. She had knowledge of the facts relevant to her claim against all defendants within the limitation period. The plaintiff's claims had never had a reasonable prospect of success on the merits. The plaintiff was capable of seeking, retaining and instruction counsel between 1989 and the date the action was commenced. There were no compelling circumstances that impeded the plaintiff's ability to bring an action at the appropriate time. Postponement of the limitation period was not available to the plaintiff. The plaintiff was not under a disability capable of extending the limitation period. |

**Statutes, Regulations and Rules Cited:**

Freedom of Information Act, *R.S.B.C. 1996, c. 15*,

Limitation Act, R.S.B.C. 1996, c. 266, s. 3(2), s. 3(2)(a), s. 3(2)(c), s. 3(2)(d), s. 3(5), s. 6, s. 6(3), s. 6(4), s. 6(4) (b), s. 6(5), s. 6(5)(b), s. 6(6), s. 7, s. 7(1), s. 7(2), s. 8(1)(b), s. 8(2)

Limitation Act, [*S.B.C. 2012, c. 13, s. 30*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TR-00000-00&context=), s. 30(3)

Supreme Court Civil Rules, Rule 7-7(1), Rule 9-7, Rule 14-1(15)

**Counsel**

The plaintiff, Cynthia Jensen: On her own behalf.

Counsel for the defendant Margaret Ross: Scott Brearley.

Counsel for the defendant The Minister of Justice: Alison Brown.

Counsel for the defendant Vancouver Coastal Health Authority: Shauna R. Gersbach.

Counsel for the defendant Donald E. Fairweather: Jennifer Bye.

Counsel for the defendants Dr. Kirstie Overhill and Dr. Ruth Campling: Daniel J. Reid.

Counsel for the defendants Her Majesty the Queen in right of the Province of British Columbia, Polly Powley, Janice Pentland-Smith and Paul McKibben: Pamela Manhas.

Counsel for Blaire Hagedorn and Henrietta Hagedorn and Harnick Holdings Ltd. doing business as Super-Valu: James Flemming.

**Reasons for Judgment**

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| **S.F. KELLEHER J.** |

**1**   This judgment addresses seven applications by the various defendants to dismiss the plaintiff's claim. The applications are pursuant to the summary trial provisions of the *Supreme Court Civil Rules*, R. 9-7 and are based on limitation defences they have all raised.

**2**  The action was commenced on February 28, 2011. The notice of civil claim makes many allegations against the various defendants. The allegations relate primarily to the events surrounding the birth of the plaintiff's daughter Nikole Jensen and to the subsequent apprehension of Nikole by the Ministry of Social Services and Housing.

**3**  The plaintiff's says that she suffered damages, including personal injuries, as a result of the defendants' actions.

**4**  The events giving rise to Ms. Jensen's claim took place between August 16, 1988 and July 1990. Nikole was born on August 16, 1988. The Ministry apprehended Nikole on December 27, 1989. Nikole was returned to the plaintiff on January 7, 1990.

**5**  The procedural history is extensive. In March and May 2012, the plaintiff was granted orders extending the time for serving the defendants. In June 2012, Ms. Jensen applied *ex parte* for an order amending the style of cause. This application was adjourned and a case planning conference was held.

**6**  A case planning conference ("CPC") took place on November 29, 2012. The judge at the CPC invited argument from Ms. Jensen on the subject of limitation dates. The judge held that the claims were all barred by the *Limitation Act*. The judge struck the plaintiff's claim.

**7**  The plaintiff appealed. The Court of Appeal allowed the appeal and remitted the action to this Court: see *Jensen v. Ross*, [*2014 BCCA 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2DR-00000-00&context=). The court held that the limitation issue "... must be determined on a proper application with a full evidentiary foundation" (at para. 47).

**8**  I conducted a CPC on October 20, 2014. At that conference the style of cause was amended to correct certain errors. The plaintiff was directed to file an amended notice of civil claim by November 22, 2014.

**9**  The amended notice of civil claim was not filed. On January 14, 2015, at a further CPC, I directed the plaintiff to file and serve an amended notice of civil claim by January 23, 2015. I also made this direction:

After January 23, 2015, whether the notice of civil claim has been amended, the defendants may bring applications to dismiss the claim whether based on a limitation defence or otherwise.

**10**  On February 4, 2015, a judicial management conference took place. The plaintiff had still not amended the notice of civil claim. She advised at that time that she intended to do so by March 14, 2015. I directed the parties to schedule a hearing for their applications to dismiss the action and a possible application to amend the notice of civil claim.

**11**  A fourth judicial management conference took place on March 24, 2015. There were directions given about the production of documents. It was confirmed that five days had been set aside for the hearing of the defendants' applications. As well, I said that any application by the plaintiff to amend her pleadings could be made at the same time.

**12**  In fact, an application to amend the pleadings was not necessarily required. Counsel and the Court were proceeding under a misunderstanding of the law.

**13**  On July 13, 2015, the defendants' applications came on for hearing. The misunderstanding about the need for leave was clarified and the plaintiff was told that the notice of civil claim could be amended any time before the setting of a trial date.

**14**  Ms. Jensen advised the Court on July 13 that she wished to adjourn the hearing because she had not completed her affidavit in support of her response to these applications.

**15**  The hearing had been scheduled for many weeks. Ms. Jensen had prepared a statement but it was not a sworn affidavit. In the circumstances, I decided to have Ms. Jensen swear to the truth of the contents of the statement. It was made an exhibit in these proceedings.

**16**  The hearing proceeded. On July 17, the fifth day of the hearing, Ms. Jensen advised that she was filing an amended notice of civil claim. The proposed amended notice of civil claim contains new allegations and new causes of action. It was explained to Ms. Jensen that because the new allegations were outside the *Limitation Act*, she would need to apply for leave.

**17**  No such application has yet been made.

**18**  There were a number of admissions made by the plaintiff in response to notices to admit pursuant to *Supreme Court Civil Rules*, R.7-7(1)

**19**  The defendant Margaret Ross sent the plaintiff a notice to admit. The plaintiff responded on March 9, 2015 (the "First Admissions").

**20**  The First Admissions list a number of legal proceedings in which the plaintiff was a participant and in many cases the initiator of the proceedings. Those include:

1. On May 8, 1995, Ms. Jensen commenced an action against Kenford Nedd, in which:
2. She filed a notice of trial on June 3, 1997 and a notice requiring trial by jury on June 9, 1997;
3. A consent dismissal order was entered on February 10, 1999;
4. Ms. Jensen was represented by legal counsel at the time of entering the consent dismissal order; and
5. Ms. Jensen was represented by legal counsel throughout that action and instructed legal counsel at various times.
6. Ms. Jensen was the petitioner in an action commenced May 29, 2001 against David Kester.

**21**  The defendant Margaret Ross sent a second notice to admit to which the plaintiff responded on June 17, 2015 (the "Second Admissions").

**22**  The Second Admissions include the following:

1. Ms. Jensen obtained a university degree in education in 2001;
2. Dr. Kenford Nedd was her doctor at some point prior to her commencing a lawsuit against him. The substance of her lawsuit concerned the allegation of a sexual relationship, during which she became pregnant and underwent a therapeutic abortion;
3. Ms. Jensen underwent liposuction surgery in May 1999, performed by Dr. David Kester. She commenced a lawsuit against Dr. Kester concerning the surgery. She consulted a lawyer with respect to the surgery and filed a lawsuit but did not serve it.

**23**  On May 19, 2015 Her Majesty the Queen in Right of the Province of British Columbia, Polly Powley, Janice Pentland-Smith and Paul McKibben (collectively the "Ministry") sent the plaintiff a notice to admit. The response was made by the plaintiff on May 29, 2015 (the "Third Admissions").

**24**  The Third Admissions included the following:

1. With respect to the initial "taking" of her daughter by the Ministry on December 27, 1989, Ms. Jensen attended a court hearing on January 2, 1990 and was represented at the hearing.
2. In the years following the return of her daughter, Ms. Jensen called the Ministry regularly to ask whether there had been any complaints about her. She also taped certain conversations with social workers and mental health professionals.
3. Ms. Jensen submitted a Freedom of Information request to the Ministry in 1994 and as a result of this request received numerous Ministry documents.
4. Following receipt of these documents, Ms. Jensen wrote a two-page letter to Alick Troup at the Ministry dated October 18, 1994 and subsequently a letter to the Ministry dated March 8, 1995.
5. The March 8, 1995 letter written by Ms. Jensen reflects a written account of Ms. Jensen's side of the story with respect to the matters at issue in this action, including with respect to the homemaker services she had received.
6. Ms. Jensen had regular contact with the RCMP from December 1992 to 1994.
7. Ms. Jensen provided a statement to the RCMP on dated May 18, 1994, pertaining to the apprehension of her daughter in 1989.

**25**  On June 4, 2015 the Ministry sent the plaintiff a further notice to admit and the plaintiff responded on June 17, 2015 (the "Fourth Admissions").

**26**  The Fourth Admissions include:

1. Ms. Jensen sought legal advice from a lawyer in Gibsons following what she believed to be the "fraudulent apprehension" of her daughter, and sought direction about what to do. She obtained legal advice at least two years after the "fraudulent apprehension", but well before 1995.
2. Ms. Jensen sought legal advice from a lawyer with the Legal Services Society on March 30, 1993, when her daughter was a toddler, about what she believed to be the "fraudulent apprehension" of her daughter. She explained to that lawyer what had happened and provided written material for that lawyer to review, which written material concerned what she believed to be the "fraudulent apprehension" of her daughter.
3. Ms. Jensen also sought legal advice from an unnamed lawyer concerning incidents involved in the birth of her daughter on August 16, 1988. She sought legal advice at some point before 1992.

**27**  The plaintiff has made numerous claims against each of the defendants. The plaintiff alleges that their actions caused her to sustain various personal injuries.

**28**  All of the defendants argue that the claims against them are beyond the limitation period. The *Limitation Act*, [*S.B.C. 2012, c. 13, s. 30*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TR-00000-00&context=) (the "new *Act*") came into force on June 1, 2013. It repealed the *Limitation Act*, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=) (the "former *Act*"). Section 30 of the new *Act* provides:

1. In this section:

"effective date" means the day on which this section comes into force;

"former Act" means 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=), as that Act read immediately before the effective date;

"former limitation period" means, with respect to a pre-existing claim, a limitation period that applied to the pre-existing claim before the effective date;

"pre-existing claim" means a claim

1. that is based on an act or omission that took place before the effective date, and
2. with respect to which no court proceeding has been commenced before the effective date.
3. A court proceeding must not be commenced with respect to a pre-existing claim if
4. a former limitation period applied to that claim before the effective date, and
5. that former limitation period expired before the effective date.
6. Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.
7. Subject to subsection (2), if a pre-existing claim was not discovered before the effective date,
8. in the case of a pre-existing claim referred to in section 3 of this Act, that section applies to the pre-existing claim,
9. subject to paragraph (a) of this subsection, in the case of a pre-existing claim referred to in section 8 (1) (a) or (b) of the former Act, Part 2 of this Act and section 8 of the former Act apply to the pre-existing claim, or
10. in the case of any other pre-existing claim,
11. subject to subparagraph (ii) of this paragraph, this Act applies to the pre-existing claim, and
12. Part 3 of this Act applies to the pre-existing claim as if the act or omission on which the pre-existing claim is based occurred on the later of
13. the effective date, and
14. the day the act or omission takes place under section 21 (2) of this Act.
15. Nothing in this section restricts the right of a person to bring a court proceeding at any time in relation to a claim referred to in section 3 (1) (i), (j) or (k) of this Act, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period.

(emphasis added)

**29**  The effect of s. 30(3) is that the provisions of the former *Act* apply to this application.

**30**  The relevant limitation provisions of the former *Act* are s. 3(2) and (5):

**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;
2. for trespass to property not included in paragraph (a);
3. for defamation;
4. for false imprisonment;
5. for malicious prosecution;
6. for tort under the *Privacy Act;*
7. under the *Family Compensation Act;*
8. for seduction;
9. under section 27 of the *Engineers and Geoscientists Act*.

...

1. Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

**31**  The postponement provisions of the former *Act* are contained in sections 6 and 7.

**32**  Section 6(3), (4), (5) and (6) provide:

6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

1. for personal injury;
2. for damage to property;
3. for professional ***negligence***;
4. based on fraud or deceit;
5. in which material facts relating to the cause of action have been wilfully concealed;
6. for relief from the consequences of a mistake;
7. brought under the Family Compensation Act;
8. for breach of trust not within subsection (1).
9. Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
10. 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
11. 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.
12. For the purpose of subsection (4),
13. "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,
14. "facts" include
15. the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
16. that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,
17. if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and
18. if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
19. The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of postponement.

**33**  The test to be applied in determining whether s. 6 of the former *Act* applies to the circumstances of a particular case has four elements, all of which must be satisfied before time begins to run. Those components were described by Mr. Justice Tysoe in *Ounjian v. St. Paul's Hospital et al*, [*2002 BCSC 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61GK-00000-00&context=), at para. 21:

1. The identity of the defendant is known to the plaintiff.
2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge.
3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.

**34**  Section 7 of the former *Act* addresses the situation of a person who is under a disability. The relevant provisions are s. 7(1) and (2):

1. For the purposes of this section,
2. a person is under a disability while the person
3. is a minor, or
4. is in fact incapable of or substantially impeded in managing his or her affairs, and
5. "guardian" means a parent or guardian who has actual care and control of a minor or a committee appointed under the Patients Property Act.
6. If, at the time the right to bring an action arises, a person is under a disability, the running of time with respect to a limitation period set by this Act is postponed so long as that person is under a disability.

**35**  Each of the seven applications raises three issues: (1) whether the claim against the defendant is outside the limitation period; (2) whether the running of time is postponed pursuant to s. 6 of the former *Act*; and (3) whether the plaintiff was under a disability within the meaning of s. 7 of the former *Act*, thus postponing the limitation period.

**36**  I will first consider the various claims against each defendant to determine whether these claims are outside the limitation period; second, I will assess whether the running of time has been postponed as per the test described in *Ounjian v. St. Paul's Hospital, supra*, and; third, I will discuss whether the claimant was under a disability that postponed the running of time.

**I. ARE THE PLAINTIFF'S OUTSIDE THE LIMITATION PERIOD?**

**A. The Application of Dr. Kristie Overhill and Dr. Ruth Campling**

**37**  The causes of action against Dr. Campling relate to "maternity services" which she provided to the plaintiff between July 1988 and September 1989. The plaintiff claims Dr. Campling kept the plaintiff confined to the bathroom during the delivery and that Dr. Campling intimidated her. The plaintiff also claims that Dr. Campling exaggerated and fabricated information about the plaintiff and filed "fraudulent and defamatory reports to the Ministry of Social Services".

**38**  Based on those facts, the plaintiff has put forward the following causes of action against Dr. Campling: ***negligence***; gross ***negligence***; breach of duty of care; defamation; fraud; battery; false imprisonment; wilful infliction of nervous shock; child endangerment; deliberate indifference; infliction of emotional distress, and harassment.

**39**  The plaintiff's claims of "gross ***negligence***", "breach of duty", "infliction of emotional distress", and "absence of due care" do not disclose recognizable causes of action. Any claims the plaintiff has made in relation to those against any defendant are not valid.

**40**  In the notice of civil claim the plaintiff alleges that, along with the defendant Polly Powley, Dr. Overhill invented or made conclusions that were false or harmful. The allegations against Dr. Overhill are found in paras. 6 and 9 of part one of the notice of civil claim:

1. ... The plaintiff discovered later that the Defendant had gone to Dr. Kirstie Overhill's office to speak to her about the plaintiff. In their conversation they invented or made conclusions that were false and harmful.

...

1. ... Seven to ten days after this, the court ordered the Plaintiff's daughter to be returned to her. ... The Plaintiff put her on the floor and she went into seizures. Her seizures went on hourly, then daily, then gradually got better. Even [sic] two or three years she would go stiff and her eyes would roll up. The Plaintiff mentioned these seizures to Defendant Dr. Kirstie Overhill, a homemaker and others.

***i. Are the claims against Dr. Kirstie Overhill and***

***Dr. Ruth Campling outside the limitation period?***

**41**  The allegations against Dr. Campling primarily relate to the medical care she provided to the plaintiff. The ultimate limitation period for a claim against a medical practitioner based on professional ***negligence*** or malpractice is six years from the date on which the right to bring the action arose (former *Act*, s. 8(1)(b)). The ultimate limitation period cannot be postponed with the exception of a plaintiff who has not reached the age of majority (former *Act*, s. 8(2)).

**42**  The plaintiff's right to bring an action against Dr. Campling for medical ***negligence*** arose by September 1989. As a result, the ultimate limitation period for the plaintiff's claim against Dr. Campling in ***negligence*** and breach of duty of care expired in September 1995.

**43**  The claim of fraud against Dr. Campling lacks sufficient facts. But even if the plaintiff were to amend to include sufficient factual allegations, fraud is subject to a six-year limitation period (former *Act*, s. 3(5)). The other claims against Dr. Campling -- battery, false imprisonment, and wilful infliction of nervous shock -- are all in respect of injury to the person and are also subject to a two-year limitation period (s. 3(2)(a)).

**44**  The plaintiff's allegations against Drs. Overhill and Campling arise from events that took place between July 1988 and September 1989. In the absence of postponement, the basic limitation period for the claims related to personal injury expired by October 1991. In the absence of postponement, the basic limitation period for the claim in fraud expired by October 1995.

**45**  Defamation is alleged. It is not properly pleaded but even if there were a cause of action in defamation pled against Dr. Overhill it would relate to reports tendered to the Ministry of Child and Family Development which the plaintiff obtained as of no later than 1994.

**46**  The basic limitation period for the claims in defamation is expired. The limitation period for defamation is two years from the date the right to bring a cause of action arose: s. 3(2)(c)(d).

**47**  The right to bring a cause of action arises on the date of publication. There is no postponement provision applicable to defamation claims: *Zanetti v. Bonniehon Enterprises Ltd.*, [*2003 BCCA 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20VT-00000-00&context=).

**48**  I conclude that the claims against these defendants are outside the limitation period.

**B. The application of Don Fairweather**

**49**  Mr. Fairweather is a barrister and solicitor. He has little independent recollection of the specific interactions and events. However, when the plaintiff's daughter was apprehended on December 27, 1989, the plaintiff either retained Mr. Fairweather or more likely Mr. Fairweather was appointed by Legal Services Society to represent the plaintiff.

**50**  He attended Provincial Court on January 2, 1990 and argued for the return of the child. He was successful. An order was made that the child be returned to the plaintiff immediately.

**51**  A work plan agreement was effected on April 6, 1990. In that, it was agreed between the Ministry and the plaintiff that the plaintiff would undergo various forms of supervision and treatment for a period of six months. Mr. Fairweather does not recall giving advice in relation to this agreement, but it is likely, he deposes, that he did counsel the plaintiff in relation to same. His standard practice was, and is, to fully explain the benefits and consequences of such agreement and to ensure that the plaintiff understood it. He has no reason to think he deviated from that practice.

**52**  That is the extent of Mr. Fairweather's recollection. The file materials no longer exist.

**53**  The plaintiff's claim against Mr. Fairweather is that he gave her "misleading and improper legal advice" and "showed her the documents about the claims of the Ministry" which "shocked" her. She alleges that he subsequently provided "false and misleading legal advice". She claims the following causes of action: ***negligence***, gross ***negligence***; defamatory libel and slander; breach of duty; fraud; absence of due care; infliction of emotional distress; and infliction of nervous shock.

***i. Are the claims against Mr. Fairweather outside the limitation period?***

**54**  The claim for damages to the extent they are in respect of personal injury is subject to the two-year limitation period: see s. 3(2)(a). The defamation claim is also subject to a two-year limitation period: s. 3(2)(c).

**55**  To the extent that any of the claims are not captured by s. 3(2), such as the claim of fraud, they are subject to the six-year limitation period set out in s. 3(5).

**56**  The events occurred in 1989 and 1990. The claims against Mr. Fairweather are outside the limitation period.

**C. The application of Margaret Ross**

**57**  The plaintiff alleges that Margaret Ross administered an immunization to her infant, Nikole Jensen, in 1989. The plaintiff alleges that the applicant used the word "abortion" during this procedure and that she subsequently reported the plaintiff to the Ministry of Social Services.

**58**  The plaintiff alleges that she suffered personal injury and damage as a result of Ms. Ross's: "***negligence***, gross ***negligence***, defamatory libel and slander, breach of duty and care, harassment, malice, fraud, assault and battery, infliction of emotional distress, and infliction of nervous shock".

***i. Are the claims against Margaret Ross outside the limitation period?***

**59**  The conduct that is alleged occurred between September 1989 and December 1989. The claims against Ms. Ross are outside the limitation period.

**D. The applications of HMTQ in Right of the Province of British Columbia, Polly Powley, Janice Pentland-Smith and Paul McKibben (collectively, the "Government Defendants")**

**60**  The action against these defendants is framed at paragraph 9 of the notice of civil claim. The crux of the claim is that the plaintiff's daughter was apprehended on December 27, 1989 after the Ministry of Social Services and Housing received allegedly false reports from other respondents and that her daughter suffered harm while in the Ministry's care for a period of one week. The plaintiff further alleges that Polly Powley and Janice Pentland-Smith harassed and followed her "a few times" following the return of the plaintiff's daughter to her care.

**61**  The plaintiff alleges at paragraph 6 of the notice of civil claim that "a short time after" the plaintiff moved to Gibsons, B.C. she met the respondent Polly Powley who took inaccurate notes and drew conclusions about the plaintiff that were not true. The plaintiff further alleges that Ms. Powley met with the defendant Dr. Overhill prior to the apprehension and that, together, they "invented or made conclusions that were false and harmful".

**62**  There are no particularized allegations against Paul McKibben.

**63**  The claim of the plaintiff is that she has suffered personal injury and damage as result of the Government Defendants' "***negligence***, gross ***negligence***, defamatory libel and slander, absence of due care, wrongful invasion, harassment, malice, fraud, misfeasance in public office, false imprisonment, infliction of emotional distress, [and] infliction of nervous shock..."

**64**  As pleaded, the apparent causes of action known to law against all the Government Defendants as result of the apprehension, are:

1. ***negligence***;
2. negligent or intentional infliction of nervous shock;
3. defamation;
4. fraud;
5. misfeasance in public office; and
6. false imprisonment.

**65**  As pleaded, the apparent causes of action known to law that are alleged against Polly Powley as a result of her meetings with the plaintiff and Dr. Overhill are:

1. ***negligence***;
2. defamation;
3. trespass;
4. fraud;
5. fraudulent misrepresentation; and
6. negligent or intentional infliction of nervous shock.

***i. Is the claim against these defendants outside the limitation period?***

**66**  The conduct occurred between September 1989 and January 3, 1990. The plaintiff has alleged personal injury as a result of that conduct or has otherwise alleged causes of action are subject to a two-year limitation period. On its face, the plaintiff's claim is statute barred.

**E. The Application of Harnick Holdings Ltd. dba Super Valu, Blair Hagedorn and Elaine Hagedorn**

**67**  The causes of action alleged against these defendants is that between September 1989 and July 1990 the plaintiff was harassed by employees of the Super Valu store and that certain employees put in false and fraudulent reports about the plaintiff to the Ministry of Social Service and Housing.

**68**  It is alleged that one unnamed employee would startle the plaintiff and her daughter and bump her shopping cart. Unnamed employees of the store continued to make exaggerated and fraudulent reports about the plaintiff for several more years.

**69**  The plaintiff has elaborated the following causes of action against these defendants: ***negligence***, gross ***negligence***, defamatory libel and slander, harassment, malice, fraud, intentional infliction of emotional distress and infliction of nervous shock.

***i. Whether this claim against these defendants is outside the limitation period***

**70**  The claims are clearly outside the limitation period.

**F. The application of the Minister of Justice**

**71**  The allegations against the Minister of Justice are that between September 8, 1989 and July 1990 the Royal Canadian Mounted Police "put in defamatory and fraudulent reports about [her] to the Ministry of Social Services" and that the RCMP "completely ignored" her "written report to the police about what happened to [her] daughter". The claims are for defamation, ***negligence***, gross ***negligence***, harassment, breach of duty, fraud, absence of due care, infliction of emotional distress and infliction of nervous shock.

***i. Whether the claims against this defendant are outside the limitation period***

**72**  The limitation period is two years. The events occurred in 1989 and 1990.

**73**  In her factum to the Court of Appeal in this matter, the plaintiff stated that the relevant years are 1989 to 2000. While I do not see any basis for that, even if there were a cause of action that arose in 2000 the claim was barred by 2002 at the latest. The claims are outside the limitation period.

**G. The application of the Vancouver Coastal Health Authority**

**74**  The Vancouver Coastal Health Authority is the current provider of services previously provided by the North Shore Home Support Services. The plaintiff's claim is that NSHSS "entered her home under false and fraudulent pretenses, were exaggerating and fabricating reports about her to their Director...they said she had marijuana in her apartment, which was completely untrue...They made detailed and false reports about the plaintiff...[NSHSS] made fraudulent and defamatory reports to the Ministry of Social Services ..."

**75**  The plaintiff's allegations against NSHSS include "***negligence***, gross ***negligence***, defamatory libel and slander, breach of duty and care, deliberate indifference, harassment, malice, trespass, fraud, fraudulent misrepresentation and infliction of emotional distress".

***i. Whether the claim against the defendant is outside the limitation period***

**76**  The plaintiff's claim for damages in respect to personal injury are subject to a two-year limitation period. So are claims in trespass and defamation. Claims not captured by s. 3 (2) of the former *Act*, fraudulent misrepresentation, fraud and "intentional" infliction of mental suffering, are subject to the 6 year limitation period in s. 3(5).

**77**  All of the allegations against this defendant arise from events which occurred or are alleged to have occurred in 1989 and 1990.

**78**  The claims against the defendant are all outside the limitation period.

**79**  In summary, all of the plaintiff's claims against the various defendants are outside the limitation periods. Having made this finding, I will now turn to the factors set out in *Ounjian v. St. Paul's Hospital, supra* to determine if s. 6 of the former Act applies to any of the plaintiff's claims.

**II. WAS THE RUNNING OF TIME POSTPONED PURSUANT TO S. 6 OF THE FORMER*ACT***

**80**  Sections 6(4) and 6(5) of the former *Act* qualify s. 6(3) by providing for postponement of the commencing of a limitation period.

**81**  The issue now is how do principles articulated in *Ounjian v. St. Paul's Hospital, supra* apply in this instance.

**A. Identity of the defendants**

**82**  Ms. Jensen had knowledge of, or had within her means of knowledge, the identity of all defendants prior to the expiry of the limitation period.

**83**  Ms. Jensen knew the identity of the defendants Dr. Kristie Overhill and Dr. Ruth Campling at the time of the impugned acts.

**84**  The plaintiff knew the identity of Mr. Fairweather at the material time.

**85**  The plaintiff alleges she was present during the immunization of her daughter. Even if Ms. Ross's identity was not actually known to the plaintiff, she could have discovered her identity with reasonable diligence: see *Shah v. Stainless Cleaning Inc.*, [*2008 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1C1-00000-00&context=).

**86**  The plaintiff's pleadings suggest that the Government Defendants were known at all times to her. She had meetings with Polly Powley. She was present at the apprehension of her daughter and at the presentation hearing following the apprehension.

**87**  Even if the identity of the Government Defendants were not known to the plaintiff, the test for postponement is at what time the plaintiff could, with reasonable diligence, have been expected to discover their identities, not the point at which she actually became aware of their identities. *Shah, supra.*

**88**  The identity of the defendants Harnick Holdings Ltd. dba Super Valu, Blair Hagedorn and Elaine Hegedorn were not an issue.

**89**  The plaintiff was aware of the identity of the RCMP through personal interactions with members and through materials obtained through the Freedom of Information request in 1994. As well, reasonable diligence would have permitted the plaintiff to discover the identity.

**90**  The plaintiff's pleadings, the particulars and the admissions show the plaintiff was aware of the identity of NSHSS and had in fact articulated concerns with respect to the homecare services provided by NSHSS in her letter to the Ministry dated March 8, 1995. Even if the identity of NSHSS were not known, the test is at what point in time the plaintiff could with reasonable diligence have been expected to discover the identity. *Shah, supra.*

**B. Facts within means of knowledge**

**91**  The plaintiff had knowledge of the facts or could reasonably have ascertained all facts relevant to her claim against all defendants within the limitation period. Facts within the plaintiff's "means of knowledge" are those actually known as well as those which would become known if the plaintiff took such steps as would have been reasonable for her to take in circumstances: *Blok v. Matthew*, [*2012 BCSC 754*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3V0-00000-00&context=).

**92**  The plaintiff was aware of the facts relating to her claim against Dr. Campling and Dr. Overhill on the date on which the care was provided. Any facts not known to the plaintiff could have been discovered through reasonable steps.

**93**  The plaintiff was present when Mr. Fairweather advocated on her behalf in court and gave her legal advice and when he showed her Ministry reports, some or all of which allegedly caused her immediate emotional injury. Thus, all the facts were either directly known to her or within her means of knowledge.

**94**  The plaintiff was present when Ms. Ross performed the immunization on the plaintiff's daughter Nikole Jensen. The plaintiff alleges damages flowing from witnessing that event; therefore, all facts were within her knowledge at the relevant time.

**95**  The plaintiff alleges she was present when the apprehension of her daughter by the Government Defendants took place. She was present at the at the presentation hearing. She submitted a Freedom of Information request for Ministry documents in 1994. She wrote two lengthy letters to the Ministry, the latter of which is March 8, 1995 which reveals she had become aware of the facts pertinent to the claims in the action.

**96**  In any event, she could have taken steps prior to the expiration of the limitation period against the Government Defendants that would have brought all facts within her means of knowledge.

**97**  At the material time, the plaintiff was aware of all facts related to her claim against Harnick Holdings Ltd. dba Super Valu, Blair Hagedorn and Elaine Hagedorn.

**98**  The plaintiff knew the allegations underlying her claims against the RCMP because she was present for the interactions. She also had access to documents obtained through the Freedom of Information request in 1994.

**99**  The plaintiff could reasonably have ascertained all facts relevant to her claim against the Vancouver Coastal Health Authority within the limitation period. All facts were reasonably known to the plaintiff by March 8, 1995 at the latest, at which time she wrote to the Ministry with various concerns with respect to her homecare services.

***i. Appropriate advice a reasonable person would seek***

**100**  The third component in *Ounjian v. St. Paul's Hospital, supra* requires that a reasonable person, having taken appropriate advice with regard to the facts, would view those facts as showing that an action would have a reasonable chance of success.

**101**  Exactly what constitutes "appropriate advice" is relevant to this third principle. The Court of Appeal in *Levitt v. Carr*, [*66 B.C.L.R. (2d) 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B10P-00000-00&context=), said the following at para. 51 with respect to the "appropriate advice" aspect of the test:

... "Appropriate" must therefore refer to the nature of the inquiry to be made as revealed by the facts within the means of the plaintiff's knowledge. In this sense "appropriate" means suitable in the circumstances of those facts. This generalization is broad enough to accommodate the variety of causes of actions s. 6(3) addresses.

**102**  The court went on at para. 57:

We think it clear that those who drafted the British Columbia statute rejected simple ignorance of the existence of a cause of action as sufficient to postpone the running of time. The solution adopted by the Law Reform Commission and by the legislature was to introduce another level of abstraction: notional advice by notional advisors. This advice is given the conceptual status of facts and, when added to those within the plaintiff's means of knowledge, forms the body of information upon which the reasonable man decides whether an action on the cause of action would have a reasonable prospect of success and whether the plaintiff ought to be able to bring that action.

**103**  It must be assumed that the plaintiff received notional advice by a notional advisor at time the facts were known or within her means of knowledge: see *Blok v. Mathew*, [*2012 BCSC 754*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3V0-00000-00&context=) at para.57; *Thomas v. Vancouver Coastal Health Authority et al.,* [*2006 BCSC 422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23VR-00000-00&context=) at para. 24.

**104**  In my view, the plaintiff's various allegations do not have, and have never had, a reasonable prospect of success on the merits. However, assuming the facts alleged in her notice of civil claim are true, a notional legal advisor would have recommended pursuing an action. A reasonable person would have heeded that advice. It was not reasonable for the plaintiff to refuse to seek legal advice or to assume any action would fail or assume her child would be taken in retaliation to any potential action. A reasonably competent legal advisor would have advised the plaintiff that there would be no repercussions in regards to her daughter for filing a lawsuit.

**105**  The notional advisor would have provided advice to the plaintiff indicating that there was a reasonable prospect of success based on the facts as alleged, regardless of whether or not the cause of action would ultimately succeed: see *Thomas v. Vancouver Coastal Health Authority et al., supra* at para. 25.

**106**  A notional legal advisor apprised of the plaintiff's allegations against Drs. Overhill and Campling and against Mr. Fairweather would have concluded that a cause of action existed.

**107**  Likewise, if one accepts the facts that are alleged in the notices of civil claim and one assumes that Ms. Ross acted outside of the scope of her ordinary duty as a healthcare professional, there is no doubt that a competent legal advisor would have recommended the cause of action of negligent infliction of mental suffering.

**108**  A reasonable person having taken appropriate advice on the facts known to the plaintiff regarding her allegations against the Government Defendants would regard those facts as showing that an action would have a reasonable prospect of success. As previously noted, I do not accept the plaintiff's statement that she was precluded from bringing an action because of her belief that if she did the Ministry of Child and Family Development would take her child in retaliation.

**109**  A notional legal advisor would have regarded the facts alleged in the notice of civil claim against Harnick Holdings Ltd. dba Super Valu, Blair Hagedorn and Elaine Hegedorn as showing that a potential cause of action existed.

**110**  Assuming that the plaintiff had a reasonable cause of action in relation to the RCMP, a competent legal advisor would have informed her of this when the cause of action arose. The plaintiff contacted the Ministry and the RCMP and sought legal advice from three separate lawyers following the alleged fraudulent apprehension of her daughter, between 1990 and 1993. These actions all indicated she regarded the facts as showing that her allegations formed a cause of action with a reasonable prospect of success.

**111**  A reasonable person, having taken appropriate advice on the facts known to the plaintiff, would regard the alleged facts against the NSHSS as showing that an action would have a reasonable prospect of success. I am satisfied that a reasonable person, in the plaintiff's position, would have regarded an action as having a reasonable prospect of success at that time, if ever.

**112**  I conclude that the plaintiff was capable of seeking, retaining and instructing counsel between 1989 and the date this action was commenced.

***ii. Ability to bring an action***

**113**  The final consideration respecting postponement is whether a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interest and taking the circumstances into account, be able to bring an action. In other words, were there compelling circumstances that impeded the plaintiff's ability to bring an action at the appropriate time? 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=), the Supreme Court framed this issue as to whether the plaintiff's circumstances were so "serious, significant and compelling" that they prevented her from bringing an action. Madam Justice McLachlan (as she then was) addressed this issue noting at para. 81 that the proper interpretive approach to s. 6(4)(b) denotes:

... a time at which a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could - not necessarily should - bring an action. ... The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling.

(emphasis in original)

**114**  Madam Justice McLachlan went on at para. 90:

I conclude that delay beyond the prescribed limitation period is only justifiable if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized. ...

**115**  The court must "adopt the perspective of a reasonable person who knows the facts that are within the plaintiff's knowledge and has taken the appropriate advice a reasonable person would take on those facts." *Novak v. Bond, supra* at para. 39. The limitation period begins to run when that reasonable person could, acting reasonably, in light of her circumstances and interests, bring an action.

**116**  In *Cowen v. Gray*, [*2001 BCSC 487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-637H-00000-00&context=), the court considered what constitutes "serious significant and compelling circumstances". In that case, the plaintiff commenced a medical malpractice action arising out of a motor vehicle collision. Her claim was that she lost consciousness as a result of medication taken on the instructions of the defendant physician. The plaintiff claimed that the running of time was postponed because the plaintiff was incapable or substantially impeded in managing her affairs.

**117**  The court rejected the argument and considered whether the plaintiff's medical condition constituted "serious, significant and compelling interests and circumstances". The court said at paras. 52-53:

Notwithstanding that Ms. Cowen suffered from a mental disability (loss of short term memory) as well as several physical illness, I am unable to find that her circumstances meet the requirements of s. 6(4)(b). ...

At no time was her hold on life "tenuous", either physically or mentally. The costs and strains of litigation would likely have been difficult for her, but there is no evidence to suggest they would have been "overwhelming". Nor do I believe that her circumstances combined to make it "unfeasible" for her to initiate an action earlier than she did.

**118**  The plaintiff must assert a positive reason or circumstance to bring the postponement provision into consideration. As previously noted, the Supreme Court of Canada stated in *Novak v. Bond, supra* that the circumstances must be "serious, significant and compelling".

**119**  The plaintiff alleges serious, significant and compelling circumstances. She argues that she could not deal with the pain resulting from Nikole's apprehension. She states that she suffered from insomnia and other symptoms of post-traumatic stress disorder. She says she assumed a detached dissociated state to cope with life. She argues she came in and out of a "psychological coma" over the years. But, as noted above, there is no admissible medical evidence of a psychiatric or psychological disorder.

**120**  Moreover, I note:

1. The plaintiff was a party to various legal actions between 1992 and 2001 including various legal actions in which she was a plaintiff.
2. She instructed legal counsel in those actions.
3. She engaged counsel after her daughter was apprehended and took "appropriate advice".
4. The plaintiff obtained documents from the Ministry of Children and Family Development and from the RCMP.

**121**  The plaintiff admitted authoring a letter on March 8, 1995 to the Ministry of Social Services in which she directly alleged that Dr. Campling made specific false allegations against her. She also admits that she received documentation from the Ministry which appears to form the basis of her present claim.

**122**  Ms. Jensen had no physical illness and no diagnosed mental disability. Her self-serving assertion that she was in a "psychological coma" is not sufficient to satisfy the test. The conclusion is also contrary to the evidence: she was not paralyzed or comatose. She was, in the months and years following the return of her daughter, able to:

1. keep a detailed log of stalking and threats she perceived against her and her daughter;
2. make numerous reports to the police regarding the stalking and threats and alleged past harms the daughter;
3. actively seek information from the Ministry and the RCMP for information about her and any reports about her;
4. seek legal advice from a lawyer at Legal Aid; and
5. be party to several legal actions between 1992 and 2001 and instructed legal counsel in those actions.

**123**  The plaintiff puts forth that she was unable to bring an action due to concern that her daughter would be apprehended in retaliation. She says that this amounts to serious, significant and compelling circumstances.

**124**  Any threat underlying postponement did not exist after August 16, 2007. Nikole Jensen turned 19 at that time and could not have been removed. Even if the possibility of the removal of the plaintiff's daughter had existed, it dissipated in August 2007.

**125**  In summary, in each of 1995 and 2001, she brought civil actions against two different doctors seeking compensation for harm arising from a sexual relationship and surgery, respectively. She retained and instructed legal counsel in relation to those actions.

**126**  Throughout the period of proposed or alleged postponement, the plaintiff engaged with the various issues underlying her claim. She sought legal counsel, she made police reports, she obtained information from the Ministry of Children and Family Development through regress through requests under the *Freedom of Information Act*, *R.S.B.C. 1996, c.15* and she kept a log and photographs of possible stalkers.

**127**  Moreover, the plaintiff used the courts to redress perceived wrongs. She was involved in at least four civil proceedings including three which she initiated.

**128**  The plaintiff does not meet the test in *Novak v. Bond, supra* that her circumstances were sufficiently "serious, significant and compelling" such that a reasonable person would conclude that that individual could not bring an action when the cause of action arose.

**129**  A reasonable person would conclude that someone in the plaintiff's situation could, acting reasonably in light of her own circumstances and interest, bring an action as of 1989/90.

**130**  The inevitable conclusion based on her admissions, the pleadings and documents is that she was capable of grappling with the subject matter of the within action and was capable of commencing and maintaining legal actions and managing her affairs such that she may not rely on the postponement provisions that govern s. 6. I conclude that postponement pursuant to s. 6 of the former *Act* is not available to the plaintiff in regards to any of her claims against any of the various defendants.

***iii. Defamation and trespass***

**131**  The plaintiff alleged "defamatory libel and slander" and "trespass" against several defendants. The plaintiff's claim for damages in respect of defamation and trespass and subject to a two-year limitation period. The limitation has expired.

**132**  The plaintiff's claims relating to defamation and trespass are not actions listed in s. 6 (3) and cannot benefit from the postponement provision.

**III. WAS THE PLAINTIFF UNDER A DISABILITY WITHIN THE MEANING OF Section 7?**

**133**  The plaintiff alleges she was physically and psychologically disabled and was therefore precluded from bringing an action within the applicable limitation period.

**134**  In *Sandhu v. Insurance Corporation of British Columbia*, [*2011 BCSC 793*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-228F-00000-00&context=), at para. 22 the court listed factors which can be considered in determining whether a party is disabled within the meaning of s. 7. Those include whether the plaintiff:

1. is cognizant of the facts giving rise to the cause of action;
2. understands the nature and purpose of proceedings including the role of judge, jury and counsel;
3. comprehends the personal import of the proceedings; that is, whether he is able to form a rational judgment about the effect of the action on his interests; and
4. is able to comprehend legal advice being given to him and able to instruct counsel and make critical decisions.

**135**  For several reasons, these factors applied to Ms. Jensen do not indicate that she was under a disability capable of extending the limitation period. First, Ms. Jensen was able to obtain a university degree after these events and before bringing the claim. She earned a grade point average of 3.85.

**136**  Second, as discussed, the plaintiff was able to engage in various issues during the period of postponement. She sought legal counsel. She made police reports; she made requests under the *Freedom of Information Act,* she wrote detailed letters to the Ministry in 1994 and 1995; and kept logs and photographs documenting incidents.

**137**  Third, as previously noted, she embraced the use of the court to redress perceived wrongs. She was involved in at least four legal proceedings, three of which she initiated.

**138**  The inevitable conclusion based on her admissions, the pleadings, and authenticated documents is that she was capable of grappling with the subject matter of the within action and was capable of commencing and maintaining legal actions and managing her affairs such that she may not rely on the postponement provisions in s. 7.

**139**  Moreover, there is no admissible medical evidence that the plaintiff suffered from a medical or psychiatric condition that rendered her "...incapable of or substantially impeded in managing his or her affairs".

**140**  I conclude that s. 7 is not available to the plaintiff.

**IV. CONCLUSION**

**141**  The plaintiff's claim is outside the limitation period. The time is not postponed by s. 6 or s. 7. The plaintiff's claim is therefore dismissed.

**V. COSTS**

**142**  The defendants seek an award of costs. They argue that the Court should fix the costs under R. 14-1(15).

**143**  The Court of Appeal recently commented on this practice. In *Gichuru v. Smith*, [*2014 BCCA 414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FX0-KKR1-JCBX-S2K8-00000-00&context=) at para 154, the court recognized the discretion of the trial judge to fix costs but stated that the discretion should be exercised "sparingly" as the court pointed out:

...The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of the trial judge.

**144**  The court went on, however:

...An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

**145**  In the present case I am persuaded "the time and cost of a registrar's hearing cannot be justified". There are six counsel representing the many defendants. Merely scheduling a registrar's hearing will be difficult. It has been difficult to set dates throughout these proceedings. The plaintiff is self-represented and lives in Fort St. John.

**146**  What should the bill of costs be? A bill of costs was prepared, as a template, by counsel for Mr. Fairweather. It totals $19,342.40 plus disbursements of $3,521.87 for a total of $22,864.27. This was put forward as fairly representative. Some counsel, Mr. Brearley and Ms. Manhas, expended extra time preparing the notices to admit. Ms. Manhas and Mr. Flemming incurred significant transportation expenses. It was submitted by all counsel that an award of $15,000 for each party or group of parties represented by counsel was equitable.

**147**  I agree that $15,000 is a substantial discount from what the registrar would likely uphold. It is agreeable to the defendants and fair and reasonable to the plaintiff. Those costs are therefore awarded.

S.F. KELLEHER J.

**End of Document**

[***Katinic v. Bruno, [2000] B.C.J. No. 1453***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22F8-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Baker J.

July 12, 2000.

Vancouver Registry Nos. C943672, B955595, B936294, B930224,

B955598, B955597 and B955593

**[2000] B.C.J. No. 1453** | 2000 BCSC 1085 | 77 B.C.L.R. (3d) 297 | 45 C.P.C. (4th) 186 | 97 A.C.W.S. (3d) 1088

Between Insurance Corporation of British Columbia, plaintiff, and Tom Katinic, Marco Bruni, George Santo, Frank Bruno and Spencer Aoki, defendants (Vancouver Registry No. C943672) And between Tom Katinic, plaintiff, and Shery Leah Castle, defendant (Vancouver Registry No. B955595) And between Marco Bruni, plaintiff, and John Renaud, defendant, and Insurance Corporation of British Columbia, third party (Vancouver Registry No. B936294) And between Frank Bruno, Spencer Aoki and Marco Bruni, plaintiffs, and Insurance Corporation of British Columbia and Alexander Miller, defendants (Vancouver Registry No. B930224) And between Tom Katinic, plaintiff, and Frank Bruno, Alfredo Giovanni Bruno, Insurance Corporation of British Columbia, defendants, and Insurance Corporation of British Columbia, third party (Vancouver Registry No. B955598) And between Tom Katinic, plaintiff, and Alexander Thomas Mackenzie and Irene Catherine Remedios, defendants (Vancouver Registry No. B955597) And between Tom Katinic, plaintiff, and Craig Ross Rettie, Barbara Jean Rettie and Rogerio Jesus Silveira, defendants (Vancouver Registry No. B955593)

(55 paras.)

**Case Summary**

**Practice — Costs — Solicitor and client costs — Entitlement to solicitor and client costs — Measure of solicitor and client costs — Entitlement to solicitor and client costs — Fraud — Party-and-party costs — Special orders — Increase in scale of costs, difficulty and complexity of proceedings.**

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| Application by the Insurance Corporation of British Columbia for costs. The trial of seven actions were heard together, by a jury, for 21 days. The seven actions involved claims arising out of five motor vehicle collisions. Six of the actions were for damages for personal injuries alleged to have been caused by the ***negligence*** of one or more of the defendants. The Corporation denied liability for ***negligence***, and disputed the claims of injury. In the seventh action, the Corporation alleged that Katinic, Bruni, Bruno, Aoki, and Santo had made claims for compensation based on injuries that did not exist or were grossly exaggerated. The jury made separate findings with respect to the different collisions. At issue was whether the award of special damages against Aoki, Bruni, Bruno and Katinic should have been a joint and several award. The Corporation sought costs for defending the six actions brought by the unsuccessful parties and for prosecution of the Corporation's claim for damages for fraud, qualified only by the requirement that the fees and disbursements incurred were reasonable.  HELD: Application allowed.  In four of the actions, the Corporation was entitled to costs against Katinic in favour of the defendants who were represented by the Corporation of all proceedings up to, but not including the trial, on a Scale of four. Those actions were more complex. One set of costs was awarded against Bruni for one action, and against Aoki, Bruni and Bruno, who were liable jointly and severally. The Corporation was entitled to an order for special costs with respect to one of the actions, which included the trial of the action. There was nothing reprehensible about the conduct of Katinic, and therefore an award of special damages was not warranted in that action. The authorities did not suggest that costs in excess of those to which a party would be entitled as special costs under Rule 57(3) should be routinely ordered whenever a party succeeded in proving that another party had acted fraudulently, or had attempted to perpetrate a fraud. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 57(3).

Counsel Michael S. Menkes, for Tom Katinic, plaintiff, in Action No. B955595. F.G. Potts and Wesley D. Mussio, for Shery Castle, defendant, in Action No. B955595. Michael Menkes, for Marco Bruni, plaintiff, in Action No. B936294. F.G. Potts and Wesley D. Mussio, for John Renaud, defendant, and the Insurance Corporation of British Columbia, third party, in Action No. B936294. Michael S. Menkes, for the plaintiffs in Action No. B930224. F.G. Potts and Wesley D. Mussio, for the defendants in Action No. B930224. Michael S. Menkes, for Tom Katinic, plaintiff, in Action No. B955598. No one appeared for Franco Bruno and Giovanni Bruno, defendants, in Action No. B955598. F.G. Potts and Wesley D. Mussio, for the Insurance Corporation of British Columbia as third party in Action No. B955598. Michael S. Menkes, for Tom Katinic, plaintiff, in Action No. B955597. F.G. Potts and Wesley D. Mussio, for the defendants in Action No. B955597. Michael S. Menkes, for Tom Katinic, plaintiff, in Action No. B955593. F.G. Potts and Wesley D. Mussio, for the defendants in Action No. B955593. F.G. Potts and Wesley D. Mussio, for the plaintiff in Action No. C943572. Michael S. Menkes, for Tom Katinic and Marco Bruni, defendants, in Action No. C943572. George Santo, Frank Bruno and Spencer Aoki, defendants, in Action No. C943572, appeared in person.

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| **BAKER J.** |

**1**   The trials of these seven actions were heard together, by a jury, for 21 days commencing November 1, 1999 and concluding on December 7, 1999. The seven actions involved claims arising out of five motor vehicle collisions which occurred on July 15, 1992, October 5, 1992, November 8, 1992, February 5, 1993 and May 18, 1993. The first six actions listed above were brought by Messrs. Katinic, Bruni, Bruno and/or Aoki for damages for personal injuries alleged to have been caused by the ***negligence*** of one or more of the defendants named in those actions.

**2**  The six actions were defended by the Insurance Corporation of British Columbia ("the Corporation"), on behalf of the named defendants Castle, Renaud, Miller, Mackenzie, Remedios, Rettie, Rettie and Silveira. In each of the actions, the Corporation denied liability for ***negligence***, and disputed the plaintiffs' claims of injury.

**3**  In addition, however, in defence of the six actions, and as plaintiff in the seventh action, the Corporation alleged that Messrs. Katinic, Bruni, Bruno and Aoki, and a fifth defendant, Mr. Santo, had made and pursued fraudulent claims for compensation. The Corporation alleged that in filing claims with the Corporation and pursuing claims for compensation for alleged personal injuries, the plaintiffs were knowingly and fraudulently claiming compensation for injuries that did not exist or were deliberately and grossly exaggerated; or were deliberately and fraudulently misrepresenting the circumstances of the events out of which their alleged injuries arose. In particular, the Corporation alleged that Mr. Katinic, Mr. Santo and Mr. Bruni had lied, or, in the case of Messrs. Katinic and Bruni were continuing to lie, about who was driving Mr. Santo's vehicle when it was involved in the November 8, 1992 collision. The Corporation also alleged that Messrs. Katinic, Bruni, Bruno and Aoki had either "staged" the October 5, 1992 accident, or lied about how and where the collision occurred.

**4**  In the seventh action, the Corporation sought damages against Messrs. Aoki, Bruni, Bruno, Katinic and Santo for fraud. Special damages were specifically claimed for the costs incurred by the Corporation in investigating and defending the plaintiffs' claims relating to the five collisions. In addition, the Corporation sought punitive damages.

**5**  At the conclusion of the evidence and submissions to the jury, the jury were asked to answer 46 questions. The concluded that the July 15, 1992 collision had not been caused by the ***negligence*** of the defendant Castle. The jury did not find that Mr. Katinic had deliberately caused the collision, but concluded that he had advanced a fraudulent claim for compensation for personal injury. They awarded special damages against Mr. Katinic in favour of the Corporation in the amount of $5600 and punitive damages in the amount of $17,500.

**6**  In respect of the October 5, 1992 collision, the jury concluded that the collision had not been caused by the ***negligence*** of the defendant or an unidentified driver. The jury concluded that Messrs. Aoki, Bruni, Bruno and Katinic had not been injured. They concluded that Messrs. Aoki, Bruni, Bruno and Katinic had conspired to advance fraudulent personal injury claims against the Corporation. They assessed special damages of $3600 in favour of the Corporation against each of Messrs. Aoki, Bruni, Bruno and Katinic. They assessed punitive damages of $11,400 against each of Messrs. Aoki, Bruni and Bruno and punitive damages of $17,500 against Mr. Katinic.

**7**  In respect of the November 8, 1992 collision, the jury apportioned liability 75% to the defendant George Santo, and 25% to the defendant John Renaud. They concluded that Mr. Bruni had made a material wilfully false statement in relation to his claim for compensation for personal injury as a passenger in Mr. Santo's vehicle in the November 8, 1992 collision. They concluded that Messrs. Bruni and Santo had conspired to advance fraudulent claims for compensation for personal injury or vehicle damage. They concluded that Mr. Katinic had not participated in the conspiracy. They awarded $700 in special damages and $4300 in punitive damages against Mr. Bruni; and $15,000 in special damages and $8000 in punitive damages against Mr. Santo; in favour of the Corporation.

**8**  The jury concluded that the February 5, 1993 collision had not been caused by the ***negligence*** of the defendants MacKenzie or Remedios. They concluded that Mr. Katinic had advanced a fraudulent claim for compensation. They awarded special damages of $3500 and punitive damages of $17,500 against Mr. Katinic in favour of the Corporation.

**9**  The jury concluded that the May 18, 1993 collision was not caused by the ***negligence*** of the defendants Craig Rettie or Rogerio Silveira. They concluded that Mr. Katinic had advanced a fraudulent claim for compensation. They awarded $400 in special damages and $17,500 in punitive damages against Mr. Katinic in favour of the Corporation.

**10**  On December 10, 1999, counsel for the Corporation applied for judgment based on the jury verdicts, and submitted a draft order. The form of order, prepared by counsel for the Corporation, was not objected to by Mr. Menkes, on behalf of Messrs. Katinic, Aoki, Bruni or Bruno; or by Mr. Santo, who appeared on his own behalf, except as to the appropriate scale of costs and whether costs should be awarded jointly and severally. There is also a dispute about whether the award of damages against Messrs. Aoki, Bruni, Bruno and Katinic in relation to the October 5, 1992 collision should be joint and several. In addition, the court must specify a date for the commencement of prejudgment interest.

DAMAGES

**11**  I am of the opinion that the award of special damages against Messrs. Aoki, Bruni, Bruno and Katinic in relation to the October 5, 1992 motor vehicle collision should be a joint and several award. It appears that the jury, in arriving at the award of $3600 against each of the four defendants, simply accepted the Corporation's estimate of the total cost it had incurred in relation to investigation of the claim, and allocated one-quarter of the estimated total to each defendant. In such circumstances, I am satisfied that the award should be joint and several, based on the authority 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=).

INTEREST

**12**  The Corporation is entitled to recover prejudgment interest on all pecuniary awards. All awards are properly treated as awards in the fraud action brought by the Corporation. In order to calculate the amount of interest, a commencement date must be selected. For the purposes of certainty, I direct that court order interest will commence on the date the writ of summons in the fraud action was filed in the court registry. Some of the special damages no doubt began to accrue prior to that date, but the evidence about special damages was not sufficiently specific to enable a calculation from any earlier date. Accordingly, I am of the view that the fairest and most efficacious way to calculate interest is from the date of the commencement of the fraud action, to the date the jury rendered its verdict. Interest accruing after that date shall be considered to be post-judgment interest.

COSTS

**13**  In general, the Corporation is seeking orders for costs which would require the unsuccessful parties to fully indemnify the Corporation for all actual legal fees and disbursements paid by the Corporation to its solicitors incurred in defending the six actions brought by the unsuccessful parties; and in prosecution of the Corporation's claim for damages for fraud, qualified only, counsel submits, by the requirement that the fees and disbursements actually incurred be "reasonable". Although counsel for the Corporation has referred to the costs it is seeking as "special costs", the costs he seeks would really be in the nature of what are sometimes referred to in contracts and in these courts as "solicitor and own client costs".

**14**  More specifically, the Corporation is seeking the following orders in relation to costs in Action No. C943572, in which the Corporation is plaintiff:

This Court Further Orders that the Plaintiff, ICBC, shall have its costs and disbursements of and incidental to these proceedings taxed as Special Costs amounting to full indemnity for its actual legal fees and disbursements, provided that they were reasonably incurred, and that the Defendants Aoki, Katinic, Bruno and Bruni shall be jointly and severally liable for payment to ICBC, forthwith after taxation thereof, of fifty percent (50%) of the total of such costs and disbursements assessed; the Defendants Santo and Bruni shall be jointly and severally liable to ICBC for payment of twenty-five percent (25%) of the total such costs and disbursements assessed, and the Defendant Katinic shall be solely liable to ICBC for twenty-five percent (25%) of such costs as are assessed.

This Court Further Orders that the taxation of the costs of this proceeding shall be heard at the same time as the taxation of costs in the matters of Katinic v. Castle, British Columbia Supreme Court, Vancouver Registry No. B955595; Katinic v. Bruno et al., British Columbia Supreme Court, Vancouver Registry No. B955598; Bruno et al v. Miller, British Columbia Supreme Court, Vancouver Registry No. B930224; Bruni v. Reynaud, British Columbia Supreme Court, Vancouver Registry No. B936294; Katinic v. McKenzie et al., British Columbia Supreme Court, Vancouver Registry No. B955597; and Katinic v. Rettie et al., British Columbia Supreme Court, Vancouver Registry No. B955593.

**15**  The Corporation is also seeking an order that it have costs amounting to a full indemnity (solicitor and own client costs) against Mr. Katinic in Action #B955595; costs amounting to a full indemnity against Mr. Katinic in Action No. B955598; costs amounting to a full indemnity against Messrs. Bruno, Aoki, and Bruni, jointly and severally, in Action No. B930224; costs amounting to a full indemnity against Mr. Bruni in Action #B936294; costs amounting to a full indemnity against Mr. Katinic, except for the costs relating to the trial, in Action #B955597; and costs amounting to a full indemnity against Mr. Katinic in Action #B955593.

**16**  In addition, the Corporation is seeking an order for costs on Scale 3 against Mr. Santo in Action B945436, an action that was dismissed, by consent, on October 6, 1999.

**17**  In submissions made on behalf of Mr. Katinic and Messrs. Aoki, Bruni and Bruno, Mr. Menkes opposed an order for special costs or a full indemnity award to the Corporation. He argued that the court should direct the Registrar to assess costs based on success in individual actions; or on individual issues within the actions. He submitted that the Corporation should be denied a portion of its costs because the trial had been unnecessarily prolonged by the actions of counsel for the Corporation. He argued that the Corporation wrongfully persisted in taking some of the actions to trial when it was unnecessary to do so because the actions could have been settled. Mr. Menkes also submitted that the costs should not be awarded on a joint and several basis, which would permit the Corporation to recover all of its costs from any one or more of Messrs. Katinic, Aoki, Bruno, and Bruni; and that the Court should instead award a fixed proportion of the costs against each unsuccessful party.

**18**  Mr. Santo argued that the Corporation should not receive an award of costs against him because he had admitted, prior to trial, that he had falsely claimed that he was not driving his vehicle at the time it was involved in the November 8, 1992 motor vehicle accident. He submitted that the Corporation's claim against him could have been settled without the expense of trial.

**19**  Before some of the actions were discontinued or dismissed by consent, there were actually 12 separate actions involving these parties. All had been scheduled to be heard together at trial, as a result of applications brought by the Corporation. Fortunately, some of the actions did not proceed to trial. Even so, the combination of the seven actions; five incidents involving motor vehicle collisions; and the numerous individuals involved in the various incidents, made the proceedings difficult and complicated. Management of the concurrent trial of seven actions proved to be a daunting task for counsel and the court. The fact that Messrs. Aoki, Bruno and Santo were self-represented throughout the trial, and Mr. Bruni was self-represented on some issues for a portion of the trial, also presented a challenge.

**20**  Trial by jury was the choice of the Corporation who filed jury notices. At an earlier stage of the proceedings, an application brought by opposing counsel to strike the jury notices was defended by the Corporation and dismissed by another judge of this court. Although I do, of course, accept the correctness of the decision at the time it was made, in light of the information then available, and the submissions made, in retrospect I perceive this trial, involving so many accidents, individuals, and issues, as well as self-represented litigants, to push the limits of what can be fairly and conveniently decided by a civil jury.

**21**  Although the fact that the trial proceeded with a jury certainly lengthened and complicated the trial, I am not persuaded that any counsel, or any party, unduly or intentionally complicated or prolonged the trial in a manner that should be reflected in the costs award.

**22**  I turn, then, to the issue of the appropriate scale or measure of costs. In support of its application for costs amounting to a full indemnity, counsel for the Corporation relies on the decision of the Court of Appeal in Insurance Corp. of British Columbia v. Sanghera, [*(1991) 55 B.C.L.R. (2d) 125*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X1C7-00000-00&context=). In that case, the Court of Appeal awarded solicitor-client costs to the Corporation in a fraud action brought by the Corporation. The fraud action had been heard together with a ***negligence*** action in which the defendants in the fraud action were plaintiffs seeking damages for personal injury, but because the ***negligence*** action was not before the Court of Appeal, the Court restricted the award of solicitor-client costs in the fraud action to costs up to and including the first two days of the three-day trial.

**23**  Counsel before me relied on the following passage from page 140 of the Reasons in ICBC v. Sanghera:

The regrettable result in this case is that the Corporation will be substantially out of pocket in exposing this fraud. However in any future case of this kind, because of the new rules on costs, it will be open to a judge to award, in the fraudulently brought action for ***negligence***, full indemnity for costs of defending that action, and, in an action for a fraud of the sort perpetrated here, full indemnity for the costs of prosecuting that action. The only limitation will be the principle of the new rules that the costs have been reasonably incurred. Thus, where it is appropriate that there be full indemnity to the Corporation, the rule in Quartz Hill will cause it no difficulty.

**24**  The facts of the Sanghera matter were complex, but certain of the facts are germane to the applicability of the passage quoted above. The facts are set out succinctly in the headnote to the reported decision and I quote:

In 1985 three "plaintiffs" sued two "defendants" for damages resulting from an alleged motor vehicle accident. I.C.B.C. added itself as a third party under s. 20 of the Insurance (Motor Vehicle) Act. I.C.B.C. then sued all five for damages for fraud, alleging the accident never occurred or was intentionally caused. Both actions were heard together. The trial judge rejected the evidence of the three plaintiffs as false, dismissed their action, and ordered an assessment of damages in the fraud action. The plaintiffs' appeal as to liability failed, and the fraud action was referred back to the trial judge for assessment of damages. On the assessment, I.C.B.C. was awarded $57,672.36 which included all its expenses of investigating and defending the claims, including legal fees in both the ***negligence*** action and the appeal, and all accident benefits paid out. Additionally it was awarded punitive damages of $25,000.

**25**  The Court of Appeal allowed the appeal by the unsuccessful defendants, and varied the award made by the trial judge, [*41 C.C.L.I. 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M20D-00000-00&context=). The Court of Appeal held that in the fraud action I.C.B.C. was entitled to recover benefits paid and its expenses of processing and investigating the claims brought by the plaintiffs, but it was not entitled to recover the costs of defending the ***negligence*** actions as damages. This was because I.C.B.C. had not defended the ***negligence*** actions as an insurer of the defendants but rather as a third party under s. 20 of the Insurance (Motor Vehicle) Act.

**26**  The Court also held that because the fraud action as pleaded did not allege fraudulent acts in the course of the ***negligence*** actions, the costs of defending the ***negligence*** action could not form the basis of an award of damages in the fraud action.

**27**  In Sanghera, Justice Southin said that the court will not award damages against the plaintiff who brings an action that fails, even if it is wholly without merit; nor can damages be recovered against a plaintiff who testifies falsely at trial. Ac action can be brought for malicious abuse of civil process but, except in limited cases, only upon proof of special damage, and that in such an action, the plaintiff cannot claim the costs of the earlier proceedings as special damage.

**28**  She noted also, that even where a claim has been dishonestly put forward, the courts have not awarded full indemnity for costs to the successful defendant against the fraudster. She held, however, that an insurer can recover - from an insured who has put forward a false proof of loss and witness statement - all sums paid out to the insured as a result of the false proofs of loss and the expenses of process and investigating the claims.

**29**  She held, however, that I.C.B.C. could not recover the costs of the defending the ***negligence*** actions brought by the fraudulent insureds in Sanghera for three reasons: because I.C.B.C. had not defended the ***negligence*** action as the insurer of the fraudulent parties; because the fraudulent parties were not asserting a right against I.C.B.C. as their insurer in the ***negligence*** actions; and because I.C.B.C. had not specifically pleaded, in the fraud action, that the defendants' fraudulent acts included things done in the course of the ***negligence*** actions- such as giving false testimony on discovery or at the trial.

**30**  As a result, the Court of Appeal held that I.C.B.C. could not recover the costs of defending the ***negligence*** action as damages in the fraud action.

**31**  In Sanghera, the Court of Appeal also dealt with the issue of costs in the fraud action. However, in considering the Court's Reasons on costs, it must be remembered that in Sanghera, counsel for the fraudulent defendants conceded not only that I.C.B.C. should recover "taxable solicitor and client costs" in the fraud action, but also submitted that those costs should include the costs of both the fraud action and the ***negligence*** action.

**32**  The Court of Appeal stated that they could not make any order for costs in the ***negligence*** action, because the only appeal before them was in the fraud action. Justice Southin held that the court could award solicitor-client costs to I.C.B.C. in the fraud action, and did so, although limiting the costs to two of the three days of trial. Justice Southin concluded her Reasons with the passage on page 140 which I quoted earlier.

**33**  I take the reference to "the new rules on costs" in that quoted passage to be a reference to the introduction of a new Rule on costs in the Supreme Court Rules that had come into effect late in 1990.

**34**  The reference to the rule in Quartz Hill I take to be a reference to that portion of the Reasons of Brett M.R. quoted by Justice Southin at page 135 of her Reasons, to the effect that a losing party, even one who has brought civil proceedings falsely and maliciously, is only entitled to "the costs between party and party" in the unsuccessful action, and is not entitled to recover any "extra costs" incurred as damages in a subsequent action.

**35**  Although the issue of the Corporation's right to recover special costs was obiter dicta in Sanghera, that decision has been relied upon by judges of this court in subsequent decisions as authority for an award to the Corporation of special costs amounting to a full indemnity.

**36**  In Insurance Corporation of British Columbia v. Raymond Hung Sam and others, [*[1997] B.C.J. No. 571*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21PK-00000-00&context=), March 7, 1997, Supreme Court of British Columbia, Vancouver Registry No. C963847, Justice Williamson heard an application by the Corporation for an assessment of damages in an action for damages for fraud brought by the Corporation against 18 defendants who had filed insurance claims relating to eight automobile accidents. The Corporation had obtained default judgment against all of the defendants. Although two of the defendants did appear at the damage assessment hearing, their position was that they were not liable in damages at all, submissions that Justice Williamson concluded were irrelevant to the issue he had to decide.

**37**  Before Justice Williamson, the Corporation sought an order that the defendants be jointly and severally liable, and an order for special costs in the nature of a full indemnity. The Court held that the defendants were jointly and severally liable, as participants in a group involved in a fraudulent claim. The Court also awarded special costs:

...in an amount equal to the actual costs of proceeding against these individual defendants, such costs to be taxed by the Registrar.

**38**  In Insurance Corporation of British Columbia v. Teo Le, and others, [*[1997] B.C.J. No. 3135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1Y9-00000-00&context=), September 5, 1997, Vancouver Registry No. C966020, Justice Arkell heard an application to assess damages on a summary basis against numerous defendants against whom default judgment had been obtained. The action had been brought by the Corporation against 58 individuals who were alleged to have staged 12 motor vehicle accidents in order to fraudulently obtain insurance monies.

**39**  On the application before Justice Arkell, only counsel for the Corporation appeared. None of the defendants were present or represented. Justice Arkell acceded to the request of counsel for the Corporation to award special costs amounting to a full indemnification.

**40**  In Insurance Corporation of British Columbia v. Raymond Hung Sam and others, [*[1999] B.C.J. No. 3151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M26M-00000-00&context=), June 1, 1999, Vancouver Registry No. C963847, Justice Bennett heard an application for judgment and for special costs brought by the Corporation after a jury trial. The Corporation had sued 18 individuals, alleging fraud or attempted fraud, which included allegations of staged accidents, fraudulently obtained insurance, and premium fraud. The trial of the fraud action had been heard together with claims for personal injury alleged to have resulted from one of the accidents.

**41**  Although one of the defendants appeared in person at the hearing before Justice Bennett, and another was represented by counsel, her Reasons do not reveal whether those parties opposed the order for special costs amounting to a full indemnity. Justice Bennett quoted the paragraph from page 140 of the Reasons in Sanghera that I also quoted above. Justice Bennett concluded that she could see no basis to depart from the reasoning in the Sanghera decision and awarded special costs, amounting to a full indemnity, to the Corporation, both in the fraud action brought by the Corporation, and in the unsuccessful personal injury action.

**42**  With great respect to the learned trial judges referred to above, I do not understand the decision in Sanghera to establish that an award of special costs amounting to a full indemnity must or should be made in all cases in which the Corporation succeeds in an action for fraud, or succeeds in defending, on behalf of an insured, an action brought by a plaintiff who is found to have advanced a fraudulent claim, either by staging an accident, or by fraudulently misrepresenting the circumstances of the accident, or his or her injuries. To interpret Sanghera in such a way would not, in my view, be in conformity with the general rule that the scale of costs to be awarded is a matter within the discretion of the trial judge, in accordance with the Supreme Court Rules, in all cases, including cases where fraud is pleaded and proved. It would be anomalous, in my view, to conclude that because the fraud is alleged and proved by a public insurer, that an order for special costs amounting to "solicitor and own client costs" will automatically follow.

**43**  In Sanghera, the unsuccessful parties had conceded that "solicitor-client" costs, as they were called under the previous Rules, should be awarded. That issue was not in dispute on the appeal. In that respect, the comments of Justice Southin are obiter, albeit persuasive, and are only authority for the proposition that a court may, but is not required to, award special costs.

**44**  In addition, the reference to a "full indemnity" in Sanghera seems to be based on an assumption that an award of special costs under Rule 57(3) is equivalent to a "full indemnity" or solicitor and own client costs. Subsequent jurisprudence has demonstrated that although special costs may come close to or may sometimes provide a full indemnity, costs recoverable as special costs, and solicitor and own client costs, are not necessarily synonymous. This is because Rule 57(3) directs the Registrar as to the factors to be taken into account in assessing special costs, and the Rule does not require a party to be fully indemnified, through special costs, for all fees and disbursements charged to the party by its own counsel. See Midland Mortgage Corp. v. Jawl & Bundon [*(1997) 9 C.P.C. (4th) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0WP-00000-00&context=), (B.C.S.C.) and Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd. [*(1990) 45 B.C.L.R. (2d) 367*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4B6-00000-00&context=) (C.A.). See also Bradshaw Construction Ltd. V. Bank of Nova Scotia [*(1991), 54 B.C.L.R. (2d) 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X18G-00000-00&context=) (S.C.) affirmed at [*73 B.C.L.R. (2d) 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S11F-00000-00&context=) (C.A.).

**45**  I do not think Justice Southin intended, by her obiter remarks in Sanghera, to suggest that an award of costs, in excess of those to which a party would be entitled as special costs under Rule 57(3), should routinely be ordered whenever a party succeeds in proving that another party has acted fraudulently, or has attempted to perpetrate a fraud.

**46**  I turn now to a consideration of the specific orders sought by the Corporation. The Corporation is not seeking special costs against Mr. Santo in Action B945436, which was dismissed by consent before trial, and I award the Corporation costs of that action against Mr. Santo on Scale 3.

**47**  The jury concluded that Mr. Katinic was acting fraudulently in filing a proof of loss, providing statements to the Corporation's adjusters, and in bringing and maintaining his claims for damages for personal injury in relation to the July 15, 1992, February 5, 1993 and May 18, 1993 motor vehicle collisions. I am not satisfied, however, that his conduct in doing so was so reprehensible that an award for special costs is warranted. There was nothing about his conduct in the proceedings, other than his conduct in pursuing what the jury concluded were fraudulent claims, that warrants a punitive cost award.

**48**  However, while the costs of steps taken in the actions brought by Mr. Katinic prior to trial can be dealt with in the normal course, it is impossible to attempt to allocate the costs of the trial into separate actions or issues. I will therefore return to the matter of the trial costs later in these Reasons.

**49**  In each of Actions B955595, B955597, B955593, and B955598 I award one set of costs against Mr. Katinic in favour of the defendants in each of those actions who were represented by the Corporation (4 sets of costs in total) of all proceedings up to but not including trial, on Scale 4. I have chosen Scale 4 because in my view these actions were somewhat more complex than the average, both liability and quantum being in issue.

**50**  I also award one set of costs against Mr. Bruni, in favour of the defendant represented by the Corporation and the Corporation, in Action B936294, to be assessed on Scale 4, for all proceedings up to but not including trial.

**51**  I also award one set of costs against each of Messrs. Aoki, Bruni and Bruno, who will be liable for the costs jointly and severally, in favour of the defendant represented by the Corporation and the Corporation, in Action B930224, to be assessed on Scale 4, for all proceedings up to but not including trial.

**52**  Having carefully considered the matter, and exercising my discretion in relation to costs, I have determined that the Corporation shall have an order for special costs, including disbursements, under Rule 57(3) against Messrs. Aoki, Bruni, Bruno, Katinic and Santo, for all proceedings in Action C943572. The costs of that action, to be assessed as special costs, shall include the costs of the entire trial. As requested by the Corporation, the order shall provide that the defendants Aoki, Katinic, Bruno and Bruni shall be jointly and severally liable for 50% of the taxed costs and disbursements; the defendants Santo and Bruni shall be jointly and severally liable for payment of 25% of the taxed costs and disbursements, and the defendant Katinic shall be solely liable for the remaining 25% of the costs and disbursements assessed.

**53**  The costs of the application for the entry of judgment, and the hearing about costs, as well as any taxation or assessment that is required, shall be considered costs in Action C943572, and shall be assessed as special costs and allocated in the proportions outlined in the preceding paragraph.

**54**  The taxations or assessments of all costs shall proceed under Rule 57 and shall be conducted at the same time, before the same Registrar or taxing officer. For additional certainty, and for the assistance of the parties and the taxing officer, it should be understood that the order I have made for special costs in Action C943572 is an order under Rule 57(3). I have not made an order for special costs amounting to a full indemnity. The Registrar or taxing officer is simply directed to tax the costs in Action C943572 as special costs, in the usual and ordinary way, under the Rule.

**55**  If further directions are required in order to carry out any of the orders dealt with in these Reasons, the parties have leave to apply.

BAKER J.

**End of Document**

[***Lyon v. Ridge Meadows Hospital and Health Care Centre, [2007] B.C.J. No. 1516***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Stromberg-Stein J.

Heard: June 4 - 8 and 11 - 15, 2007.

Judgment: July 9, 2007.

Vancouver Registry No. M060209

**[2007] B.C.J. No. 1516** | 2007 BCSC 1000 | 159 A.C.W.S. (3d) 756

Between Maureen Lyon, Mitchell Bodnarchuk on his own behalf and Mitchell Bodnarchuk as guardian ad litem for Brandon Bodnarchuk and Nicholas Bodnarchuk Plaintiffs, and Ridge Meadows Hospital and Health Care Centre, (Operated by Fraser Health Authority), Dr. Howard Verrico, Dr. Michelle Little, and Nurses "Jane Doe", Donna Forbes and Astrida Fernandes, Defendants

(149 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Causation — Failure to diagnose — The family members' action for damages in this medical malpractice action for the death of the patient was dismissed — Although the nurses admitted breaches of their duty of care, the doctors had not breached their duty, and more importantly, causation had not been established — Had the correct operation been ordered it would not have taken place in time to save her life.**

**Professional responsibility — Professional duties — Duties of care and *negligence* — The family members' action for damages in this medical malpractice action for the death of the patient was dismissed — Although the nurses admitted breaches of their duty of care, the doctors had not breached their duty, and more importantly, causation had not been established — Had the correct operation been ordered it would not have taken place in time to save her life.**

**Professional responsibility — Professions — Health Care — Doctors — The family members' action for damages in this medical malpractice action for the death of the patient was dismissed — Although the nurses admitted breaches of their duty of care, the doctors had not breached their duty, and more importantly, causation had not been established — Had the correct operation been ordered it would not have taken place in time to save her life.**

**Tort law — *Negligence* — Causation — Causal connection — The family members' action for damages in this medical malpractice action for the death of the patient was dismissed — Although the nurses admitted breaches of their duty of care, the doctors had not breached their duty, and more importantly, causation had not been established — Had the correct operation been ordered it would not have taken place in time to save her life.**

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| The plaintiff family members sought damages in this medical malpractice action for the death of Debra Summers under the Family Compensation Act -- She had died of cardiac arrest, resulting from a twisted bowel, 11 hours after being admitted to the respondent hospital for abdominal pain -- The plaintiffs contended that the emergency physician, Dr. Verrico, failed to appropriately respond to, diagnose and treat her condition -- They further alleged that Dr. Little failed to independently assess her complex medical condition, and did not arrange a surgical consultation -- They alleged that neither doctor considered the possibility of sepsis from a small bowel obstruction, or the need for emergency surgery -- The plaintiffs alleged the hospital was vicariously liable for the ***negligence*** of the doctors and nurses -- The key question was whether a general surgeon, if called on to assess Debra at some point during the night could or would have operated on her in time to save her life -- HELD: The action was dismissed -- The doctors had not breached their standard of care; although the nurses admitted breaches for failure to document, etc., the plaintiffs had failed to prove causation -- Even if a general surgeon was called to assess Debra at some point during the night, the operation would not have taken place in time to save her life -- It was unlikely the procedure would have taken place at the defendant hospital, and Debra would not have survived while awaiting transfer -- Dr. Verrico could not be faulted for electing to proceed conservatively, to observe Debra overnight, as medically she was deemed a stable patient despite her pain level and on-going pain -- It was reasonable for Dr. Little to accept Verrico's assessment. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, *R.S.B.C. 1996, c. 126*

**Counsel**

Counsel for the Plaintiffs: Erin F. Berger.

Counsel for the Defendants: Ridge Meadows Hospital, Donna Forbes and Astrida Fernandes: Adam H. Howden-Duke.

Counsel for the Defendants: Dr. Howard Verrico and Dr. Michelle Little: Kimberly J. Jakeman, Julie K. Gibson.

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| **STROMBERG-STEIN J.** |

**Background**

**1**  This medical malpractice action concerns the issue of liability arising from the death of Debra Summers. Ms. Summers' mother, Maureen Lyon, her common-law husband, Mitchell Bodnarchuk, and her two children, ages seven and nine, claim loss and damages under the ***Family Compensation Act***, *R.S.B.C. 1996, c. 126*.

**2**  Tragically, on April 29, 2005, 11 hours after she was admitted to Ridge Meadows Hospital for abdominal pain, 43-year-old Debra Summers suffered a cardiac arrest and died. The autopsy report concluded she died of systemic shock and sepsis, due to small bowel ischemia and necrosis, due to vascular occlusion of the bowel as a result of a mesenteric band and volvulus. In other words, Ms. Summers developed a "strangulated bowel": a bowel that twisted, cutting off the blood supply, causing infection. However, the medical experts do not really understand why Ms. Summers died.

**3**  Ms. Summers' medical history was complex. Eleven years earlier she had a heart transplant. She was on immunosuppressive medication, as well as an exogenous steroid, which could blunt or mask signs of and response to infection. She suffered from Crohn's disease, chronic renal failure, and hypertension. She had a high output ileostomy, following an anastomotic leak from a small bowel resection several months earlier, which required frequent hospital admissions for rehydration. Approximately five months before her death she was transferred from Ridge Meadows Hospital to St. Paul's Hospital for surgery for a small bowel obstruction and abscess. A postoperative pulmonary embolus led to her being placed on Coumadin, an anticoagulation therapy.

**Position of the Parties**

***Plaintiffs***

**4**  The plaintiffs contend, supported by their expert witnesses, Dr. Isser Dubinsky, a specialist in emergency medicine, and Dr. John Bohnen, a general surgeon, that Ms. Summers' death was preventable, as she could have been treated in time to save her life. The plaintiffs contend the emergency physician, Dr. Howard Verrico, failed to appropriately respond to, diagnose and treat Ms. Summers for her complaints of abdominal pain when she arrived by ambulance at the emergency department at Ridge Meadows Hospital, a community hospital in Maple Ridge, British Columbia.

**5**  The plaintiffs maintain Dr. Verrico should have ordered more tests, including a CT scan, arterial blood gases and serum electrolytes. They allege Dr. Verrico should not have admitted Ms. Summers to the hospital under the care of Dr. Michelle Little, a hospitalist, but should have had Ms. Summers assessed by the emergency physician coming on duty, and should have arranged a surgical consultation. The plaintiffs claim that Dr. Verrico failed to re-examine Ms. Summers and failed to appreciate her condition was not stable and her severe abdominal pain was unresponsive to intravenous morphine. The plaintiffs submit that Dr. Verrico should have told Ms. Summers and her family to go to St. Paul's Hospital; he should have arranged to transfer her to St. Paul's Hospital; and he should have contacted her doctors at St. Paul's Hospital to assist in arranging her transfer.

**6**  The plaintiffs allege that when Ms. Summers was admitted to hospital under the care of Dr. Little, she failed to properly respond to Ms. Summers' condition in that she did not independently assess Ms. Summers' complex medical condition and did not arrange a surgical consultation.

**7**  With respect to both Dr. Verrico and Dr. Little, the plaintiffs allege that neither doctor considered the possibility of sepsis from a small bowel obstruction, or the need for emergency surgery.

**8**  The plaintiffs, supported by their expert witness Barbara Radons, a registered nurse practitioner, contend that Nurse Donna Forbes and Nurse Astrida Fernandes failed to perform an adequate assessment of Ms. Summers, failed to document her pain; failed to appreciate her acute and unstable condition, and administered morphine without proper observation or monitoring by failing to document the dosage and response to morphine. In addition, the plaintiffs say the nurses failed to use reasonable care and skill by failing to record the fact of Ms. Summers' ileostomy bag, that there were no results in the bag, and her urine output. The plaintiffs argue the nurses were required to advocate for Ms. Summers, to prevent her transfer from the emergency department to an overflow ward, and to notify the doctors that the morphine was ineffective.

**9**  With respect to Nurse Fernandes, the plaintiffs contend that she should have phoned Dr. Little at least at 04:00 hours, and should not have waited until 06:30, but she failed to appreciate Ms. Summers' medical condition, discounted Ms. Summers' pain level due to lack of experience, and failed to ask for assistance from the emergency nurses.

**10**  The plaintiffs argue the hospital is vicariously liable for the ***negligence*** of the doctors and nurses.

**11**  The plaintiffs submit that surgery was required, and together with appropriate monitoring and treatment Ms. Summers probably would have survived, at least up to an hour before she died. The position of the plaintiffs is that the failure of the doctors to call in a surgeon, and the inaction of the nurses to alert the doctors to Ms. Summers' condition, caused or contributed to Ms. Summers' death.

***Dr. Howard Verrico***

**12**  It is the position of Dr. Verrico, supported by Dr. David Esler, an emergency physician, and Dr. Peter Blair, a general surgeon, that his conduct in the assessment and treatment of Ms. Summers - his history, physical examinations, orders for tests, diagnosis of query partial small bowel obstruction, decision to admit Ms. Summers to hospital for monitoring overnight, and administration of morphine for pain management and saline for hydration - was reasonable in all of the circumstances. Dr. Verrico says his conduct was in accordance with the standard expected of a reasonably competent emergency room physician. Dr. Verrico asserts that he came to a reasonable conclusion to admit Ms. Summers overnight for observation and for further tests in the morning based on Ms. Summers' presentation and all of the other clinical information available to him.

***Dr. Michelle Little***

**13**  It is the position of Dr. Little, supported by Dr. Tricia Ewert, a hospitalist, that she was not required to make an independent assessment of the patient and she responded in a manner that was reasonably expected in the circumstances.

***Nurses Donna Forbes and Astrida Fernandes and Ridge Meadows Hospital***

**14**  It is the position of the nurses and the hospital, supported by their expert witness, Leighanne MacKenzie, a registered nurse, that there was no breach of the standard of care owed to Ms. Summers that affected in any way either the treatment she received or her outcome. They maintain there was no obvious neglect or incompetence on the part of the doctors that required the nurses to depart from the treatment plan, and nothing to indicate the treatment plan was inappropriate. The nurses acknowledge breaches of their standard of care in failing to document, but argue these were immaterial or had no causative effect.

**Issues**

**15**  There is no question that the doctors and nurses owed a duty of care to Ms. Summers. There is also no issue that the hospital is vicariously liable for the acts or omissions of the nurses as its employees. The plaintiffs did not pursue the issue of whether the hospital was liable for the acts or omissions of the doctors. In any event, the evidence does not establish that the doctors were employees of the hospital.

**16**  The first issue is whether the defendants breached the standard of care owed to Ms. Summers. If the answer is yes, the second issue is causation; that is, even if the defendants breached the standard of care owed to Ms. Summers, have the plaintiffs established that the breach affected either her treatment or outcome? The key question is whether a general surgeon, if called on to assess Ms. Summers at some point in the night, could or would have operated on Ms. Summers in time to save her life.

**Result**

**17**  I conclude the doctors did not breach their standard of care. The nurses have admitted breaches of their standard of care for failing to document. In addition, I conclude Nurse Fernandes breached the standard of care owed to Ms. Summers by failing to notify Dr. Little of her condition at 04:00 hours. However, the plaintiffs have failed to prove causation.

**18**  I find that a general surgeon, if called to assess Ms. Summers at some point in the night, would not have operated in time to save her life. It is unlikely that Ms. Summers would have been operated on at Ridge Meadows Hospital. It is unlikely, given her presentation, that she would have been transferred to another hospital in an emergent way. It is unlikely that she would have made it to St. Paul's Hospital, or another tertiary care hospital, before morning. Unfortunately, given her abrupt deterioration, Ms. Summers would not have survived while awaiting transfer to a hospital that could have operated on her. Ms. Summers' death, while tragic, was not the result of any ***negligence*** on the part of the doctors, the nurses or the hospital.

**The Law**

**19**  A doctor must exercise a reasonable degree of learning and skill, similar to those possessed by physicians in similar places and circumstances. An error in judgment is not considered ***negligence***; a physician's professional obligation has been satisfied where judgment has been exercised honestly and intelligently: ***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=).

**20**  When a doctor acts in accordance with a recognized and respectable practice of the profession, that doctor will not be deemed negligent. It is assumed by the courts that the medical profession has adopted procedures which reflect the best interests of patients; therefore, liability only follows where there has been a violation of universally accepted rules of medicine. Even where there are competing theories and multiple available methods of treatment, a physician will not be held liable if the diagnosis and treatment they give to a patient corresponds to those recognized by medical science at the time: ***ter Neuzen v. Korn*** [*(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=), [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=).

**21**  The general principles laid down in ***ter Neuzen v. Korn***, with regard to the standard of care of physicians, also apply to nurses. The nurses' duty of care differs from that of the physicians in that they are not required to second guess the physicians, absent a clear and obvious basis for concern on the nurse's part.

**22**  The plaintiffs must prove, on a balance of probabilities, that the defendants breached the applicable standard of care, thereby causing Ms. Summers' death, and that there is a causal connection between the breach and the death.

***Test of Causation***

**23**  In establishing causation in medical malpractice cases, the burden of proof lies with the plaintiff. The plaintiff must prove that the defendant's breach of duty of care caused the injury. The plaintiff has the ultimate burden; however, where the defendant has failed to put forward evidence to the contrary, the courts may draw a "robust and pragmatic" inference of causation, based on the facts, that the defendant's ***negligence*** materially contributed to the plaintiff's injury, even though positive or scientific proof of causation has not been submitted: ***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=), [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=). The burden of proof does not shift to the defendant and the plaintiff remains fixed with the burden of proving causation on a balance of probabilities.

**24**  An inference of causation cannot be drawn without evidence that ***negligence*** caused the injury. A substantial connection between the injury and the defendant's conduct must be proven by the plaintiff. In other words, in order to draw an inference of causation there must be evidence that the ***negligence*** caused, or could have caused, the injury: ***Jackson v. Kelowna General Hospital***, [*[2007] B.C.J. No. 372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S427-00000-00&context=), [*2007 BCCA 129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S427-00000-00&context=) at para. 20.

**25**  The primary test for determining causation in ***negligence*** actions is the "but for" test. The "but for" test requires the plaintiff to show that the injury would not have occurred *but for* the ***negligence*** of the defendant. Under the "but for" test, a defendant is liable for the plaintiff's injuries where a substantial connection exists between the injury and the defendant's negligent conduct: ***Resurfice Corp. v. Hanke***, [*[2007] S.C.J. No. 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH21-JPGX-S0F9-00000-00&context=), [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=) at paras. 22-23.

**26**  In exceptional cases where the basic "but for" test is found to be unworkable, a "material contribution" test may be applied. In those special circumstances, where the material contribution test is applied, there are two requirements:

1. it must be impossible for the plaintiff to prove that the defendant's ***negligence*** caused the plaintiff's injury using the "but for" test (e.g. due to limits in scientific knowledge); and
2. it must be clear the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, which form of injury the plaintiff did suffer.

Where those two requirements are met, liability may be imposed despite the "but for" test not being satisfied: ***Resurfice*** at para. 25.

**27**  The material contribution test may be required in cases where it is impossible to say what caused the particular injury. For example, in cases where the injury was caused by two tortious sources, or where it is impossible to prove what a particular person in the chain of causation would have done in the absence of the ***negligence***.

**28**  While the material contribution test may be useful in cases where medical proof is problematic, it is only intended to lead to an inference of causation where it is impossible, not just difficult, for the plaintiff to discharge the burden of proof. Although ***negligence*** may be made out by the plaintiffs, to draw an inference of causation the breach must be shown to have materially increased the risk that death resulting from small bowel obstruction would occur, and it must be impossible for either party to lead evidence that would establish either that the breach of duty caused the death or that it did not cause the death. An inference cannot be drawn if it was possible for the plaintiffs to lead evidence of causation, or if the defendants could lead contrary evidence: ***B.S.A. Investors Ltd. v. DSB***, [*[2007] B.C.J. No. 947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24FM-00000-00&context=), [*2007 BCCA 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24FM-00000-00&context=) at paras. 37-39.

**29**  The material contribution test is inapplicable in a case such as this, where the "but for" test has not been proven unworkable: plaintiffs' counsel did not bring evidence showing what a surgeon would have done, if consulted, and it has not been proven that Ms. Summers' injury fell within the ambit of risk created by the defendants' departure from the appropriate standard of care. Accordingly, the "but for" test remains the applicable test for causation in this case.

***Loss of Chance***

**30**  In order to prove causation, the plaintiffs must prove that it is more likely than not that proven breaches of the standard of care caused the death of Ms. Summers. An increased possibility of injury as a result of a failure in medical care (a loss of chance) is not compensable: ***Laferrière v. Lawson*** [*(1991), 78 D.L.R. (4th) 609*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-602C-00000-00&context=), [*[1991] 1 S.C.R. 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-602C-00000-00&context=). The plaintiffs must prove that any breach of duty owed by the defendants actually caused the damages suffered. Thus, loss of chance is non-compensable in medical malpractice cases. It is not enough for the plaintiffs to prove that surgery "might" have saved Ms. Summers; rather, they must prove that on a balance of probabilities surgery would have been undertaken and would have saved her.

***Expert Evidence***

**31**  In ***Leaker* v*. Porter***, [*[2001] B.C.J. No. 1602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23VG-00000-00&context=), [*2001 BCSC 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23VG-00000-00&context=), Owen-Flood J. made the following comments on expert evidence at para. 51:

[51] Clearly, expert evidence is required to assist the court to determine what actions by a physician amount to a reasonable exercise of skill, knowledge and care. Further, the standard of care to be applied to a physician's treatment choices and diagnosis depends on the particular circumstances, including the time and place: *ter Neuzen v. Korn* [*(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 (S.C.C.). ...

**32**  It is the expert evidence of the prevailing standard of care for an emergency physician, hospitalist and nurse in a community hospital in April 2005 that is applicable: ***St. Jules* v*. Chen***, [*[1990] B.C.J. No. 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-21F5-00000-00&context=); ***Dobie* v*. Dlin***, [*[2001] B.C.J. No. 2258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61GN-00000-00&context=), [*2001 BCSC 1523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61GN-00000-00&context=); ***Leaker* v*. Porter***.

**Facts**

**33**  During the day of April 28, 2005, Ms. Summers attended St. Paul's Hospital for a pre-operative assessment as her ileostomy was scheduled to be surgically reversed at St. Paul's Hospital the next week. Upon leaving the hospital, she complained of abdominal pain. She decided to return to her home in Maple Ridge rather than immediately seek care and treatment at St. Paul's Hospital.

**34**  That night, at 19:46, Ms. Summers arrived at Ridge Meadows Hospital by ambulance. It was not obvious at that time that she needed to go to St. Paul's Hospital for surgery; in any event, the ambulance crew will only transport a patient to the nearest hospital. Documented in the Ambulance Crew Report are Ms. Summers' complaints of abdominal pain since 13:00, associated with vomiting. Her pain level was rated as 10/10 and constant. Her abdomen was soft and "++tender" mid epigastrium.

**35**  At 19:55, a triage nurse assessed Ms. Summers who was complaining of epigastric pain since 12:00 and rating her pain level at 8/10. The emergency nurse, Nurse Forbes, assessed Ms. Summers at 20:05 and documented constant abdominal pain, with an onset six hours before, and vomiting four times. Nurse Forbes described Ms. Summers as being in considerable pain, consistent with a pain rating of 8/10.

**36**  All of Ms. Summers' vital signs were considered to be in the normal range.

**37**  Dr. Verrico, the emergency room physician, assessed Ms. Summers at 20:10. He noted a history of complaint by Ms. Summers about abdominal pain since noon that was ongoing and progressive. She complained of nausea, vomiting without blood, and no results from her ileostomy. Dr. Verrico said Ms. Summers definitely appeared to be in significant pain. On physical examination, Ms. Summers' head, neck, respiration and cardiovascular systems were normal. There was no evidence of dehydration or hyperventilation. Her abdomen was tender in the epigastrium, there were decreased bowel sounds, and an absence of abdominal distension. Ms. Summers did not display a "surgical abdomen"; that is, an abdomen that is not just tender but has rebound pain or guarding. Dr. Verrico ordered intravenous saline, gravol and morphine. He ordered blood tests and abdominal x-rays.

**38**  For pain, Ms. Summers was administered morphine at 20:35 (3 mg.); 20:50 (3 mg.); and 21:54 (4 mg.). Nurse Forbes noted that Ms. Summers was not yet comfortable with the initial small dose of morphine, and so she administered the further doses of morphine.

**39**  Nurse Forbes testified that Ms. Summers was more comfortable before she went to x-ray, although she did not expect the morphine to eliminate Ms. Summers' pain. Nurse Forbes noted that Ms. Summers had been on hydromorphone at home, which meant that she would require more morphine to relieve her pain. Ms. Summers arrived back from x-ray at around 22:00 complaining of severe abdominal pain. Nurse Forbes informed Dr. Verrico of this and he ordered more intravenous morphine as needed.

**40**  Ms. Summers was administered further doses of morphine at 22:10 (3 mg.); 22:45 (3 mg.); and 23:30 (4 mg.). Ms. Summers received a total of 20 mg. of morphine in the emergency department. Nurse Forbes noted Ms. Summers seemed to be getting some relief between doses of morphine, consistent with her experience with other patients with bowel obstructions.

**41**  Nurse Forbes considered the possibility of sepsis, but did not observe any of the signs of sepsis in Ms. Summers, particularly an elevated temperature. Nurse Forbes noted that Ms. Summers' vital signs were stable throughout and her pain was becoming more manageable with morphine.

**42**  Dr. Verrico testified that morphine is a fast acting short-term analgesic administered in multiple small doses. Dr. Verrico explained that morphine is administered to alleviate pain and suffering and provide some level of comfort, but does not therapeutically address the underlying cause, such as the bowel obstruction itself.

**43**  At some point, Dr. Verrico reviewed Ms. Summers' medical records from previous hospital visits. He was aware of Ms. Summers' complex medical history. He was aware Ms. Summers' medications included immunosuppressants and steroids. Dr. Verrico noted that Ms. Summers had a prescription for hydromorphone, a high potency narcotic, for treatment of her Crohn's disease, making her less tolerant to pain and requiring higher doses or morphine for subsequent treatment.

**44**  Dr. Verrico reviewed Ms. Summers' x-rays and blood tests. The abdominal x-rays, taken at 21:43, showed one or two non-specific small bowel air fluid levels, centrally, but no definite evidence of obstruction and no specific diagnostic features. Dr. Verrico correctly interpreted the x-rays as being non-diagnostic or negative. Ms. Summers' blood tests were unremarkable other than her white blood cell and neutrophil counts, which were slightly elevated, but in a non-specific range, consistent with infection, stress or pain.

**45**  Dr. Verrico did not know that Ms. Summers' white blood cell count was elevated from her white blood cell count taken that morning at St. Paul's Hospital. In theory, this information might have been available had St. Paul's Hospital been contacted, but there was no evidence on this point. In any event, this information would not have altered the course Dr. Verrico chose. Dr. Esler did not think the results from St. Paul's Hospital provided a useful comparison of the white blood cell and neutrophil counts because there was not a marked change that was useful diagnostically.

**46**  Dr. Verrico said he returned to Ms. Summers' bedside, reviewed the x-ray results with Ms. Summers, and conducted a repeat examination of Ms. Summers' abdomen, again testing for any sign of a surgical abdomen. Dr. Verrico says his repeat abdominal examination was unchanged from his previous examination and therefore he did not chart any additional findings from that examination. Dr. Verrico said he does not chart his notes chronologically by time, but keeps a running record. Dr. Esler commented Dr. Verrico's charting was probably consistent with what most physicians would chart in a given circumstance; serial examination does not necessarily have to be documented; there are many encounters between a patient and physician in an emergency department that are not documented.

**47**  Dr. Verrico claims he has an independent memory of the events because it was a unique case of a heart transplant patient ending in a tragic death, which he learned about a week later. Dr. Verrico says he discussed with Ms. Summers that he considered her to have a small bowel obstruction, and that she would be admitted overnight for observation to see if it would resolve spontaneously. Dr. Verrico told Ms. Summers that if there was no improvement overnight, she would be reassessed in the morning to determine what the next step would be. At some point, Dr. Verrico says he discussed with Mr. Bodnarchuk the possibility of an eventual transfer to St. Paul's Hospital.

**48**  Mr. Bodnarchuk disputes that Dr. Verrico re-examined Ms. Summers after he obtained the lab results and x-rays. Mr. Bodnarchuk testified that Dr. Verrico did not see Ms. Summers the whole time Mr. Bodnarchuk was at the hospital; specifically, he did not examine her abdomen after he looked at the x-rays or any time while Mr. Bodnarchuk was there.

**49**  Mr. Bodnarchuk's memory was demonstrated to be wrong about a number of events that occurred that night. Mr. Bodnarchuk specifically recalled coming to the hospital at 20:30 hours and he recalled that Ms. Summers came back from x-ray about five minutes after he arrived. He was sure of his times and suggested the hospital records were wrong. The x-ray image records a time of 21:43 hours, indicating Mr. Bodnarchuk's memory is incorrect. Mr. Bodnarchuk maintained that Dr. Verrico was holding an x-ray, despite being informed that x-rays were reported in digital form only, also indicating his memory is incorrect. Mr. Bodnarchuk recalled discussing the x-ray results with Dr. Verrico at the nursing station, while Ms. Summers was screaming in pain. Neither Nurse Forbes nor Dr. Vericco recalled Ms. Summers screaming. Mr. Bodnarchuk said he left the hospital at 00:30 hours when the nurse told him Ms. Summers was going to be transferred to another room; however, the nurses' notes indicate he left at 23:30, after Ms. Summers had been transferred to the overflow ward, indicating again that Mr. Bodnarchuk's memory is incorrect.

**50**  I accept Dr. Verrico's evidence that he did re-examine Ms. Summers prior to deciding to admit her to hospital and that his reassessment did not produce any new information. While Nurse Forbes had no recollection of a re-examination, she said this would accord with her knowledge of Dr. Verrico's usual practice.

**51**  Dr. Esler commented that two to three hours is an appropriate interval to re-assess a patient and is typical and standard for an emergency physician in a clinical setting before declaring the patient stable. Dr. Tricia Ewert described a stable patient as one who has stable physical findings, including vital signs and symptoms from the time of admission, not progressing or deteriorating, and whose lab work and x-ray findings are also stable.

**52**  From Ms. Summers' presentation, other than pain, there were no obvious clinical or vital signs to suggest a diagnosis of ischemic bowel. In fact, Ms. Summers' presentation was not dissimilar to her earlier admission for bowel obstruction in October 2004. The weight of the expert evidence establishes that pain and pathology cannot be correlated. The degree or intensity of pain is highly subjective and has limited use diagnostically to correlate with the degree of underlying pathology, other than to point a doctor to the location of the pathology. Pain is a subjective symptom and probably the most common symptom of bowel obstruction. Dr. Esler testified that the correlation is very poor between the severity of pain, the use of narcotics, and the underlying pathology; some patients with minimal pathology might require large doses of morphine, while some patients with severe pathology require little morphine, so the response to pain is not diagnostically important.

**53**  Dr. Verrico testified that pain is expected in small bowel obstruction and the degree of pain Ms. Summers presented with was in keeping with the diagnosis. If he had found signs of a surgical abdomen or a significant change in clinical status he says he would have ordered a surgical consultation. He elected to proceed with conservative management. He considered Ms. Summers to be a stable patient. In the absence of a surgical abdomen, Dr. Bohnen agreed there is support for conservative management of a small bowel obstruction for 24 hours to five days, rather than operating immediately.

**54**  Ms. Summers' admission in November 2004 provided Dr. Verrico with an indication that Ms. Summers was able to mount an immune response and show signs of sepsis even though she was on immunosuppressant medications. Unlike her presentation on her admission of April 28, 2005, in November 2004, Ms. Summers' white blood cell and neutrophil counts were significantly elevated and Ms. Summers presented with an acute metabolic acidosis. Dr. Verrico noted that intravenous analgesics had been used in the November 2004 admission of Ms. Summers.

**55**  Dr. Verrico saw no need to order a CT scan to assist him in making his clinical diagnosis. At Ridge Meadows Hospital a radiologist is on call. Dr. Vericco felt a decision to order a CT scan could wait until morning given his diagnosis of query partial small bowel obstruction, since that was the most likely diagnosis based on the clinical information available at the time. Dr. Verrico testified that he was considering whether the bowel obstruction was partial or complete, but the distinction was academic in that both diagnoses would lead to a conservative, observant management of the patient for a period of time.

**56**  Dr. Verrico did not order arterial blood gas or serum lactate tests. Neither are routine tests and neither are pathognomonic (meaning absolutely diagnostic) of an ischemic bowel. There was no indication from vital signs or lab work that either test was necessary. He chose not to give Ms. Summers steroids, but to hold all oral medications overnight. He did not use a nasogastric tube because Ms. Summers was not vomiting and the tube was uncomfortable. He did not order a foley catheter because the circumstances did not require one. He did not transfer her care to the emergency physician because he had a diagnosis. He agreed he had the option to call Ms. Summers' doctors at St. Paul's Hospital, but he did not call them.

**57**  Dr. Verrico said there were three general surgeons at Ridge Meadows Hospital who took turns on call, so a general surgeon was available 24 hours a day. These surgeons depended on the emergency physician to use their services wisely by assessing and working up a patient like Ms. Summers who presented with abdominal pain.

**58**  Dr. Verrico testified he could have obtained a surgical consultation. That was his practice when he clinically judged the situation to warrant it; for example, if the patient had a surgical abdomen or signs of sepsis. Another reason Dr. Verrico would request a surgical consultation was if he was unclear about his diagnosis and felt he needed assistance. As well, he would request a surgical consultation if faced with a request by the patient or their family to have an immediate surgical consultation. None of these circumstances were present in Ms. Summer's case during Dr. Verrico's involvement on April 28, 2005.

**59**  The decision to seek surgical consultation is not mandated simply by the past history. Dr. Verrico testified that, in his clinical judgment, he did not consider a surgical consultation to be warranted at the time that he went off duty and left the hospital on April 28, 2005, at about 23:00 hours. He considered Ms. Summers to be stable and responding to analgesics. Her vital signs were normal, her blood work was essentially normal and she did not display a surgical abdomen. His impression was her pain was definitely improving with the morphine. Dr. Verrico elected to proceed with conservative management overnight, hopeful that any small bowel obstruction would resolve spontaneously, and to have Ms. Summers reassessed in the morning.

**60**  Dr. Verrico commented that he cannot choose who presents to the emergency at Ridge Meadows Hospital. He is expected to provide initial management of the patient, including an assessment. Based on his 20 years of experience as an emergency physician, he maintained that St. Paul's Hospital would not consider a transfer of a patient based on clinical impression alone.

**61**  Ms. Summers presented with symptoms of a small bowel obstruction, but with no signs of serious complications. It was the standard or usual course to monitor a stable patient overnight and re-evaluate first thing in the morning. Therefore, Dr. Verrico admitted Ms. Summers to hospital under the care of Dr. Little, the hospitalist, whom he called and briefed on his management plan and orders. Dr. Verrico's diagnosis on admission was "abdominal pain NYD" (not yet diagnosed). His admission orders to continue intravenous fluids, morphine and gravol were appropriate. He ordered follow up investigation in the morning by repeating blood tests and x-rays.

**62**  Dr. Michelle Little was the on-call hospitalist at Ridge Meadows Hospital on April 28 and 29, 2005. A hospitalist takes the place of a patient's own family physician, given that many patients now do not have family physicians, or do not have family physicians with hospital privileges.

**63**  Dr. Little testified that she responds to her pages during overnight periods, and attends at the hospital based on patient need, depending on the information she is given by other physicians and nurses. Dr. Little lived 8 to 10 minutes away from the hospital; her contract gave her 15 minutes to answer a page.

**64**  Dr. Little had worked with Dr. Verrico for some time and trusted his judgment as an emergency room physician. Dr. Little explained that if she accepts a patient on transfer and she does not know the transferring physician, she would come in to examine that patient herself.

**65**  Dr. Little trusted Dr. Verrico's clinical judgment that Ms. Summers was a stable patient, so she did not come in to examine her. Dr. Little had no concerns regarding ongoing monitoring of the patient because she had confidence in the nursing staff and in the assessment of Dr. Verrico about the stability of the patient at the time of transfer to her care. Dr. Little testified that she relied on the assessment of the nurses and she had a good working relationship with all the nurses at Ridge Meadows Hospital. Dr. Little's expectation was that the nurses would notify her of any change in a patient's condition and they would exercise their clinical judgment in deciding if a physician needed to be called. Dr. Little indicated that if the nurse feels unable to manage a patient, or has a question about the patient's care, they should call her.

**66**  At 23:30, Ms. Summers was transferred to the overflow ward and Nurse Fernandes assumed her care. Nurse Forbes considered Ms. Summers stable when she handed over care to Nurse Fernandes. At that time, Nurse Fernandes documented that Ms. Summers complained of being in continuous abdominal pain. Nurse Fernandes did not conduct an assessment of Ms. Summers when she assumed her care. Nurse Fernandes did not document a comment she now attributes to Ms. Summers, that Ms. Summers told Nurse Fernandes not to touch her, and refused to cooperate with an assessment. Nurse Fernandes testified Ms. Summers appeared stable, with normal vital signs. She had been getting relief from the pain with morphine and she appeared comfortable, but tired. This is consistent with the evidence of Mr. Bodnarchuk who said that within a half hour of him speaking with Dr. Verrico, following Ms. Summers' return from x-ray, Ms. Summers pain subsided with the morphine, she grew quieter, and was comfortable for the rest of the time that he was with her that night.

**67**  Between 23:30 and 03:15, Nurse Fernandes checked on Ms. Summers regularly. She responded to three call bell rings from Ms. Summers at around 00:30, 01:30 and 03:15, when Ms. Summers requested morphine, asked to get up to void, and was able to move herself to the commode and return to her bed. Ms. Summers appeared to sleep and appeared comfortable between administrations of morphine, consistent with what Nurse Fernandes said she would expect for a patient with small bowel obstruction. She observed Ms. Summers had regular, easy respirations throughout this period, had stable vital signs and appeared appropriately alert and orientated while awake.

**68**  At 04:00 Nurse Fernandes spent 8 to 10 minutes assessing Ms. Summers, including taking vital signs and listening for bowel sounds, which she apparently heard and were normal but she did not note on the chart. Nurse Fernandes says these were noted on a work sheet that she threw out. At this time, Nurse Fernandes documented that Ms. Summers stated her pain was 10/10, that she had never had such pain before, and was unable to sleep. Not documented was what Nurse Fernandes says was her own view that Ms. Summers' pain was not as severe as reported.

**69**  Nurse Fernandes claims that while she listened to Ms. Summers' own rating of 10/10 pain, she felt Ms. Summers appeared in moderate, rather than severe pain as demonstrated by Ms. Summers' ability to sleep between doses of morphine, to be conscious and alert when awake, to have normal vital signs, and to ambulate from the bed to the commode to void and back again. If she was in excruciating pain, the nurse would have expected a different presentation. Nurse Fernandes did not recall if Ms. Summers requested more morphine at 04:00, but if she had, the nurse would have given it to her.

**70**  Nurse Fernandes testified that if Ms. Summers had appeared to be in 10/10 pain, she would have contacted Dr. Little. However, Nurse Fernandes judged Ms. Summers to be relatively unchanged from her earlier presentation at 23:30 hours and did not call Dr. Little.

**71**  It is noteworthy that Nurse Fernandes is the only witness who did not accept Ms. Summers' subjective pain evaluation as severe, and who judged Ms. Summers' level of pain as moderate.

**72**  The next morphine dose of 5 mg. was given at 04:30, followed by another 5 mg. of morphine at 05:45. The chart notes Ms. Summers was up to void at 05:30 and complained of abdominal pain at both 04:30 and 05:30 when Nurse Fernandes was on her break. While in the care of Nurse Fernandes, Ms. Summers received intravenous morphine of 20 mg. in 5 mg. increments, at 00:30, 01:30, 03:15, 04:30, and 05:45. Between doses of morphine, her pain appeared to settle.

**73**  The 40 mgs. of morphine administered to Ms. Summers up to her demise, while a significant amount, apparently was not an unusual amount in a patient with a history of Crohn's disease who was taking the highly potent narcotic hydromorphone.

**74**  At 06:50, Nurse Fernandes decided to be "better safe than sorry", so she called Dr. Little and told her Ms. Summers' vital signs, that Ms. Summers' temperature was 36.6 degrees, which did not concern her as being abnormal, and that Ms. Summers had pain most of the night with relief from the morphine, but now she had pain again and appeared drowsy and pale. Dr. Little made a verbal order for one dose of 10 mg. of morphine, and said she would be there in about 20 minutes.

**75**  Nurse Fernandes claims someone, she does not know who, maybe it was her writing or maybe it was not, wrote over the temperature she recorded in the chart, which appears as 35.6 or 36.6. Nurse Fernandes does not know how that happened. Her evidence at trial is inconsistent with her evidence at her examination for discovery and lacks credibility.

**76**  Dr. Little's recollection about the call from Nurse Fernandes is similar, that she learned Ms. Summers had experienced pain and was still in pain so she ordered an increased dose of morphine over the phone. However, the nurse did not tell Dr. Little the patient's temperature was 35.2 (or 35.6), the patient was shivering, or the nurse had trouble getting a pulse. Dr. Little testified that if she had been called by Nurse Fernandes at 04:00 and told the patient's pain was 10/10, she would have come in to reassess the patient at that point. Dr. Little would have wanted to review the patient herself if there was a report of 10/10 pain, even though Ms. Summers' vital signs were normal and the morphine was effective to manage the pain.

**Standard of Care**

**77**  The following doctors testified as experts on the issue of standard of care: Dr. Isser Dubinsky, Dr. David Esler, Dr. John Bohnen, Dr. Peter Blair and Dr. Tricia Ewert.

**78**  Dr. Isser Dubinsky has significant academic qualifications and accomplishments, particularly as an administrator and consultant. Dr. Dubinsky has not practised any clinical emergency medicine for the past five years and not at a community hospital like Ridge Meadows Hospital since at least 1987.

**79**  Dr. David Esler is an emergency physician who has been practising exclusively in emergency medicine since 1988. Dr. Esler's practice has been based largely at community hospitals.

**80**  Dr. John Bohnen is a general surgeon who has practiced and taught since 1984 and is presently at St. Michael's Hospital in Toronto.

**81**  Dr. Peter Blair is a general surgeon who has been practising since 1980. As part of his practice he teaches emergency room physicians how to assess a patient with abdominal pain and conducts these same assessments on a daily basis.

**82**  Dr. Tricia Ewert practices in a community hospital in British Columbia and began working as a hospitalist in 2002.

**Standard of Care of Dr. Verrico**

**83**  The issue of standard of care requires consideration of whether Dr. Verrico exercised reasonable clinical judgment in his care and treatment of Ms. Summers. The plaintiffs' experts, Dr. Dubinsky and Dr. Bohnen, raise a number of criticisms regarding the care of Ms. Summers.

***Diagnosis and Management of Ms. Summers***

**84**  Dr. Dubinsky testified Ms. Summers' demise was caused by a twisting of the small bowel, which was not recognized or appropriately treated by those vested with responsibility for her care. Dr. Dubinsky had significant concerns with the management of Ms. Summers due to her complicated history and constellation of risk factors. He felt Dr. Verrico failed to appreciate the severity of her illness at presentation, failed to appreciate the importance of ongoing pain, investigate it properly, and initiate an emergent surgical referral. Further, he felt Ms. Summers was not a stable patient due to uncontrolled, unremitting abdominal pain, notwithstanding significant narcotics. Dr. Dubinsky criticized Dr. Verrico for coming to a provisional diagnosis of query partial small bowel obstruction. He felt Dr. Verrico failed to acknowledge the significance of lack of output in the ileostomy bag.

**85**  However, whether the obstruction was partial or complete was academic because the management would have been the same.

**86**  Many patients attend the emergency department with bowel obstructions to receive pain management and usually their symptoms resolve when the obstruction clears on its own. Dr. Verrico estimated that only 30% of all bowel obstructions go on to require surgical intervention at any point. Dr. Dubinsky agreed that sometimes it takes time for a diagnosis to declare itself; in about 40% of the cases of abdominal pain presenting to the emergency department the initial diagnosis is ambiguous. Dr. Bohnen said sometimes a doctor cannot immediately diagnose a case of bowel obstruction and needs time for the clinical presentation to develop. A rare presentation can make a difficult diagnosis. Dr. Ewert and Dr. Esler commented that small bowel obstruction due to adhesions can lead to ischemic bowel, but rarely does, only in about 5% of patients.

**87**  Dr. Dubinsky commented on Ms. Summers' atypical presentation, with minimal signs or symptoms, of a relatively rare condition. At her initial presentation there was no suggestion that Ms. Summers required immediate surgical care. Dr. Verrico organized conservative management because the majority of small bowel obstructions resolve with conservative management, as acknowledged by all the expert witnesses. Dr. Esler and Dr. Blair agreed that Dr. Verrico's diagnosis was a reasonable one in the clinical circumstances and there was no need to organize further assessment through the night.

**88**  Dr. Verrico testified that he considers all possible causes when faced with a patient with abdominal pain, in accordance with his experience and training. In Ms. Summers' case, Dr. Verrico said he considered a wide range of possible causes of her abdominal pain. The fact there were no results from her ileostomy suggested that bowel obstruction was the most likely cause for her pain. The fact she had a previous small bowel obstruction that required surgery created an increased risk of subsequent bowel obstruction. Her presentation of pain was consistent with a small bowel obstruction; the analgesia was effective to manage the pain, suggesting small bowel obstruction rather than anything graver. Dr. Verrico considered the signs of sepsis but did not find them in Ms. Summer's clinical presentation: she was not tachycardic, her blood pressure did not drop and her white blood cell count was not significantly elevated. Dr. Verrico says he considered ischemic bowel, but determined, based on Ms. Summers' clinical presentation at the time, that she did not have the condition.

**89**  Dr. Verrico noted the signs suggesting a likely small bowel obstruction, gleaned from the history, physical, laboratory results and x-rays. There were no signs of a surgical abdomen. He felt that Ms. Summers' pain was in keeping with what his experience had been of patients with Crohn's disease and bowel obstruction due to adhesions. Dr. Verrico testified that he felt comfortable with his diagnosis of small bowel obstruction, and determined that conservative, observant therapy with analgesia and fluid replacement, an anti-emetic, and orders for observation in case of any signs of deterioration, would be appropriate overnight.

**90**  Dr. Dubinsky testified that Dr. Verrico would not be required to record all his considered differential diagnoses as long as he did something to rule them out. Dr. Verrico said he did just that.

**91**  Unlike Dr. Dubinsky, who stated that Ms. Summers' constellation of symptoms and the pain with the narcotics is most often ascribed to ischemic bowel, Dr. Esler testified that ischemic bowel is a rare condition. Most patients with severe pain will be found ultimately to have no significant underlying pathology, so ischemic bowel, while in the differential diagnosis of serious abdominal pain, is not a common diagnosis or one that leaps to mind immediately under the clinical circumstances of Ms. Summers' case.

**92**  There is a variation in the management of a patient with small bowel obstruction from conservative to surgical. The latter is chosen when there are signs and symptoms that warrant that choice. Here, these were not present. The only clue that Ms. Summers had sepsis was a slightly elevated white blood cell count, but the white blood cell count was at a non-specific, non-diagnostic level.

**93**  Dr. Esler made a comment that is very apt in this case: "It would be unexpected in the extreme for such a patient to acutely decompensate over a few hours and go on to suffer cardiac arrest and death."

**94**  While in hindsight it might have been prudent for Dr. Verrico to get a second opinion from a surgeon, in the circumstances of this case, Dr. Verrico cannot be faulted for electing to proceed conservatively, to observe Ms. Summers overnight, as medically she was deemed a stable patient despite her pain level and on-going pain.

***Significance of Ms. Summers' pain***

**95**  Dr. Verrico testified that pain is a very important component of a patient's clinical presentation, but it is not in itself definitive of the degree of underlying pathology. Dr. Esler and Dr. Dubinsky agreed. Dr. Esler testified that the role of pain in diagnosing a condition is that it leads the physician to examine the correct part of the body. Pain is important but it does not portend a diagnosis.

**96**  Dr. Verrico agreed that Ms. Summers appeared to be in significant pain on admission. He decided to treat this pain with small amounts of morphine so that her response could be monitored. Dr. Verrico noted that she received some relief from the pain. When he left the hospital he considered her pain was managed. That evidence is corroborated by the evidence of Nurse Forbes and by Mr. Bodnarchuk.

**97**  Dr. Dubinsky felt pain at Ms. Summers' level should have led Dr. Verrico to consider severe underlying pathology and he should have searched for and ruled out any possible surgical or other catastrophic illness as the cause of pain. He felt that pain failing to respond to narcotics can be assumed to be from a severe, life threatening, condition like ischemic bowel. Dr. Esler disagreed that abdominal pain that fails to respond to appropriate doses of potent narcotics must be assumed to be due to severe underlying condition. Response to pain is one factor incorporated into a clinical diagnosis. Some patients with minimal pathology might require large doses of morphine, while some patients with severe pathology require little morphine; the response to pain is not diagnostically important.

**98**  Dr. Esler disagreed with Dr. Dubinsky's statement that it is clear emergency medicine practice that abdominal pain requiring intravenous narcotic therapy must always be viewed as possibly indicating a life threatening inter-abdominal pathology. Dr. Esler testified that virtually all patients presenting to an emergency department with abdominal pain are treated with intravenous narcotics in order for them to be more comfortable, but the vast majority of those patients do not turn out to have significant underlying pathology.

**99**  The morphine prescribed was within the medical standard required to manage pain for a patient presenting with small bowel obstruction. Dr. Bohnen had no concerns about the morphine prescribed and did not suggest her pain should have led to any different treatment course by Dr. Verrico. Dr. Dubinsky agreed that intravenous morphine is a common drug used in the emergency department and that it has a half life of one to two hours. He also agreed that the amount of morphine prescribed would depend upon many factors including whether or not a patient is narcotic naïve. In Ms. Summers' case, she was on hydromorphone, which is about five times the strength of the morphine prescribed on the April 28, 2005 admission.

***Failure to obtain a surgical consultation***

**100**  At minimum, Dr. Dubinsky felt a surgical consultation should have been requested, particularly in light of previous complicated bowel surgery. Dr. Dubinsky said for a patient who has a partial or complete small bowel obstruction and no complicating factors it may be prudent to admit them for a period of time. However, for a patient like Ms. Summers, with significant co-morbidities and complicating factors, a high level of pain and failure to respond to intravenously administered narcotics should be considered unstable and referred for emergent surgical consultation.

**101**  However, the evidence established Ms. Summers' pain was not unremitting and unrelenting; the evidence suggests she had some relief from pain with the morphine and her pain settled between doses of morphine. Further, there was no clinical indication to warrant surgical consultation.

**102**  In managing a patient with abdominal pain for whom a definitive diagnosis cannot be established, the decision to admit the patient for observation or to call a surgeon for a second opinion relies on the experience and clinical judgment of the doctor. For a patient deemed stable, conservative management is followed. If the patient is unstable, then a surgical consultation and further investigation is mandated. A majority of patients in similar circumstances to Ms. Summers' will experience symptom resolution within 12 to 24 hours. A minority will develop small bowel obstruction and require surgery.

**103**  Dr. Bohnen commented that, "strangulated bowel is a surgical emergency. Without operation, strangulated bowel dies and so does the patient." In the case of Ms. Summers, "operation would have been the only way she would have survived, and operation more often than not saves a patient with dead bowel".

**104**  Dr. Bohnen never testified that Ms. Summers' clinical presentation warranted a surgical consultation. There was simply nothing objective to suggest that Ms. Summers was going to require a surgical consultation before morning.

**105**  I conclude Dr. Verrico conducted a careful and thorough assessment of Ms. Summers. He understood her previous medical history and took the time to review the previous chart and gather as much information as he could to assist him in understanding her medical history. Dr. Verrico's conservative management of Ms. Summers was in accordance with the appropriate standard of care.

***Significance of Ms. Summers being on immunosuppressant drugs***

**106**  Dr. Esler disagreed with Dr. Dubinsky's statement that a prudent emergency physician must be aware of the high risk of significant underlying pathology in a patient on immunosuppressant drugs. Dr. Esler stated the concern with patients on immunosuppressants presenting to the emergency department is that they may have an infection that is masked and they may have a decreased ability in terms of their immune system response to infection. However, that does not carry over to them necessarily masking other significant underlying pathology while on immunosuppressants, like a small bowel obstruction.

**107**  Dr. Verrico testified that immunosuppressed patients can have a somewhat limited ability to produce white blood cells in response to infection. However, in the case of Ms. Summers, Dr. Verrico noted she was able to mount a discernible immune response to infection at her admission for an abdominal abscess in November 2004, and when he saw her her white blood cell count was only slightly elevated and non-specific for infection.

***Failure to administer steroids***

**108**  Dr. Bohnen and Dr. Dubinsky both felt that Dr. Verrico should have given or have considered giving Ms. Summers steroids. Dr. Esler felt every physician should consider at least the possibility of giving steroids; however, most physicians would not have given the steroids. Dr. Esler testified that Ms. Summers was on such a low dose of steroids at that time that he would not expect giving a bolus of steroids that night would have been necessary or made any difference.

**109**  Dr. Verrico noted Ms. Summers had been given a bolus of steroids at her October 2004 admission to Ridge Meadows Hospital, but not until the day following admission at the November 2004 admission. Dr. Verrico said he considered giving her a bolus of steroids on April 28, 2005, but decided to hold all her oral medications that night.

***Failure to order arterial blood gas and serum lactate tests and a CT scan***

**110**  Initially, Dr. Dubinsky said that an emergency physician's level of concern should have been "heightened" in Ms. Summers' case because of her complaint of pain; and that Dr. Verrico should have ordered an arterial blood gas evaluation and measured her serum lactate because these would have been pathognomonic of ischemic bowel. In cross-examination, Dr. Dubinsky agreed that serum lactate is, in fact, "non-specific" and that if he could order only one of the serum lactate or the arterial blood gas tests, he would choose the blood gas.

**111**  Dr. Esler did not believe that the combination of history, exam findings, laboratory studies and response to treatment mandated the obtaining of an arterial blood gas or a serum lactate level. Dr. Esler said he would not expect a reasonable, prudent emergency physician in Dr. Verrico's position to order serum lactate testing, given Ms. Summers' presentation. Dr. Esler stated that the serum lactate test is not sensitive and specific for ischemic bowel. Dr. Bohnen agreed that a physician has to exercise his clinical judgment to determine if such a test is necessary. It is not a standard test expected in the usual course and would depend on the presentation of the patient. Dr. Blair testified that Ms. Summers' clinical presentation did not warrant a serum lactate test and, in any event, even if one were done, it would not be diagnostic, only corroborative at best.

**112**  Dr. Verrico did not see any clinical indications to order a serum lactate or arterial blood gas test. Dr. Verrico testified that serum lactate testing is not done at the laboratory at Ridge Meadows Hospital; if a physician requests a serum lactate test, a technician arranges for drawn blood to be transported by taxi to Royal Columbian Hospital, where the test is conducted. Dr. Verrico noted that the return time on results is about 2.5 hours.

**113**  Dr. Dubinsky was not aware that the serum lactate test could not be completed at Ridge Meadows Hospital. This is a question of clinical judgment on the part of Dr. Verrico, and Ms. Summers' clinical presentation did not warrant such a lab test.

**114**  Dr. Verrico made a clinical decision not to order arterial blood gases, because there were no clinical indications for this non-routine test. Dr. Verrico testified that Ms. Summers had a level of chronic metabolic acidosis due to her chronic renal failure, but no sign of acute metabolic acidosis that would cause him concern. Dr. Verrico noted that patients with acute metabolic acidosis would hyperventilate. Dr. Bohnen confirmed that this would be the case. Ms. Summers did not exhibit an abnormal respiratory rate or sodium bicarbonate levels out of keeping with her normal, given her chronic renal impairment, so there was no clinical indicator to order a blood gas test.

**115**  A CT scan is a more sensitive and specific test in any case of abdominal pain and would have distinguished between partial and complete obstruction and ischemic bowel. Dr. Esler says it was not essential to order that test. Furthermore, it may have been difficult to convince a radiologist to perform a CT scan, since most patients with bowel obstruction are managed in an observational fashion. Most emergency physicians would not have called in the radiologist, having reached the assumption that Ms. Summers was stable. The standard management would be observational or expectant.

***Nasogastric tube and foley catheter***

**116**  Dr. Dubinsky criticized Dr. Verrico for failing to use a nasogastric tube and foley catheter. The standard treatment is to admit a patient with abdominal pain to hospital, put them on an intravenous drip, pass a nasogastric tube if they have persistent or frequent vomiting, and then see what happens after 12 to 24 hours. Dr. Esler supported Dr. Verrico's decision not to use a nasogastric tube in Ms. Summers' case because she was no longer vomiting. These tubes are uncomfortable and not necessary in all circumstances. In addition, it would be unusual to use a foley catheter in these circumstances and risk infection and discomfort.

***Fluid Replacement***

**117**  Dr. Dubinsky felt Dr. Verrico fell below the standard of care by failing to provide fluid replacement at an appropriate level for Ms. Summers. Dr. Dubinsky contended that 400-500 cc of fluid per hour, instead of 125 cc ordered by Dr. Verrico, would be required in Ms. Summers' case.

**118**  Dr. Ewert testified that amount of fluid could have easily overloaded a patient like Ms. Summers, putting her into congestive heart failure. Dr. Esler, Dr. Blair and Dr. Ewert all testified that intravenous hydration at 125 cc per hour was appropriate given Ms. Summers' clinical situation.

**119**  It was expected that the nurses would monitor for signs of dehydration and report any concerns to the physician. The nurses recorded that Ms. Summers had urine output overnight. Dr. Esler's opinion is that there was no indication Ms. Summers was dehydrated and therefore the amount of fluids Dr. Verrico administered was a reasonable amount and consistent with prudent practice. Dr. Esler also testified that one would not expect Ms. Summers' urine output to be monitored in the usual management of a small bowel obstruction, unless in an ICU.

**120**  I conclude Dr. Verrico's assessment of Ms. Summers' level of hydration was appropriate.

**Standard of Care of Dr. Little**

**121**  Dr. Dubinsky and Dr. Ewert provided opinions with respect to Dr. Little's care of Ms. Summers. Dr. Dubinsky has never practiced as a hospitalist in a community hospital in British Columbia and therefore I give more weight to Dr. Ewert's opinion.

**122**  Dr. Ewert testified about the standard of practice for the emergency doctor to phone the hospitalist on call and give a brief summary of the patient's case, including the diagnosis and treatment plan. The usual practice for an evening admission where the patient is stable is that the emergency doctor will leave a complete set of written orders and the hospitalist will see the patient and assess the patient in the morning, unless there is some intervening change in the patient's condition overnight. While Dr. Dubinsky stated that Dr. Little should have done a physical examination of Ms. Summers at the time of the referral from Dr. Verrico, Dr. Ewert testified the standard practice is for the hospitalist to see a stable patient in the morning, unless made aware that there has been a deterioration in the patient's condition overnight.

**123**  Dr. Ewert disagreed with Dr. Dubinsky's assertion that it would have been equally appropriate for Dr. Little to request a surgical consultation. Usually hospitalists manage patients with bowel obstruction conservatively unless there is indication the patient is unstable and needs to proceed to surgery, and Ms. Summers did not have objective signs that might point to an ischemic bowel. When she was called at 06:49 by the nurse, Dr. Ewert testified that the usual routine is for the hospitalist to proceed to the hospital, conduct an evaluation of the patient, and then make a decision regarding further management, including further tests, imaging or consultation.

**124**  The nurses are instructed to monitor the patient and report any significant change in the patient's condition by paging the physician who is responsible for the patient.

**125**  I am satisfied Dr. Little acted appropriately for a hospitalist practising in a community hospital in British Columbia. It was reasonable for Dr. Little to accept Dr. Verrico's assessment of Ms. Summers. Dr. Little and Dr. Verrico had worked together in the past and Dr. Little trusted his clinical judgment. Ms. Summers' presentation was in keeping with a small bowel obstruction and she appeared to be stable based on all of the clinical evidence. Dr. Little understood that Ms. Summers was stable when she took over her care. There was no reason for Dr. Little to come to the hospital to assess Ms. Summers barring a significant change in her condition. Dr. Little was entitled to rely on the nursing staff to observe and monitor Ms. Summers for any significant change in her condition and to notify Dr. Little of such change. Dr. Little was not contacted by the nursing staff until Nurse Fernandes called her at 06:49. Dr. Little could have been at the hospital in about 10 minutes if the patient's needs warranted such a visit. **Standard of Care of the Nurses**

**126**  Ms. Radons testified that Nurse Forbes and Nurse Fernandes failed to meet the standard of care consistent with accepted standards of practice by failing to document Ms. Summers' pain, physical assessment, ongoing assessment, response to treatment, vital signs and the worsening of her condition. Ms. Radons' report also indicates that Ms. Summers was an unsuitable patient for the overflow patient care area in that the level of care in that area was inadequate. Ms. Summers' condition was acute, requiring comprehensive assessment, documentation and intervention. According to Ms. Radons, Nurse Fernandes failed to recognize the significance of Ms. Summers' temperature, failed to act on her continued complaints of 10/10 pain and to document urine output, and failed to communicate assessment findings in a timely way to Dr. Little.

**127**  Ms. MacKenzie testified that emergency nurses are responsible for carrying out physician orders, documenting nursing activity and notifying physicians of any changes in a patient's condition. Ms. MacKenzie also stated that "overflow" areas are staffed by medical/surgical nurses, rather than emergency nurses. Nurses caring for patients receiving conservative treatment for partial bowel obstruction would be watching for any changes in vital signs, pain and vomiting and to notify physicians of any of those changes. Nursing care and documentation for patients in overflow areas are dictated by individual patients' conditions and any physician orders. According to Ms. MacKenzie, the defendant nurses acted reasonably in their care of Ms. Summers, according to expected practice standards.

**128**  It is acknowledged by the nurses that they fell below the applicable standard in not charting the existence of Ms. Summers' ileostomy bag, and in Nurse Fernandes not charting her investigations of bowel sounds, doses of morphine and response to morphine.

**129**  It is only in cases of clear and obvious neglect or incompetence that nurses are required to depart from the treatment plan determined by the physician. There was nothing to indicate to the nurses that either of the physicians' diagnoses, orders or treatment plans for Ms. Summers were not appropriate, requiring the nurses to advocate for a different treatment plan.

**130**  However, I conclude Nurse Fernandes fell below the applicable standard of care in not calling Dr. Little following her charted entry at 04:00, recording that patient "states pain 10 on 10 never been such before. Unable to sleep." I reject her evidence that while she recorded what Ms. Summers said, in her clinical judgment she did not believe that Ms. Summers was in this level of pain, taking into account a number of objective signs which she observed during the 8 or 10 minutes she was with Ms. Summers. Nurse Fernandes is impeached on her own record, written at the time. Nowhere did she ever note that Ms. Summers was deemed to be in moderate pain only, despite her complaints of severe pain. There is a reasonable basis to conclude Nurse Fernandes failed to exercise her clinical judgment reasonably when she failed to recognize Ms. Summers' pain to be severe, at 10/10, and failed to notify Dr. Little.

**131**  The expectation is that the nurse is monitoring the patient; when Ms. Summers complained of 10/10 pain at 0:4:00, the nurse should have phoned the hospitalist. In failing to call Dr. Little, Nurse Fernandes' conduct fell below the expected standard of care.

**Causation**

**132**  Dr. Verrico and Dr. Little did not fall below the applicable standard of care in their care of Ms. Summers.

**133**  Nurse Forbes and Nurse Fernandes did fall below the standard of care owed to Ms. Summers by failing to document properly. However, there is no evidence that their failure to chart had any causative effect in this case. In the case of Nurse Forbes, Dr. Verrico was aware of Ms. Summers' condition. In the case of Nurse Fernandes, Dr. Little would not have read the chart until the morning. There is no evidence to suggest that any of the failures to document by the nurses altered Dr. Verrico's or Dr. Little's treatment plans. There is therefore no evidence to suggest that these had any causative effect.

**134**  Nurse Fernandes ought to have called Dr. Little at 04:00. Had she called Dr. Little, there is evidence Dr. Little would have come to the hospital to assess Ms. Summers; however, there is no evidence that Dr. Little would have initiated a surgical consultation. Therefore, although Nurse Fernandes breached the standard of care, the evidence does not establish on a balance of probabilities that her breach led to Ms. Summers' death.

**135**  To prove causation, the following assumptions would have to be made in this case. The first assumption is that a surgeon, if contacted, would have come in to assess Ms. Summers. The second assumption is that a surgeon, after assessing Ms. Summers, would have decided to proceed to emergency surgery. The third assumption is that if surgery would have occurred it would have been successful.

**136**  The key question is whether a surgical consultation would have made any difference to the outcome; that is, if a surgical consultation had been requested at some point, could and would the consulting surgeon have proceeded to surgery on Ms. Summers in a timely enough fashion to have avoided her acute deterioration and death on the morning of April 29, 2005? The plaintiffs' experts, particularly Dr. Bohnen, did not provide an answer to this crucial question on causation.

**137**  Dr. Bohnen said Ms. Summers' bowel obstruction and strangulation led to her clinical presentation and to lethal systemic effects. Dr. Bohnen said strangulated bowel is a surgical emergency. Operation would have been the only way she would have survived and operation more often than not saves a patient with dead bowel. Dr. Bohnen's said in his report of May 6, 2007, "by six hours after onset, ensuring Ms. Summer's survival after operation might have been challenging, but it would have been probable". Dr. Bohnen felt more relevant to estimating her probability of survival would have been in the context of monitoring her urine output and metabolic parameters and provision of resuscitation to correct abnormalities. If she had been given those measures her chance of survival would have exceeded 50%.

**138**  Dr. Bohnen concluded in his report that:

... the causes of Ms. Summers' death can be divided into probabilities and possibilities. It is highly probably [*sic*] that she died as a direct result of sepsis from strangulated bowel caused by adhesions. It is likely that between the onset of dead bowel and her death, she sustained one or more physiologic abnormalities that cannot be proven: fluid volume depletion, hypoxemia, academia, hyperkalemia, cardiac rhythm disorder, and adrenal insufficiency. Any and all of these conditions would have been superimposed on chronic renal insufficiency and chronic steroid administration, conditions that would have made her more susceptible to the deleterious effects of her acute condition.

**139**  Dr. Bohnen did not address the question of whether surgery would or could have been undertaken at a time to affect the outcome, he only said that *if* surgery had been undertaken at six hours after onset, or up to the hours before she died, it probably might have saved her.

**140**  The only evidence on causation comes from Dr. Blair. He said Ms. Summers was considered a high risk patient for surgery at a community hospital because of her history, including a previous bowel obstruction, previous abdominal surgery and infection, anticipation of extensive adhesions and scarring increasing the risk of a long operative procedure, and the increased likelihood of injuring the small bowel and causing more complications.

**141**  Dr. Blair was asked what a surgeon would do if they had come in to assess Ms. Summers. Dr. Blair said that a reasonable general surgeon, faced with Ms. Summers' presentation on April 28, 2005, would likely have opted to observe her overnight and reassess her in the morning. Dr. Blair commented that if a surgeon had opted to operate, the surgeon would not likely have done so without insisting on and risking a CT scan, with contrast, to see the obstruction definitively. Administration of medication to protect Ms. Summers' kidneys from the damaging effects of the contrast would have been a pre-requisite to the CT scan, given her chronic renal impairment; that preparation would have taken several hours. She was on a blood thinner medication following an earlier embolus, making surgery more difficult. Dr. Blair noted a number of factors a surgeon would be live to before deciding to operate on someone with Ms. Summers' co-morbidities, history of Crohn's disease and previous operations. Dr. Blair indicated that bowel obstruction is usually self-limiting and resolves spontaneously with supportive care. In the face of that knowledge, it does not seem likely that a surgeon would have proceeded to emergent surgery in a patient such as Ms. Summers.

**142**  Dr. Blair described Ms. Summers' situation as "terribly complicated". Dr. Blair said Ms. Summers had a "hostile abdomen" and before she would be sent to the operating room a surgeon would have to make sure she needed surgery. A decision would have to be made if Ridge Meadows Hospital was the place to do any surgery. In Dr. Blair's opinion, if she needed surgery, she was at the wrong hospital. A surgeon would be reluctant to operate on Ms. Summers at Ridge Meadows Hospital. The best course would be to send her to St. Paul's Hospital if she needed surgery.

**143**  In November 2004, it took five days to transfer Ms. Summers to St. Paul's Hospital for surgery in the face of more serious clinical indications than were seen on her April 28, 2005 admission.

**144**  There is a great deal of difficulty and bureaucracy in British Columbia to send a patient to a tertiary care hospital. Ms. Summers' presentation was stable and it was unlikely a transfer to St. Paul's Hospital could be arranged before morning. Her presentation did not warrant sending her to St. Paul's Hospital, or telling her family or ambulance services to take her there. There was nothing in her clinical assessment or blood work or x-rays to suggest she needed emergent surgery. Therefore, it is unlikely Ms. Summers would have been operated on before morning and in time to save her life.

**145**  Up to an hour before her death, if Ms. Summers was operated on she probably would have survived. Dr. Blair testified that mortality is actually quite acceptable even in the presence of infracted bowel, and it was unusual for a patient to die in this situation. He has had many patients taken to the operating room with infracted bowel in a similar situation and they survived. Dr. Blair commented that by 06:00 to 06:30, Ms. Summers was in "desperate trouble": her vital signs were askew, and her outcome was unsure. Dr. Blair said it was a tragedy that she died but it was unusual for her to die and it was not really understood why she died. It was concluded she died of sepsis from an ischemic bowel because there was no other explanation. Unfortunately, due to lack of monitoring, the immediate cause of Ms. Summers' cardiac arrest is unknown.

**Conclusion**

**146**  The only way that a different outcome could have been achieved for Ms. Summers is if she had undergone surgery.

**147**  The plaintiffs called no evidence to say that a surgeon, faced with Ms. Summers' constellation of symptoms and conditions, would have in fact operated within the relatively short timeframe before she went into cardiac arrest. The evidence called suggested there were no clinical indicators pointing to any reason to seek a surgical consultation. The evidence establishes that, if called, a surgeon probably would not have operated before morning and would not have operated at Ridge Meadows Hospital.

**148**  The plaintiffs have failed to prove on a balance of probabilities that Ms. Summers' death was caused by ***negligence*** on the part of any of the defendants.

**149**  The action against the defendants is dismissed with costs.

STROMBERG-STEIN J.

**End of Document**

[***MacDonald (Litigation Guardian of) v. Goertz, [2008] B.C.J. No. 593***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1HS-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

M.A. Humphries J.

Heard: January 14-18 and 21-25, 2008.

Judgment: April 7, 2008.

Dockets: M044453 and M050816

Registry: Vancouver

**[2008] B.C.J. No. 593** | [*2008 BCSC 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2CT-00000-00&context=) | [*63 M.V.R. (5th) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2CT-00000-00&context=) | [*2008 CarswellBC 678*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2CT-00000-00&context=) | [*166 A.C.W.S. (3d) 796*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2CT-00000-00&context=)

Between Kristy MacDonald, an infant, by her Litigation Guardian, Anne-Lise MacDonald, Plaintiff, and Jessica Goertz, Masoom Ahmad, White Rock South Surrey Taxi Ltd., John Doe and John Doe Taxi Company, Defendants And between Kaitlyn Chambers, an infant, by her Litigation Guardian Marilyn Chambers, Plaintiff, and Jessica Goertz, Masoom Ahmad, White Rock South Surrey Taxi Ltd., John Doe and John Doe Taxi Company, Defendants

(85 paras.)

**Case Summary**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Motor vehicles — Liability of driver — Pedestrians — Determination of liability regarding a motor vehicle accident — The defendants, Goertz and Ahmad, failed to meet their standards of care, although to different degrees — However, the greater fault lay with the plaintiffs, the pedestrians who were struck, as they failed to take reasonable care for their own safety — Liability was apportioned 60 per cent to each of the plaintiffs, 30 per cent to Goertz and 10 per cent to Ahmad — Motor Vehicle Act, s. 178(a), s. 179, s. 180, s. 181.**

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| Determination of liability regarding a motor vehicle accident. The plaintiffs, McDonald and Chambers, were teenagers who had been attending a party on the night in question. They left the party with three other teenagers and walked to an intersection in an undeveloped area. Unable to obtain a safe ride home in another way, the plaintiffs called for a taxi. The defendant Ahmad was the driver of the taxi which arrived on the scene. He stopped his taxi across the highway in order to ascertain whether or not the teenagers were his waiting passengers. However, the plaintiffs and their friends immediately crossed the highway and began trying to enter the taxi. Ahmad then informed the teenagers that he would have to call for a larger vehicle as he could only take four passengers. The teenagers then turned from the taxi and began crossing the highway again, at which point McDonald and Chambers were struck by the defendant Goertz' oncoming vehicle. Goertz did not see the pedestrians as the taxis' high beams were on, but she did notice the taxi stopped in the opposite lane. The plaintiffs took the position that the greatest portion of liability rested with Ahmad, as he was negligent in failing to take reasonable measures to pick up the plaintiffs and their friends safely. The plaintiffs also took the position that Goertz was negligent by traveling too fast and continuing to drive when she was unable to see due to the taxis' high beams. Goertz submitted that it was the plaintiffs' own ***negligence*** that caused the accident. Ahmad took the position that he was not negligent and that he legitimately refused entry to the teenagers.  HELD: Liability apportioned 60 per cent to each of the plaintiffs, 30 per cent to Goertz and 10 per cent to Ahmad.  The greater fault lay with the plaintiffs as they were negligent and failed to take reasonable care for their own safety. Furthermore, the consequences of their risky actions were reasonably foreseeable. Goertz was partially liable because she failed to reduce her speed and continued to drive when she could not see due to the taxi's headlights. As such, she departed from the standard of care expected of her. Ahmad also did not meet his standard of care, but his lapse resulted from an unexpected situation which distracted his attention. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 178*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0HF-00000-00&context=)(a), s. 179, s. 179(2), s. 180, s. 181

Motor Vehicle Regulations, s. 4.06(5), s. 4.06(6)

***Negligence*** Act, s. 1(1)

**Counsel**

Counsel for the plaintiff: F.E. Hayman.

Counsel for the defendant Jessica Goertz: P.M.E. Abrioux.

Counsel for the defendants Masoom Ahmad, White Rock South Surrey Taxi Ltd., John Doe and John Doe Taxi Company: R. Hartshorne.

**Reasons for Judgment**

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| **M.A. HUMPHRIES J.** |

**1**   These two actions arise out of the same motor vehicle accident. Liability is in issue. Quantum of damages has been settled on the MacDonald action and that aspect of the Chambers action is set for trial later this year. The liability actions were tried together, with discoveries and documents applicable to both, and evidence on one considered as evidence on the other.

**2**  Much of the evidence is not in dispute. On September 6, 2003, Ms. MacDonald, then 15, and Ms. Chambers, then 16, attended a house party in Langley, B.C. The number of teenagers at the party was very large - estimated at perhaps 300 - and the police were called to break it up. They required the attendees to pour out all their alcohol and told them to go home.

**3**  Ms. MacDonald and Ms. Chambers met up with another friend, Ms. Tarcea, and two young men, Drew Jessiman and Kevin Douglas, both 18. They hung around the party a little longer until the police once again told them to leave.

**4**  Ms. MacDonald testified she had consumed one cooler during the party. Ms. Chambers and Ms. Tarcea had shared a bottle of raspberry vodka; Ms. Tarcea said she had had 2-3 drinks; Ms. Chambers said she could have had a few drinks and could have been drunk. Mr. Jessiman testified that the boys had drunk about six beers each. Mr. Douglas did not testify.

**5**  Ms. MacDonald's cell phone records indicate she made a couple of calls about the time the party was breaking up. She could not recall why she made the calls, but assumed she was trying unsuccessfully to get a ride. Her parents were always ready to come and pick her up, and she occasionally obtained rides from her older sister as well. The group turned down at least one ride from teenagers whom they were concerned might have been drinking.

**6**  Ms. MacDonald said she was not sure where the party was, and thought it would be best to walk to an intersection to get her bearings. The five teenagers started walking south on 202A Street. They did not hurry, taking their time and socializing on the way. They took some pictures of each other with a disposable camera. All of them but Ms. Tarcea, who was wearing red, were wearing white sweaters or tops; Ms. MacDonald had a black vest over her white long-sleeved top.

**7**  It took the teenagers about half an hour to reach the intersection of 202A Street and 72 Avenue, which runs east/west. This is a T intersection, with a stop sign on 202A Street. The area was undeveloped at that time. There was a fire hall on the northeast corner of the intersection, but that was the only building in the vicinity. There was a street light at the northeast corner of the intersection. There was no marked crosswalk at the intersection. 72nd Avenue is paved, with one lane in each direction, a narrow shoulder on the north side, a somewhat wider one on the south side, and faded centre lines.

**8**  Once reaching the intersection, the teenagers discussed their ride options. Ms. MacDonald tried her parents again. Her parents told her they had just come in from an evening out, had had a couple of drinks and were in the hot tub. They suggested she try to find a safe way home. Ms. MacDonald called her sister. She was unsuccessful in obtaining a ride.

**9**  Ms. MacDonald called her parents back and they gave her the number of the defendant, White Rock South Surrey Taxi. Ms. MacDonald called the company and ordered a taxi. This was at 00:19 hours, according to her cell phone records. The teenagers settled in to wait on the northwest corner of the intersection, some sitting on a concrete abutment, others standing around.

**10**  During the walk up to the intersection, it had started to drizzle or rain lightly. Mr. Jessiman said it had been raining lightly for 20-25 minutes by the time Ms. MacDonald called for a taxi. Ms. MacDonald agreed with this estimate. One of the pictures taken of the teenagers that night shows Mr. Douglas at the intersection holding a newspaper over his head, although the newspaper does not appear to be wet.

**11**  A few minutes later, the taxi, driven by the defendant Ahmad, arrived, travelling west to east along 72nd Avenue, that is in the lane farthest from the teenagers. The taxi stopped in the eastbound lane across from the teenagers who were still in a group on the northwest corner. They crossed the road to the cab and began to try the door handles.

**12**  Mr. Ahmad said he could see the teenagers as he approached the intersection. He intended to ensure they were his customers before he decided on the safest way to pick them up. He said they surrounded his car almost immediately, before he could even get his window down. Mr. Ahmad admitted he was almost sure the group at the intersection had to be his passengers since the intersection was in the middle of an undeveloped area and they were the only people at it. However, he testified that he has often been called to pick up people at a certain location, arrived to find a number of people there but the one who had called him already gone. He has learned that it is much more difficult to get people out of his cab than it is to refuse entry, so he keeps his doors locked until he is ready to let his customers in. He could not take a group of 5 as he had only 4 seatbelts. He told the teens that he would call a larger vehicle for them. He focussed on talking to a young man, that is, Mr. Jessiman, through the open driver's window, which required him to look to the side. After refusing entry to the teenagers, he began to move off, calling his dispatcher and ordering a larger vehicle.

**13**  Upon being unexpectedly refused entry to the taxi, the teenagers turned to go back across the road to the northwest corner of the intersection.

**14**  Meanwhile, the defendant Ms. Goertz, then in her early 20's, had attended a family function nearby. She had consumed only a couple of sips of wine as she had been in charge of the photography at the function. She headed home around midnight to make up a bed for her brother who had come in from out of town. She was driving westbound along 72nd Avenue.

**15**  She had driven the road hundreds of times before and knew the area was undeveloped. She had never seen pedestrians in the area.

**16**  As she crested a small hill on 72nd Avenue, around 204th Street, she had a clear view down to the 202A intersection. She could see a car with its high beams on. She said she dimmed her own lights, and then flashed them, hoping to prompt the other driver to dim his, but they remained on bright.

**17**  The posted speed on 72nd Avenue was 60 kph. Her own speed was 50-55 kph when she crested the hill, and she assumed she had picked up speed since she last looked at the speedometer. She said it had begun to drizzle and she clicked her windshield wipers up a couple of notches as she drove along. She said the surface of the road was glossy from the rain.

**18**  As she approached the fire hall, Ms. Goertz realized the oncoming car was stopped in the middle of its lane. This struck her as irregular so she took her foot off the accelerator and covered the brake, allowing her car to decelerate on its own. Her vision was impaired by the car's high beams, but she saw the roof light, although she did not recall if it was lit or not, and noticed the distinctive white and red colours on the car and realized it was a taxi. She thought the driver might be receiving a call or looking for directions. She said she did not honk her horn as she had no reason to expect pedestrians in the area. She did not flash her lights again as she did not wish to impair the taxi driver's vision.

**19**  Ms. Goertz said she had her eyes on the road, trying to see past the taxi's lights. As she passed the front of the car, she saw a white object in her lane. She slammed on the brake, and her windshield shattered. She could not see, brought the car to a stop, and saw a girl lying in the middle of the road behind her. This was Ms. Chambers.

**20**  Meanwhile, Mr. Ahmad had continued to drive forward, and testified that as he got a few hundred feet further on, he heard screaming, looked in his rear view mirror and realized there had been an accident. He radioed the dispatcher to call the police and an ambulance. He was never aware of the Goertz vehicle until he saw it in his rear view mirror.

**21**  Ms. MacDonald testified that, upon realizing they were not going to be let into the cab, she turned to go back to the northwest corner of the intersection. The next thing she remembers is lying on the road by the stop sign on 202A Street. Mr. Jessiman came rushing over and she told him she was okay, gave him her cell phone and told him to call 911, which he did at 00:27, according to the cell phone records.

**22**  Ms. Chambers remembers nothing after the group first reached the intersection. Ms. Tarcea did not recall exactly where she was when the car passed her. She became hysterical upon seeing her friend hit and began to scream and continued for a long period of time.

**23**  Mr. Jessiman testified that he looked both ways before crossing the street and noticed the lights of the Goertz vehicle as it crested the hill, when the group was walking across the westbound lane of 72nd Avenue to get to the cab, which had stopped in the eastbound lane. However, he was confident that they would all be in the cab and gone before the car reached them.

**24**  When they were unable to get into the cab, Mr. Jessiman stood by the driver's window trying to convince Mr. Ahmad to let them in. Realizing it was futile, he turned, intending to cross the road and the Goertz vehicle brushed passed him two or three feet away. He saw Ms. Chambers come up over the vehicle and land on the roadway. He saw Mr. Douglas run to her. Mr. Jessiman went to get Ms. MacDonald's cell phone. He found her lying near the stop sign. He said he did not realize she had been hit as well until Ms. Goertz told him not to leave Ms. MacDonald, although Ms. Goertz testified she was not aware that two girls had been hit until some time later.

**25**  Ms. Goertz testified she got out of the car and ran back to the girl on the road, that is, Ms. Chambers. She noticed a young man calling 911. Another man ran up and began to administer first aid. He told Ms. Goertz to hold the girl's head, which she did until the paramedics arrived.

**26**  The man who had come running up to administer first aid, Mr. Jackson, had been guarding a nearby construction site, and had been settling down for the night in his trailer a little distance along 72nd Avenue, past the fire hall. He heard the sounds of the accident and Ms. Tarcea screaming. He ran to the scene with his first aid kit, and asked Ms. Goertz to hold Ms. Chambers' head steady. He did not notice Ms. MacDonald. He said the pavement was dry but it started to rain heavily after the accident. In cross examination he admitted he was not focussed on the weather as he ran to the scene, but he knew it wasn't raining noticeably. He said the real rain started later.

**27**  Cst. Hill and Cst. Appel attended the scene. Once they ascertained that the injuries were not life-threatening, they conducted a routine investigation. Unfortunately, Cst. Hill's notes have been lost but she retained a diagram of the skid mark left by Ms. Goertz's vehicle, and measured it at 29 meters. When Cst. Appel arrived, he saw a person on a stretcher on the road about 10 meters behind the Goertz vehicle. He did not recall if he measured or estimated the 10 meters.

**28**  Both Ms. MacDonald's mother and Ms. Chambers' mother testified, as might be expected, that they emphasized many times to their daughters as they grew up to look both ways before crossing the street. Both knew there was liquor at teenage parties, but both expected their daughters to call them for rides home at night. Mr. MacDonald testified that he assumed a taxi was the safest way to get his daughter home if he was not picking her up himself.

**29**  The plaintiff called Mr. Sandhu, who organizes courses for taxi drivers at the Justice Institute, to testify about the standards expected of a taxi driver. He testified that there are no regulated minimal standards for taxi drivers, but the industry itself decided to set up courses to provide basic training. He said the taxi drivers who take their basic course are taught that their primary responsibility is to transport their passengers safely; they are to drive defensively and obey the rules of the road. Drivers are taught to pick up and drop off passengers safely, that is on the curb side, and not into traffic. He said drivers should plan ahead and try to anticipate situations that might arise when picking up passengers, but there are many scenarios that cannot be anticipated and drivers must use their best judgment.

**30**  Mr. Ahmad is an experienced driver and took the basic course offered at the institute several years ago. He admitted he had been taught to drop off his passengers in a safe area, but did not recall being taught to pick up safely. He said he obviously tries to pick up passengers in safe places but he does not have control over the passengers before they get in the cab. He agreed that it is best to try to pick up and drop off from the curb side of the taxi.

**31**  He agreed that it would have been better to turn around at some place on 72nd Avenue or 202A Street, and come and pick up the passengers on the north side of the street, but said he wanted to ensure that these were indeed his passengers, and they crossed to his cab before he had time to roll down his window. He said he pulled over to the right of the travelled lane, although there was a very narrow shoulder so he could not pull off. The teenagers and Ms. Goertz said he was stopped in the middle of the lane. Not much turns on this, given the width of the lane and the very narrow shoulder on the north side of the road.

**32**  It is admitted that the posted speed on this stretch of road was 60 kph, and that the nearest cross street to the crest of the hill on 72nd Avenue is 204th Street, slightly to the west of the crest.

**33**  No evidence was adduced of the injuries suffered by each of the plaintiffs, although the plaintiff's accident reconstructionist, Dr. Toor, was asked to assume certain injuries for Ms. Chambers: fracture of right elbow, fracture of right leg, thoracic compression fractures, left ankle sprain, and brain injury. He was told that Ms. MacDonald sustained a fractured leg, although he does not specify which one. The Statement of Claim alleges the right leg.

**34**  Photos of the Goertz vehicle show a large dent in the middle of the hood, very slightly to the driver's side.

*The speed of the Goertz vehicle*

**35**  Dr. Toor estimated the pre-braking speed of the Goertz vehicle by the length of the skid mark measured by Cst. Hill. Depending on whether the road was wet or dry, he calculated the speed to be about 61 km/h if wet, and 68 km/h if dry, and the pre-skidding speed to by 58 and 63 km/h for wet and dry respectively.

**36**  Dr. Toor was of the view that it was more likely the road was dry because pictures taken shortly after the accident, when everyone agrees it had begun to rain heavily, show the patches of pavement under the vehicles to be dry. As well, a wet road will not generate skid marks. However, Dr. Toor estimated the speed for a wet road in any event because he could not predict what finding the court would make about the road surface. For his purposes, it did not matter how long it had been drizzling unless the road was wet. He testified that there are no friction numbers for damp roads. He can deal only with wet or dry roads.

**37**  It is unfortunate that there are no figures for damp roads, because all of the evidence points to that being the state of the road at the time of the accident. Both Mr. Jessiman and Ms. MacDonald said it had been drizzling lightly for at least 20 minutes. Mr. Jackson's evidence was that the road was dry; at least it was not raining noticeably, but he was not focussed on the weather as he ran to the scene. Ms. Goertz said the road surface was "glossy."

**38**  It is probable the surface was indeed slightly damp, allowing some light to be reflected from the road surface so that it appeared glossy to Ms. Goertz, but still dry enough to allow a skid mark to be deposited and to appear dry under the car in the pictures. What this does to Dr. Toor's figures is not clear, but in any event, even at the highest speed Dr. Toor arrived at, Ms. Goertz was not travelling much over the speed limit. Ms. Goertz does not contend that she slowed her vehicle down, other than by simply taking her foot off the gas. The more important consideration is whether, given all the circumstances, her actions were in breach of the standard of care demanded of her as a driver.

*Lighting/headlights*

**39**  The plaintiff called an expert in lighting to testify that the ambient and luminent light was sufficient to allow Ms. Goertz to see the teenagers from some distance away and to take appropriate action. The ambient light relied upon was the streetlight; the luminent light was the reflection of the Goertz headlights onto the white clothing of the teenagers. The expert placed an assistant at various places on the road at night and measured the two types of light from a series of distances.

**40**  Unfortunately, the assumptions initially provided to the expert required him to provide an opinion based on the taxi having its low beams on, and although he was later asked to repeat his experiments using high beams, he did not do so. In fact, the lights of the taxi did not feature in his experiments at all although he measured the distance at which an oncoming driver would be expected to see the taxi roof light. He parked a car in the eastbound lane with its lights on low beam, but he testified that he discounted the glare from the low beam lights as being a significant factor in visibility, as he as was asked to assume that the teenagers were in the westbound lane. In the result, his report is of no assistance because of the differences between his assumptions and the evidence at trial.

**41**  There was no evidence regarding the intensity of the taxi's headlights except Ms. Goertz' testimony that they were on high beam. There was no evidence from Mr. Ahmad on this subject.

**42**  Though the only evidence before the court is from Ms. Goertz in respect of the taxi headlights, I am not required to accept her evidence, even if uncontradicted. She testified that she recognized the vehicle as a taxi by its distinctive red and white markings, and she saw the taxi roof light, although she could not recall if it was lit or not. The plaintiff says she could not have seen these things if blinded by high beams, so it is likely the headlights were on low, and Ms. Goertz should have seen the teenagers. There was, of course, the overhead light from the street light which would fall upon the roof of the cab.

**43**  Ms. Goertz was a very straightforward witness who was not self-protective. She did not try to excuse or minimize her actions. Saying that the taxi headlights were on high beam does not necessarily serve her well - it explains why her vision ahead was restricted but it also raises the question of why she would keep driving into an area where she could not see. She recalled flashing her lights at the driver to try to get him to lower his beams. The area was undeveloped and dark. It would be reasonable to have the high beams on. Mr. Ahmad's attention was diverted to the teenagers almost immediately and he never saw Ms. Goertz's vehicle approaching, which may explain why he did not address his attention to his lights.

**44**  Ms. Goertz said in cross examination that it was the shape of the bulb on the roof and the white paint that made her think the vehicle was a taxi. She maintained that the reason she was certain the headlights were on high beam was that she could not see beyond them into her lane, and low beams would not impair her vision that way.

**45**  I accept Ms. Goertz's evidence that the taxi headlights were on high beam.

***Issues:***

1. Was the defendant Ahmad negligent? If so, liability is asserted against White Rock South Surrey Taxi vicariously, and directly for failing to ascertain how many passengers required pickup and sending an appropriate vehicle.
2. Was the defendant Goertz negligent?
3. Were the plaintiffs negligent?

***Statutory provisions***

**46**  The following provisions of the ***Motor Vehicle Act***, *R.S.B.C. 1996, c. 318* and ***Motor Vehicle Regulations*** are relevant:

**s. 179 Rights of Way between vehicle and pedestrian**

1. Subject to s. 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.
2. A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable for the driver to yield the right of way.

**s. 180 Crossing at other than crosswalk**

When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

**s. 181 Duty of Driver**

Despite sections 178 (repealed), 179 and 180, a driver of a vehicle must

1. exercise due care to avoid colliding with a pedestrian who is on the highway,
2. give warning by sounding the horn of the vehicle when necessary, and
3. observe proper precaution observing a child or apparently confused or incapacitated person on the highway.

***Motor Vehicle Act Regulations***

Section 4.06(5) A person who drives or operates a motor vehicle must not illuminate the upper beam of a headlamp if another motor vehicle is within a distance of 150 m from that vehicle, unless the driver has overtaken and passed the other vehicle, so that the high intensity portion of the beam does not strike or reflect into the eye of the other driver.

1. Whenever a motor vehicle is parked or standing on a highway, the upper beam of the motor vehicle headlamps must not be illuminated.

**47**  Also relevant is s. 1(1) of the ***Negligence Act***:

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.

***Positions of the parties***

|  |  |  |
| --- | --- | --- |
| ***(a)*** | ***The Plaintiffs*** |  |

**48**  The plaintiffs submit that the greatest portion of liability rests with Mr. Ahmad and White Rock South Surrey Taxi.

**49**  They allege that Mr. Ahmad was negligent in failing to take reasonable measures to pick up the plaintiffs safely, failing to direct the teenagers to move off the travelled portion of the road before speaking to them, failing to notice the approaching Goertz vehicle at any time, and failing to put on his flashers once stopped. The plaintiffs contend that by stopping on the far side of the highway, Mr. Ahmad lured them onto the road knowing that entry into the cab could well be denied.

**50**  They allege that the taxi company is vicariously liable for the actions of Mr. Ahmad, and is also directly liable for failing to inquire about the size of the group in order to send an appropriate vehicle. There are a number of allegations of ***negligence*** contained in the Statements of Claim but this is the only one that was specifically addressed at trial.

**51**  The plaintiffs allege that Ms. Goertz was negligent in travelling too fast, and in continuing to drive blindly into the area behind the high beams of the taxi. They say they had left a place of safety and established their presence on 72nd Avenue long before the Goertz vehicle arrived; however she sped past the taxi, striking the plaintiffs whom she should have been able to see or avoid striking, had she driven with due care. They also allege that she should have sounded her horn or flashed her lights again.

**52**  As for any contributory ***negligence*** by the plaintiffs, they point to ***Cempel v. Harrison Hot Springs Hotel Ltd.***, [*[1997] B.C.J. No. 2853*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (B.C.C.A.):

1. if an act is to constitute contributory ***negligence***, it must be carelessness in relation to the risk which made the actual harm which occurred foreseeable
2. the task of the trier of fact is to assess the nature of blameworthiness of the parties.

**53**  Thus it is the degree of fault that is relevant, not the degree of causation of damage. The plaintiffs say they could not reasonably foresee a risk of harm from their consumption of alcohol. Nor was their crossing of 72nd Avenue a negligent act as they had plenty of time to get into the cab before the oncoming vehicle seen by Mr. Jessiman would arrive. Once at the cab and unexpectedly denied entry, they were returning to a place of safety - the northwest corner or the intersection from whence then had come.

***The Defendant Goertz***

**54**  The defendant Goertz says the plaintiffs have not proven that she breached any standard of care.

**55**  Ms. Goertz says it was the plaintiffs' own ***negligence*** which caused the accident. She had the right of way. The plaintiffs were crossing a highway at a point not in a crosswalk, and had an obligation to yield the right of way to her. Ms. Goertz was entitled to assume others would obey the law, and had a duty to take precautions only when it became clear they had not done so. It was not foreseeable that the plaintiffs would disregard the law. The plaintiffs, through their own inattention, impaired judgment and annoyance at not being let into the taxi, failed to take basic steps for their own safety. Ms. Goertz says she exercised due care to avoid colliding with the pedestrians once their presence and disregard of the law - that is entering into her lane - became known. At that point she complied with her duties at common law and under the ***Motor Vehicle Act***.

**56**  Ms. Goertz says the plaintiffs have a fundamental problem because their case depends on their assertion that had Goertz looked, she would have seen them and concluded they were going to ignore her right of way and cross into her lane in front of her oncoming vehicle. However, Goertz says the plaintiffs cannot say where they were at the time they assert she should have seen them, because *they* never saw the Goertz vehicle which was there to be seen. It is not clear what side of the taxi the plaintiffs were on as Ms. Goertz approached, nor is it clear if they had crossed the centre line into the westbound lane.

**57**  On this point, Mr. Ahmad said the group were trying to get into the rear doors on both sides of the cab. Ms. MacDonald said the whole group was ready to get in, with their hands on the handles. She said she was around the centre line herself, but could not remember if she was at the front or rear of the cab. She thought they were all on the same side of the cab. Mr. Jessiman was speaking to the driver; he knew Mr. Douglas was beside him, and believed the girls were behind him but could not say for sure where they were, or what side of the centre line they were on. Ms. Tarcea adopted her discovery evidence in which she said they had crossed into the eastbound lane. She said she remembered them all around the car and could not recall if they had crossed the centre line or not.

**58**  I am satisfied that all the teenagers crossed the westbound lane, over the centre line, and were around the taxi as it sat in the eastbound lane. I accept, based on Mr. Ahmad's evidence, which is supported to some extent by Ms. MacDonald, that one or more of them, probably Ms. Chambers, was on the far side of the taxi, trying to get in the rear door on the passenger side, before deciding to return to the northwest corner of the intersection. Not much turns on this, except to offer a possible explanation as to why Ms. MacDonald was almost across the lane and Ms. Chambers was still in the middle of it when the Goertz vehicle intersected their paths.

**59**  Although the plaintiffs say it would be reasonable to expect people to be around a taxi, Ms. Goertz says it was not reasonable to foresee that a taxi would be picking people up at a deserted intersection late at night.

**60**  Then the issue still arises of whether, even if Ms. Goertz should have anticipated that there might be people around the taxi when she could not see into her lane beyond the taxi's high beams, she should have foreseen that they would cross into her lane in front of her oncoming vehicle. Ms. Goertz says that even if she were negligent in continuing to drive past the high beams, there is no causation because at the point when she could have become aware that the situation was dangerous, there was nothing she could do to avoid the accident (see ***Brewster (Guardian ad litem of) v. Swain***, [*[2007] B.C.J. No. 1378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21PV-00000-00&context=), [*2007 BCCA 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21PV-00000-00&context=)).

**61**  Ms. Goertz submits that some liability could be attributed to Ahmad for stopping where he did, with his high beams on.

***The Defendant Ahmad***

**62**  Mr. Ahmad says he owed the teenagers no duty of care. He did not know they were his passengers. He had no control over them. He was not provided with sufficient time to react to the situation - the teenagers were at his taxi trying to get in almost immediately. To visit liability upon him is to make him an insurer of potential customers.

**63**  Mr. Ahmad says he legitimately refused entry to the teenagers. He could not lawfully take five passengers. He submits that stopping on a highway is not negligent *per se*. He stopped only momentarily, and this was not the proximate cause of the injury to the plaintiffs anyway. Even if he should not have stopped in the eastbound lane, the harm to the plaintiffs resulted only from their decision to cross from a place of safety, that is the vicinity of his taxi, and re-enter the westbound lane in the path of the Goertz vehicle, which was there to be seen. Mr. Ahmad argues that any chain of causation resulting from his ***negligence*** is therefore broken.

**64**  Mr. Ahmad says Goertz should be found liable for failing to slow down once she recognized the highly irregular situation ahead of her, or for failing to sound her horn or flash her lights. As well, if his headlights were on high and she was blinded, she should not have continued to drive forward at or near the speed limit.

***Liability***

**65**  The classic statement of tort liability is set out in ***Donoghue v. Stevenson***, [1932] A.C. 562, and repeated in countless decisions thereafter, including ***Arnold v. Teno***, [*[1978] 2 S.C.R. 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=), a case relied on by the plaintiffs:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injury your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by may act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

**66**  Added to this common law duty are those contained in the ***Motor Vehicle Act***, set out above. The plaintiff alleges that taxi drivers are under an additional duty to pick up passengers safely.

**67**  Mr. Ahmad stopped in the middle of the eastbound lane. This may have been to ascertain if the teenagers were his passengers or it may have been to tell them there too many for him to take. This is not of great importance because the teenagers crossed the road and tried to get into his cab almost immediately. Mr. Ahmad did not invite the teenagers across the road or suggest they should come across to get in the cab, but he clearly intended to engage them in conversation, which is why he stopped and began to lower his window. He admitted he was almost certain they were the passengers he was to pick up, and in that sense he should have foreseen that they would likely cross the road to get to the cab, once he stopped in the far lane. This created some risk.

**68**  Mr. Ahmad also had his high beams on while stopped on the highway, without regard for oncoming traffic. The lights of the Goertz vehicle were clearly visible to Mr. Jessiman as they crossed the road. They should have been visible to Mr. Ahmad, as well, had he looked, but he testified that he never saw the Goertz vehicle. He did not keep a lookout for oncoming traffic and he left his high beams on. This constitutes a departure from the standard of care expected of a prudent driver and was a contributing cause of the accident. I find that Mr. Ahmad was negligent.

**69**  Ms. Goertz had an obligation, once she knew a pedestrian was on the highway, even if she had the right of way, to exercise due care to avoid the pedestrian (s. 178(a)). While counsel for Ms. Goertz argues correctly that no duty arose under this section until she could see the pedestrians, and by that time it was too late to do anything, her fault is more general.

**70**  She approached the area at or near the speed limit, taking her foot off the accelerator and letting the car decelerate on its own. She continued to drive when she could not see ahead into her lane beyond the high beams of the taxi. She was alerted by the taxi being stopped to the irregularity of the situation; she knew taxis pick up and drop off passengers. She did not expect people to be in the area but admitted that the presence of a taxi could signal the presence of people. Despite not being able to see the area into which she was driving in this irregular situation, she continued on without braking or sounding her horn. She took some precautions, taking her foot off the accelerator and covering the brake, but they were insufficient to prevent her from driving blindly beyond the high beams at a speed somewhere around the speed limit of 60 kph. She had a common law duty to drive with due care for the safety of others that she could reasonably have in her contemplation, and she breached that duty by driving forward at that speed when she could not see into the lane ahead, an action that makes a clear risk of harm foreseeable. She should have slowed to a speed that would have allowed her to approach the blind area with appropriate caution for whatever lay ahead, including the safety of persons who could foreseeably be at or near a taxi. By failing to do so, she breached her duty to drive with due care for the safety of others. That breach was a contributing cause of the accident. If find that Ms. Goertz was negligent.

**71**  The plaintiffs were also negligent. They were trained from a young age to look both ways before crossing a street. They crossed to the taxi without looking for cars, even though the Goertz vehicle was there to be seen in the distance and was in fact seen by Mr. Jessiman, and more importantly, they headed back across the west bound lane into the path of the Goertz vehicle, again without looking.

**72**  Ms. MacDonald was calm and straightforward in her testimony, but her evidence respecting the second or two before and when she was struck is unclear. This is understandable, given the traumatic event that occurred. However, she displayed a curious notion of her responsibilities as a pedestrian on a highway. She testified on discovery that she did not have time to look for cars. She said she turned and was struck. She adopted this at trial, although when she repeated the answer, she said "I didn't even look." She was asked for an explanation why, if her practice was always to look both ways, she did not see the oncoming vehicle. She said she was trying to get to a place of safety, she was already in the middle of the road, and a person should not have to look once they are in the middle of the road; once in the middle of the road, their position is established.

**73**  Such a contention is not in accord with the ***Motor Vehicle Act***, the common law duty of care, or common sense.

**74**  The consumption of alcohol may have played a part in the plaintiffs' ***negligence***, especially for Ms. Chambers, who drank more than Ms. MacDonald did. However, the important factor is that, for whatever reason, both plaintiffs crossed the road without looking, into the path of an oncoming vehicle that was there to be seen.

**75**  On all of the evidence, the plaintiffs failed to take reasonable care for their safety and were negligent.

***Apportionment of fault***

**76**  The respective degrees of fault of Mr. Ahmad, Ms. Goertz and the plaintiffs must be assessed by considering the risk created by each of the parties, the effect of this risk, and the extent to which each party departed from the standard of reasonable care.

**77**  In ***Aberdeen v. Langley (Township)***, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=), [*35 M.P.L.R. (4th) 233*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=) (S.C.), Groves J. provided a helpful review of the principles relating to apportionment of fault, setting out the principles from a number of appellate cases:

1. In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect a potential effect of occurrences within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties. (***Cempel***, *supra*).
2. 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. (***Alberta Wheat Pool v. Northwest Pile Driving Ltd.*** ( [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=)), [*80 B.C.L.R. (3d) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=).
3. Relevant factors have been summarized 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=), [*(2002) 213 D.L.R. (4th) 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), @ para. 34; and Chiefetz, *Apportionment of Fault in Tort* (Aurora, Ont.: Canada Law Book, 1981) @ pp. 102-104:
4. The nature of the duty owed by the tortfeasor to the injured person.
5. The number of acts of fault or ***negligence*** committed by a person at fault.
6. 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.
7. 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 ...
8. 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.
9. The gravity of the risk created.
10. the extent of the opportunity to avoid or prevent the accident or the damage.
11. whether the conduct in question was deliberate, or unusual or unexpected; and
12. the knowledge one person had or should have had of the conduct of another person at fault.

**78**  The greater fault lies with the plaintiffs. Ms. Goertz was in her lane of travel. According to Mr. Jessiman, the Goertz vehicle was already there to be seen, and this accords with the evidence of Ms. Goertz herself, as she could see the headlights of the stopped vehicle as she crested the hill on 72nd Avenue. The plaintiffs moved from the area of the taxi and the centre line and crossed into her lane in front of her car without looking. They have the responsibility, when crossing a highway at a place other than a crosswalk, to yield the right of way to a vehicle (s. 179(2)). They also have the responsibility not to move from a place of safety into the path of a vehicle in circumstances where it is impracticable for the driver to yield the right of way (s. 180). Given the risk of foreseeable harm from crossing the oncoming lane of traffic without looking, they were clearly at fault to a significant degree. Although Mr. Ahmad chose to stop in the far lane, they made the decision to cross the road, and then to return to the north side. Having made the decision, they had a responsibility to take reasonable care for their own safety. All that was required was to look both ways before venturing out into Ms. Goertz's lane of travel, something each had been taught since early childhood. Ms. Goertz's car was there to be seen. In crossing in front of it, they did not take reasonable care for their own safety. The risk arising from these actions was considerable; the consequences reasonably foreseeable.

**79**  Ms. Goertz assumed some risk and departed from the expected standard of care by failing to reduce her speed and by continuing to drive into the area behind the headlights when she could not see what was there.

**80**  Mr. Ahmad assumed some risk by stopping on the far side of the road, thus raising the potential for the teenagers to cross the street to get to him, which was not in accord with his duty to take reasonable care to pick up passengers in a safe manner. However his fault arising from this is lessened because the teenagers crossed to the taxi before he could communicate with them. He also assumed some risk and departed from the expected standard of care by keeping his lights on high beam in the face of oncoming traffic, and failing to keep a lookout for oncoming traffic.

**81**  I am of the view that Mr. Ahmad's degree of fault is less than that of Ms. Goertz because, although he did not fulfil the expected standards of care, his was a lapse arising from an unexpected situation and distracted attention, whereas Ms. Goertz knew she could not see beyond the beams but chose to keep driving forward at or near the speed limit. Her conduct fell short of the required standard of care to a more significant degree.

**82**  Considering the foreseeable risk of harm arising from the actions of each of the parties, and the extent to which their respective actions departed from a reasonable standard of care, I apportion liability 60% to each of the plaintiffs, 30% to Ms. Goertz and 10% to Mr. Ahmad.

**83**  The only separate action on the part of South Surrey White Rock Taxi that was alleged to be negligent, although it was not pled, was in failing to ask Ms. MacDonald, when she called, how many were in her party. A far-sighted customer in a large group would probably alert the company to the number, but these teenagers were unfamiliar with the use of cabs and it obviously did not occur to Ms. MacDonald to provide this information.

**84**  I am unable to conclude on the evidence before me that there is a duty on the taxi dispatcher to make such enquiries, although it might be prudent to do so in order not to waste the time of the driver and the potential passengers. Nor can I say the company should have reasonably foreseen any consequences as a result of this failure. The direct cause of action against the taxi company is dismissed.

**85**  If there is a reason to speak to costs, counsel may arrange to do so at their convenience.

M.A. HUMPHRIES J.

**End of Document**

[***McEvoy v. McEachnie, [2008] B.C.J. No. 2086***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2P1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

P.J. Rogers J.

Heard: October 20-23, 2008.

Judgment: November 4, 2008.

Dockets: S69435, 37152 and 06-2751

Registry: Kelowna, Vernon and Victoria

**[2008] B.C.J. No. 2086** | [*2008 BCSC 1496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BY-00000-00&context=) | [*73 M.V.R. (5th) 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BY-00000-00&context=) | [*2008 CarswellBC 2373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BY-00000-00&context=) | [*173 A.C.W.S. (3d) 316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2BY-00000-00&context=)

Between Benedict Franklin McEvoy, Plaintiff, and Robyn Carly McEachnie, William James Forster and Stefany Leigh Forster, Defendants, and Insurance Corporation of British Columbia, Third Party And between Jordan Paul Robert, Plaintiff, and Robin Carly McEachnie, William James Forster and Stephanie Leigh Forster, Defendants, and Insurance Corporation of British Columbia, Third Party And between Robyn Carly McEachnie, Plaintiff, and William Forster and Stephanie Forster, Defendants

(69 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Liability of owner — Consent to possession — The court determined that the front passenger was liable, and the vehicle's owner was vicariously liable, in relation to three actions for injuries — The passenger, who had allowed her friend to drive because she had been drinking, grabbed the steering wheel causing the accident — The passenger was "driving or operating the motor vehicle" within the meaning of section 86 of the Motor Vehicle Act — The vehicle's owner, who was the father of the passenger, expressedly or impliedly consented to the driver's possession of the vehicle and expressdly consented to his daughter's possession of it — Motor Vehicle Act, s. 86.**

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| --- |
| The court was asked to determine the issue of liability in relation to three actions for injuries sustained in a motor vehicle accident. The vehicle left the highway, entered a ditch and overturned. The vehicle was being driven by Ms. McEachnie, Ms. Forster was in the passenger seat and Mr. Robert and Mr. McEvoy were in the rear seats. The vehicle was owned by Ms. Forster s father, who had driven the vehicle from the Lower Mainland to Vernon and left it in his daughter's possession. Mr. Forster instructed his daughter that only she should drive the vehicle and that she was not to consume alcohol and drive. Ms. McEachnie, who was driving the vehicle at the time of the incident because Ms. Forster had been consuming alcohol, testified that Ms. Forster had grabbed the steering wheel and wrenched it to the right. Ms. Forster testified that McEachnie had allowed the vehicle to drift to the right and that she had reached out, and perhaps grabbed the wheel, after Ms. McEachnie had overcorrected to the left. Mr. Robert had no recollection of the accident but Mr. McEvoy testified that he did not notice any sharp changes in the vehicle's direction prior to the crash. The RCMP officer who attended at the scene of the accident wrote on the accident report that "the passenger jokingly grabbed the steering wheel..."; the officer did not hear any objection from either Ms. McEachnie or Ms. Forster to this description.  HELD: Ms.  Forster was liable for the accident and Mr. Forster was vicariously liable as owner of the vehicle. Ms. Forster's ***negligence*** caused the vehicle to swerve off the road and she was "driving or operating the motor vehicle" within the meaning of section 86 of the Motor Vehicle Act. "Driving" in this context meant nothing more than having a degree of control over the speed and trajectory of the motor vehicle and "operating" meant having some, but not necessarily exclusive, control over the functioning of an automobile. Mr. Forster expressedly or impliedly consented to Ms. McEachnie's possession of the vehicle that night, and he expressedly consented to his daughter's possession of it. When an owner transferred car keys to a second party and the second party gave the keys to a third party, the owner was deemed to have consented to the third party's possession of the car. |

**Statutes, Regulations and Rules Cited:**

Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, s. 19(1)

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 86*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-60KK-00000-00&context=)

**Counsel**

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Counsel for the Plaintiff, J.P. Robert (Action No. 37152): M.J. Yawney.

Counsel for the Plaintiff, R.C. McEachnie (Action No. 06-2751): G.D. Williams.

Counsel for the Defendant, R.C. McEachnie (Action Nos. S69435 and 37152): R.E. Ross.

Counsel for the Defendant, W.J. Forster: J.S. Kennedy.

Counsel for the Defendant, S.L. Forster: C.R. Penty.

No other appearances.

[Editor's note: A corrigendum was released by the Court November 17, 2008. The correction has been made and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **P.J. ROGERS J.** |

**Introduction**

**1**  On June 20, 2004, a 2000 Jeep TJ left the highway just south of Vernon B.C. It entered the ditch and overturned. Three of the jeep's four occupants have sued for injuries that they say they suffered in the incident. The issue of liability for the accident in all three actions has been severed from issues relating to quantum and contributory ***negligence*** arising out of seatbelt use. The liability issues were tried first. These reasons follow the trial of liability.

**2**  The parties in the three actions dispute who caused the accident: was it the driver, Ms. McEachnie, or the front seat passenger, Ms. Forster, or both? The parties also dispute whether Ms. McEachnie was driving with the implied consent of the Jeep's owner, Mr. Forster.

**3**  The main questions to be decided are, first, whether Ms. Forster interfered with Ms. McEachnie's driving, and if she did, whether that interference caused or contributed to the accident; and, second, whether Mr. Forster expressly or impliedly consented to Ms. McEachnie, a woman he had never met and did not know, operating the vehicle.

**The Facts**

**4**  The defendant, Mr. Forster, is father to Brandon and Stephanie Forster. Brandon is 27 years old; Stephanie is 24. Mr. Forster is a generous dad. In the past, he has provided vehicles for each of his children to use. Mr. Forster kept title to the cars, and he gave them into his children's possession to use as they saw fit. Mr. Forster made it clear that the children were not to drink alcohol and drive. Mr. Forster also made it clear that he expected that only the children would operate the vehicles. His purpose in imposing this limitation was straightforward: he knew and trusted his children, but he did not know or trust their friends. In order to keep both of his children and his cars safe, he admonished the children to be the vehicles' only drivers. It is worth noting at this juncture that Mr. Forster's purpose in telling the children to not let others drive his cars was not to limit his statutory liability as the cars' owner.

**5**  In February 2004, Brandon had been out on his own for a while, and he had contracted to buy a 2000 Jeep TJ. However, Brandon planned to go back to post-secondary school, and because of that, he figured that he could not afford to keep his Jeep. Mr. Forster, who was living in the Lower Mainland, decided to help Brandon out by purchasing the Jeep from him.

**6**  When Stephanie, who lived in Vernon then, heard of this, she asked her father if she might be allowed to use the Jeep. Mr. Forster and Stephanie agreed that this was an acceptable plan provided that another of his cars, a Sunfire that he was allowing her to use, would go back into his possession. Mr. Forster planned to sell the Sunfire. So, in February 2004, Mr. Forster drove the Jeep to Vernon, left it there in Stephanie's possession, and drove his Sunfire back to the Lower Mainland. From that point forward, Stephanie had day-to-day control of the Jeep.

**7**  At that time, Ms. Forster was working somewhat less than full-time at Vernon's 30th Avenue liquor store. She was a clerk there. Ms. McEachnie also worked as a clerk at the liquor store. Mr. Robert worked there too. Mr. McEvoy worked as the manager at the adjacent Monashee Bar and Grill. Their ages were 21, 26, 19 and 27 respectively.

**8**  On the evening of June 19, 2004, Ms. Forster and Ms. McEachnie worked until approximately 11:30 p.m. They planned to spend the rest of the evening together. Before leaving the liquor store, Ms. Forster bought a four-pack of coolers. Coolers are a liquor and fruit juice beverage. Ms. McEachnie went together with Mr. Robert on the purchase of a 750 ml bottle of rum. The two women left the liquor store and stored their purchases in the Jeep. They then went next door to the Monashee Bar and Grill. Ms. McEachnie had a shot of tequila and drank about one-half of a bottle of beer. Ms. Forster applied herself to drinking mixed cocktails.

**9**  After spending about an hour at the bar, Ms. Forster and Ms. McEachnie decided to go to Ms. Forster's house. Their purpose was to change out of their work clothes. Ms. Forster drove from the bar to Ms. Forster's place. They changed clothes there. Then they returned to the bar. Ms. Forster drove from the house back to the bar. The women then socialized at the bar. Ms. Forster continued to consume alcohol, but Ms. McEachnie abstained. They stayed until the bar closed at 2 a.m.

**10**  As the bar was closing the two women, with Mr. Robert in tow, gave their friend, Jodie, a ride from the bar. By then, Ms. Forster had consumed at least four or five drinks. She felt that she was too intoxicated to drive. Ms. McEachnie became the evening's designated driver. Ms. McEachnie drove the Jeep to Jodie's place and back. "Back" was back to the bar - this night was not yet over for the young people. Their purpose in returning to the bar was to join Mr. McEvoy after he finished closing it up for the night.

**11**  Sometime between 2:30 and 3 a.m., the four friends got into the Jeep and left the bar. Ms. McEachnie was driving. Ms. Forster was in the front passenger seat. Mr. Robert was directly behind the driver and Mr. McEvoy was behind the passenger. Their plans were in flux as they left the bar's parking lot. Ms. Forster was not sure where they were going; she thought that perhaps they were headed to a house party located near her place. The others, however, decided to go to a lookout point. The lookout is located on a hill a few kilometers south of Vernon.

**12**  Ms. Forster did not think of taking a taxi that night. She testified that her reasons for not considering a taxi were twofold. They were: first, about 18 months earlier, she had taken a taxi home after a night of drinking downtown, but when she went to get her car in the morning, she was dismayed to find that it had been vandalized. Because of that experience, she did not think it was safe to risk leaving her father's Jeep overnight in the bar's parking lot. Her second reason for not taking a taxi was that a designated driver was available and willing to drive. She considered it responsible to ensure that the Jeep was driven by a person who had not been drinking. As far as she knew, Ms. McEachnie was a properly licensed, capable and competent driver.

**13**  Ms. McEachnie was, in fact, a capable and competent driver. She did not, however, as Ms. Forster assumed, have a Class 5 driver's licence. Instead, she had a novice licence.

**14**  When the plan to go to the lookout became clear to Ms. Forster, she was not terribly pleased. She perceived that her friends were making an effort to "set her up" with Mr. McEvoy. She did not welcome their purpose because she was already romantically involved with another fellow.

**15**  Ms. McEachnie was familiar with Jeep type vehicles. She had no difficulty with the Jeep's five-speed manual transmission. Ms. McEachnie drove through Vernon's downtown core and turned onto the highway leading south. She piloted the Jeep up a hill, past an army base, around a curve to the right, past a tourist information booth, and then through a curve to the left. There were two lanes in Ms. McEachnie's direction of travel; she kept the Jeep in the lane closest to the center line, or what is known as the fast lane. The speed limit rose from 50 to 70 kph and then to 90 kph. The accident happened just after the Jeep finished negotiating the left curve and as it was accelerating from 70 to approximately 80 kph.

**16**  Ms. Forster testified that the accident happened because Ms. McEachnie allowed the Jeep to drift to its right. Ms. Forster said that she noticed the drift and became concerned. Then she felt Ms. McEachnie correct the Jeep's travel with a sharp steering motion to the left. Ms. Forster believed this to be an over-correction. She testified that she remembers putting her hands out to the dashboard, and perhaps reaching for the steering wheel as well. She does not remember actually touching the steering wheel but allowed as how it was possible that she did grab the wheel. If she did do that, she testified that her intention was to correct Ms. McEachnie's over-correction. Ms. Forster's next recollection is of sitting in the wreck. The Jeep was in the south-bound ditch, lying on its passenger side. The airbags had gone off. Ms. McEachnie was suspended by her seatbelt in the driver's seat above her. Ms. Forster had a cut on her forehead, lacerations on her face and wrist, and a burn on her chin from the passenger side airbag.

**17**  Mr. Robert has no recollection of the events immediately before or after the accident.

**18**  Mr. McEvoy testified that he got into the Jeep after being invited by Ms. McEachnie to go up to the lookout point. She made that invitation in the bar's parking lot moments before setting out. Mr. McEvoy was sitting in the back seat behind Ms. Forster. He was talking to Mr. Robert. He was not paying any particular attention to Ms. McEachnie's driving. Her driving did not concern him, and he had no worries about her being impaired. A split second before the crash, he recalls seeing out of the corner of his eye Ms. Forster's arm reaching toward the steering wheel. He next remembers waking up inside the wreck. He did not notice any sharp changes in the Jeep's direction of travel prior to seeing Ms. Forster's arm reaching toward the steering wheel.

**19**  Ms. McEachnie testified that the accident happened because Ms. Forster, for no reason that she could devine, reached out, grabbed the steering wheel, and wrenched it hard to the right. The wrenching motion was so sharp that it overcame the friction of her hand upon the wheel, and the wheel slid under her hand. She said that the Jeep responded immediately by veering to the right and heading toward the ditch. Ms. McEachnie said that things happened so quickly that by the time she regained her grip on the wheel, the Jeep was already entering the ditch. There was no time to apply her brakes. She tried to turn left to get out of the ditch, but it was too late. The Jeep's front tire hit something hard and the Jeep overturned. Ms. McEachnie next remembers hanging from her seatbelt and looking down to see Ms. Forster sitting on the passenger door.

**20**  The accident was investigated by Cpl. Bowden of the RCMP. He attended the scene shortly after the ambulance personnel arrived. Cpl. Bowden was alive to the possibility that alcohol may have contributed to the crash. He interviewed both Ms. McEachnie and Ms. Forster. When his investigation was done, he was satisfied that Ms. McEachnie had been driving and that there was no reason to suspect that she was impaired by alcohol. He was, however, satisfied that she had consumed alcohol that night and then got behind the wheel. That was contrary to one of the restrictions on Ms. McEachnie's novice driver's licence, and he gave her a violation ticket for that infraction. Ms. McEachnie did not dispute the ticket.

**21**  Cpl. Bowden's investigation included trying to determine why the Jeep left the road and wound up in the ditch. He did not talk to Mr. Robert or Mr. McEvoy, but his interview of Ms. McEachnie and Ms. Forster touched on that topic. From that interview, he gained an understanding which led him to write on the accident report that "the passenger jokingly grabbed the steering wheel ..." Cpl. Bowden could not say whether it was one or both of the women who gave him to understand that was what had happened. He did say, however, that he did not hear any objection from either woman to the proposition that the passenger had jokingly grabbed the steering wheel.

**Discussion**

**Consent**

**22**  Mr. Forster's jeopardy in these suits derives from s. 86(1) of the ***Motor Vehicle Act***, *R.S.B.C. 1996, c. 318*. That section says:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **86** |  | (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who |  |

1. is living with, and as a member of the family of, the owner, or
2. acquired possession of the motor vehicle with the consent, express or implied, of the owner,

is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

**23**  The evidence is clear that no one asked Mr. Forster if it would be alright for Ms. McEachnie to drive the Jeep on the night of the accident.

**24**  The evidence is also clear that as a general proposition, Mr. Forster instructed his children that no one but them should drive the cars that he left in their possession. His purpose for imposing that rule was to keep the children and his cars safe. That was because he knew and trusted his children's judgment, but he did not necessarily know or trust the judgment of their friends. The question here is whether, notwithstanding his general rule, Mr. Forster gave his consent to Ms. McEachnie's operation of the Jeep on the night of the accident.

**25**  In ***Morrison (Committee of) v. Cormier Vegetation Control Ltd.***, [*[1996] B.C.J. No. 2601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F8D9-M1VS-00000-00&context=), the Court of Appeal considered whether an owner, having given over the keys to a car, by imposing its permission to use the vehicle, could escape liability under the section. The facts in ***Morrison*** were uncomplicated. The defendant, Carter Motors, owned numerous cars and it employed the defendant, Mr. Griend, to sell them. Carter allowed Mr. Griend unrestricted physical access to the keys to the cars. Carter imposed a restriction on Mr. Griend's use of one particular car - an Alfa Romeo 164s. The restriction was that the Alpha was not to be used for any purpose other than for demonstration to prospective purchasers. Carter's purpose in imposing this restriction was to preserve the Alpha's resale value. Mr. Griend knew of this rule, but one weekend, he took the keys to the Alpha anyway and used the car for purposes other than demonstrating it to customers. Mr. Griend's ***negligence*** in operating the car during that weekend resulted in Ms. Morrison's injuries. At trial, Carter argued that it had not consented to Mr. Griend's possession of the Alpha. It said, and the trial judge agreed, that consent to possess cannot be said to expressly or impliedly exist when an owner places a restriction on the use to which a third party may put a vehicle and the third party uses the car contrary to that restriction.

**26**  On appeal by the plaintiff against this finding, Goldie J.A. wrote:

[27] Possession of an automobile is acquired with the transfer of the means of control. The vehicle itself may be, say in a parking lot, but when keys which enable their possessor to enter and operate the vehicle, wherever it may be, possession is acquired within the meaning of s-s. 79(1) of the Motor Vehicle Act. The transfer of the means of possession - the keys to open and operate the vehicle - convey the required degree of exclusivity of control. Cf: Holt v. Dawson, [1939] 3 All E.R. 635 (C.A.). I emphasize that in the case at bar there has been express consent to the Employee acquiring control of certain automobiles through the availability of the keys; the custody of the D plates and the key to the place where they were kept. This consent, as contrasted with instructions of use, was never revoked or limited.

[28] The arrangements described in detail by the trial judge alter the principle of the statute. Carter, by the "free exercise of the owner's will" enabled the Employee to acquire possession of the white Alfa on 23 May 1993 and whether the use to which he put it thereafter was one of which Carter would approve is immaterial if, in his driving or operation of the vehicle, he was at fault.

**27**  Paragraph 28 of ***Morrison*** is instructive. In it, the court clearly separates the concept of "consent to possess" from the concept of "restricted use". The court found that consent to possess exists when the keys are made available to a third party. The court found that so long as the keys are transferred by a free exercise of the owner's will, it was immaterial to the owner's consent that the third party might use the car for a purpose of which the owner would not approve.

**28**  Given the ***Morrison*** trial judge's conclusion that Carter's restriction on use pre-existed Mr. Griend's taking of the Alpha's keys and that Mr. Griend knew of the restriction (neither of which findings were disturbed on appeal), it follows that the law in this province is that if an owner voluntarily makes the keys to its vehicle freely available to a third party, the imposition of use-restrictions by the owner can have no effect on whether the owner consents to the third party's possession of the vehicle. That is to say: violation of an owner's stipulation that a car not be used for personal purposes, expressed before use and known to the user, will not vitiate the owner's consent to possession if the owner makes the car's keys freely available to the user.

**29**  ***Morrison*** has been recently followed in ***Barreiro v. Arana***, [*2003 BCCA 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G55P-00000-00&context=). In ***Barreiro***, the vehicle's owner was Lo-Cost Rent-a-Car Ltd. Lo-Cost instructed its employee, Mr. English, not to rent the car to persons under the age of 21 years. Mr. English rented the car to Mr. Arana. Mr. English knew that Mr. Arana was only 20 years old. Mr. Arana then drove the car into an accident, injuring five people. Those people sued Mr. Arana and named Lo-Cost as a defendant. Lo-Cost argued that it had not consented to Mr. Arana's possession of the car because Mr. English knew that he should not have rented the car to Mr. Arana. When the matter came to the Court of Appeal, the only issue to be determined was whether Lo-Cost had consented within the meaning of s. 86 of the ***Act*** to Mr. Arana's possession of its car.

**30**  Writing for the court, Thackray J.A. discussed the general legislative intent of s. 86 of the ***Act***. He said:

[28] The legislative intent in section 86 must be taken, as noted by Goldie J.A. in ***Morrison***, to address the reckless use of motor vehicles and the section imposes "a heavy burden on those who have within their power the control of motor vehicles." In ***Bareham***, [*[1994] B.C.J. No. 1826*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F016-S2YR-00000-00&context=), Mr. Justice MacDonell, after reviewing the statute, said at 194:

In this case, the only policy reasons to be considered are those in favour of protecting innocent third parties seeking compensation for injuries suffered at the hands of negligent automobile drivers and, vicariously, owners.

**31**  The "heavy burden" to which that passage refers is the great difficulty car owners have in establishing that they did not consent to another's use of their cars. The scope of that burden is made clear in the closing paragraphs of ***Barreiro***:

[29] In the case at bar Lo-Cost hired and trained Mr. English, vested him with certain authority and responsibilities, controlled the level of supervision he required and entrusted him to carry out the relevant acts unsupervised. The authority given to Mr. English extended to renting its vehicles to members of the public, to executing rental agreements on behalf of Lo-Cost and to explicitly consenting to the operation of its vehicles by persons other than the vehicle owner.

[30] Mr. English, with the approval of Lo-Cost, was given the "power of control over motor vehicles." Mr. English, of his own free will, turned over the vehicle's keys to Mr. Arana. While the instructions in the policy manual were to act "in accordance with the policies and procedures of Lo-Cost", the legislative scheme, in order to be remedial, cannot be read as allowing exceptions for acts of employees simply because the acts go beyond the owner's policy manual. This would confuse the issue of authority with procedural compliance.

[31] I accept the legislative intent and, based upon the agreed facts, I am of the opinion that the trial judge committed no error in concluding that "Arana was operating the vehicle with the express consent of Lo-Cost."

**32**  ***Barreiro*** makes it clear that the policy that drove the result in ***Morrison*** extends to situations where the owner gives the keys to its agent and the agent passes the keys on to a third party. ***Barreiro*** stands for the proposition that so long as the transfer of car keys from owner to second party is done by an exercise of free will, and the second party gives the keys to a third party by free will, the owner will be deemed to have consented to the third party's possession of the car. That will be the result even though the owner and the second party had an understanding that the third party was not to ever get possession of those keys.

**33**  In my view, except for the fact that Mr. Forster obtained no financial benefit from Ms. McEachnie's possession of the Jeep, the present case is not distinguishable from ***Barreiro***. Mr. Forster freely gave the Jeep's keys to Ms. Forster. She freely gave the keys to Ms. McEachnie. Mr. Forster must, therefore, be taken to have expressly consented to Ms. McEachnie's possession of the Jeep on the night in issue.

**34**  For the same reason, Mr. Forster must be taken to have expressly consented to Ms. Forster's possession of the Jeep that night, and that is so notwithstanding the fact that she was intoxicated and that her being intoxicated broke the other of Mr. Forster's rules.

**35**  If my analysis of the law on this issue is incorrect, I would nevertheless have come to the same conclusion by other route. I have found that Mr. Forster imposed the rule about others driving his cars in order to keep his children and his cars safe. I infer from this that Mr. Foster would have consented to whatever use Ms. Forster put the Jeep to so long as that use was aimed at achieving one or both of those goals. I find that Ms. Forster's decision to have a non-drinking friend drive that night was aimed at preserving her own well-being (one recoils from the thought of how much worse things could have turned out if Ms. Forster had taken the wheel that night). I therefore infer that Mr. Forster consented to a sober person driving the Jeep if such would have kept his daughter, who was intoxicated, from jeopardizing her life by driving herself. Further, driving the car out of the downtown area of Vernon was a sensible decision, and it achieved the end of keeping the Jeep safe from vandalism. I infer that Mr. Forster consented to Ms. McEachnie driving the Jeep away from a place where, if it were left overnight, it would be at risk of being damaged.

**36**  I find that by laying down the rule for the reasons that he did, Mr. Forster impliedly consented to Ms. Forster using the car in a way that met his goals. Having Ms. McEachnie drive that night did satisfy those goals, and Mr. Forster impliedly consented to her possession of the car under the circumstances that pertained at the time.

**37**  Mr. Forster is, therefore, vicariously liable pursuant to s. 86 of the ***Motor Vehicle Act*** for any liability that Ms. McEachnie may have for this incident. The thornier question is whether Mr. Forster might also be liable for Ms. Forster's ***negligence***, if any. That latter question does not turn on consent to possession but rather on whether Ms. Forsters was "driving or operating the motor vehicle" within the meaning of the s. 86. About that, more follows.

**Liability**

**38**  Although I have every sympathy for Ms. Forster, I regret that I find that I cannot accept her evidence about how the accident happened. I have come to that conclusion because:

1. Neither Ms. McEachnie nor Mr. McEvoy felt the car swerve suddenly as if Ms. McEachnie over-corrected, and then go to its right and into the ditch; and
2. Shortly after the accident, Ms. McEachnie and Ms. Forster spoke to Cpl. Bowden, and the combined effect of their advice led the officer to conclude that the accident happened because the passenger had jokingly grabbed the steering wheel.

**39**  It seems to me that had the accident happened the way Ms. Forster now says it did, she would certainly have said something to the officer at the scene to the effect that she was trying to fix Ms. McEachnie's driving error. I find that she did not say any such thing. Instead, she was there to hear words said that gave the officer to understand that she had jokingly grabbed the steering wheel, and she said nothing to deflect or reverse the effect of those words. Also, Ms. McEachnie and Mr. McEvoy were in a position to appreciate whether the Jeep made any sudden changes of direction before it veered into the ditch. Neither did.

**40**  Further, I find that Ms. Forster was the only intoxicated person in the Jeep that night. Hers was the only memory subject to the confounding effect of excessive alcohol consumption. I do not, therefore, accept her recollection over the recollections of Ms. McEachnie and Mr. McEvoy, both of whom were sober.

**41**  Finally, I find that of all the people in the Jeep, it was Ms. Forster's judgment that was impaired by alcohol. The disinhibiting effect of alcohol on judgment is well known - it requires no expert evidence to explain or establish. I am satisfied that if she were sober, Ms. Forster would never have behaved as she did. The only conclusion I can come to on the evidence adduced at trial is that Ms. Forster's intoxication led her to believe that a hazard existed where there was none, or to think that it would be humorous to give the Jeep a shake by grabbing the steering wheel. I therefore find that Ms. Forster's judgment was impaired by alcohol and that, as a consequence of that impairment, she negligently grabbed the steering wheel and caused the Jeep to veer off the road.

**42**  I find that Ms. McEachnie did nothing wrong and was not negligent in her operation of the vehicle that night. Specifically, she was not impaired; she was not speeding; notwithstanding her novice driver's licence, she had the proper degree of skill and experience to operate the Jeep; she was attentive and alert; she did not allow the Jeep to wander from its proper course on the highway; and she could not have anticipated that Ms. Forster would do something so foolish as to grab the steering wheel and jerk it to the right. That is to say: Ms. Forster's action was not a foreseeable risk against which Ms. McEachnie was obliged to guard.

**43**  In summary, Ms. Forster was negligent and her ***negligence*** caused the Jeep to swerve off the road and into the ditch. Ms. McEachnie was not negligent and did not contribute to the cause of the accident. Ms. McEachnie was sober and was competent to drive the Jeep. No person in the Jeep that night was contributorily negligent for having taken a ride with her.

**Driving or Operating**

**44**  The question then becomes whether Ms. Forster was "driving or operating the motor vehicle" within the meaning of s. 86 of the ***Motor Vehicle Act***. This is a salient question because if Ms. Forster was not driving or operating the Jeep, then Mr. Forster cannot be held liable under the ***Act*** for her ***negligence***.

**45**  Mr. Forster argues that Ms. Forster was not "driving or operating" the Jeep. He relies on the case of ***Paulus v. Robinson***, [*[1991] B.C.J. No. 2958*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X39R-00000-00&context=) (C.A.). The issue in ***Paulus*** was whether a passenger, who in an irrational rage grabbed the steering wheel and caused the vehicle to go off the road, was an "uninsured motorist" as that phrase appeared in the ***Insurance (Motor Vehicle) Act***, R.S.B.C. 1979, c. 204. The Court of Appeal considered that the relevant portion of the definition of an "uninsured motorist" was "a person who uses or operates a motor vehicle on a highway": ***Insurance (Motor Vehicle) Act***, s. 19(1). The plaintiff in ***Paulus*** argued that any use of a motor vehicle on a highway constituted "use" or "operate" within the meaning of the statute. She maintained that when the passenger grabbed the steering wheel in the midst of his rage, he was making use of the car and was, for the purposes of the ***Insurance (Motor Vehicle) Act***, a motorist. The trial judge agreed with the plaintiff, and found that "operate" means the act of taking control of the vehicle. The trial judge concluded that the passenger was operating the car and was a motorist within the meaning of the ***Insurance (Motor Vehicle) Act***. The Insurance Corporation of B.C. appealed that result. Southin J.A., writing for the court, criticized the trial judge's conclusion. She said:

In my opinion, it makes too much of "use or operate", especially the latter, and too little of the "motorist" which colours the definition and which takes its own colouring from the concept underlying s. 19.

**46**  It is this passage that distinguishes ***Paulus*** from the present case. That is because the word "motorist" does not appear in s. 86 of the ***Motor Vehicle Act****.* It follows that the meaning of the words "driving or operating" used in s. 86 cannot be coloured by it.

**47**  The ***Motor Vehicle Act*** does not define either verb. The New Oxford Dictionary of English defines "driving" as: The control and operation of a motor vehicle: *he was convicted of reckless driving*. The dictionary defines "operate" as: Control the functioning of (a machine, process, or system).

**48**  The concept of "driving" does not necessarily imply that only one person at a time can "drive" an automobile. There is no logical reason why a vehicle can not be driven by two people at the same time. Doing so would be unwise and probably dangerous, but it can be done. Similarly, the concept of "driving" does not necessarily imply good driving. One can operate a car completely without sense or skill and still "drive" it. In fact, "driving" in this context means nothing more than having a degree of control over the speed and trajectory of a motor vehicle.

**49**  The same analysis applies to the verb "operating" as it is used in the ***Act***. *Ergo*: operating simply means having some, but not necessarily exclusive, control over the functioning of an automobile.

**50**  Although it does not matter in the present case, the difference between the two verbs seems to be that "driving" implies that the vehicle is in motion, while "operating" contemplates controlling the vehicle's function whether it is in motion or at rest. For example, the act of rolling up a door's window would probably be "operating" but not "driving".

**51**  When Ms. Forster grabbed the steering wheel, she exerted an effort to control the Jeep's trajectory. As such, she was, for a brief period of time, "driving" the Jeep by moving the steering wheel, and she was, for an equally brief period of time, "operating" the Jeep by inputting some control over its steering function.

**52**  For those reasons, I find that just before the Jeep went off the road, both Ms. McEachnie and Ms. Forster were driving it. Ms. Forster's efforts were unwelcome and unhelpful, not to say outright dangerous, while Ms. McEachnie's efforts were blameless.

**Conclusion**

**53**  The June 2004 accident was the product of Ms. Forster's ***negligence***. Ms. Forster's ***negligence*** was the product of impairment due to her consumption of alcohol.

**54**  Ms. McEachnie was sober when the accident happened. Ms. McEachnie was not negligent and did not cause or contribute to the accident.

**55**  Ms. Forster was driving the Jeep when it went off the road. Mr. Forster expressly or impliedly consented to Ms. McEachnie's possession of the Jeep that night, and he expressly consented to Ms. Forster's possession of it. Pursuant to s. 86 of the ***Motor Vehicle Act***, Mr. Forster is liable for Ms. Forster's ***negligence***.

**56**  No person in the Jeep was negligent for having agreed to ride in the Jeep while it was driven by Ms. McEachnie. No person in the Jeep could have reasonably anticipated that Ms. Forster would behave as she did, and they were not negligent for getting into the Jeep with Ms. Forster.

**Further Proceedings**

**57**  I will be seized of all trials relating to quantum and the issue of contributory ***negligence*** arising out of seatbelt use. I will also be seized of all trials relating to insurance coverage arising out of the accident.

**Costs**

**58**  Ms. McEachnie has successfully defended herself against the claims brought by Mr. McEvoy and Mr. Robert. Those plaintiffs have succeeded against Ms. Forster and Mr. Forster. Under these circumstances are two options for costs in the McEvoy and Robert actions. Those options are a Bullock order or a Sanderson order.

**59**  A Bullock order provides that the successful defendant shall have his costs against the plaintiff who failed to make the case against him, and the plaintiff, having paid those costs, may include them as a disbursement in his own bill against the unsuccessful defendant.

**60**  A Sanderson order provides that the unsuccessful defendant shall have his costs directly against the unsuccessful defendant.

**61**  The difference between the two has to do with the risk that the unsuccessful defendant may be insolvent. If he is, under a Bullock order, the plaintiff bears the risk of not recovering his own costs and the costs that he has paid to the successful defendant. Under a Sanderson order in the same circumstances, both the successful defendant and the plaintiff bear the risk of not recovering their costs.

**62**  In ***Robertson v. North Island College Technical and Vocational Institute*** [*(1980), 26 B.C.L.R. 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G17V-00000-00&context=) (C.A.), Lambert J.A. (with whom Anderson J.A. concurred) noted at p. 228 the "threshold question" of when a Bullock order may be sought, namely:

Under these circumstances, was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrong-doer to join the other defendant in order that the matter might be thoroughly threshed out?

**63**  There can be no doubt that the threshold issue is satisfied in this case. It was entirely reasonable for Mr. McEvoy and Mr. Robert to have sued Ms. McEachnie along with Ms. Forster.

**64**  McLachlin J. (as she then was), in ***Imperial Salmon House Ltd. v. Krdzalic*** [*(1983), 48 B.C.L.R. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S05N-00000-00&context=) (S.C.), noted that the court had the discretion to make a Sanderson order instead of a Bullock order. She discussed the criteria for making a Sanderson order, and at p. 258-9 said:

The question, then, is how the court's discretion should be exercised. The question, at base, is one of policy; with which of the plaintiff and the successful defendant should rest the risk that the defendant Krdzalic would be unable to pay the defendant A. E. LePage's costs? In determining this question, it must be borne in mind that the effect of a Sanderson order is that the court nominates the unsuccessful defendant as the only person to whom the successful defendant is entitled to look for payment of its costs, thus depriving the successful defendant of its right against the unsuccessful (as against him) plaintiff, upon whose ability to pay the successful defendant might have been quite content to rely: *Munshaw Colour Service Ltd. v. Vancouver* (1960), 31 W.W.R. 273 at 278 (B.C.S.C.). In the absence of special circumstances, such as where the unsuccessful defendant is legally related to the successful defendant (see *Kemp v. Lee*, [*[1983] B.C.J. No. 1804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-21XR-00000-00&context=), B.C.S.C., Toy J., Dawson Creek No. 84/1982, 9th May 1983 (not yet reported)), I would decline to make such an order. The plaintiff, as the party which initiated proceedings, must bear the primary risk of meeting the costs of parties against whom it is eventually unsuccessful. The fact that the conduct of the defendants was related is in itself insufficient; that exists in most cases where more than one defendant is properly joined by a plaintiff.

**65**  As I understand it, the general principle regarding such costs orders is this: a plaintiff should bear the risk of suing the defendants he chooses and the plaintiff should pay the costs of any defendant against whom he is unsuccessful. The plaintiff should be spared that risk only when there is some special circumstance such as a significant nexus (like a legal relationship) between the defendants. Absent that nexus, a Sanderson order ought not to be made, and costs should flow in accordance with the parties' success or failure.

**66**  In the present case, there is no nexus between Ms. McEachnie and Ms. Forster or Mr. Forster. There are, therefore, no special circumstances in this case that could justify a departure from the norm by making a Sanderson order.

**67**  It follows that a Bullock order must be made in the McEvoy and Robert actions. Therefore, Ms. McEachnie shall have her costs against Mr. McEvoy and Mr. Robert. Mr. McEvoy and Mr. Robert shall have their costs against Mr. Forster and Ms. Forster. Mr. McEvoy and Mr. Robert will be entitled to add disbursements to their bills representing the costs they must pay to Ms. McEachnie.

**68**  Ms. McEachnie was successful in her suit against Ms. Forster and Mr. Forster. She is entitled to her costs against them.

**69**  All costs will be on Scale B.

P.J. ROGERS J.

\* \* \* \* \*

Corrigendum

Released: November 17, 2008

***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice P.J. Rogers dated November 4, 2008 have been edited.

1. On the front page, the docket number "S64773" has been replaced with "S69435".

**End of Document**

[***Misterly v. Nowicki, [2017] B.C.J. No. 2636***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R9V-XFH1-FD4T-B193-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.P. Kent J.

Heard: December 11, 2017.

Judgment: December 21, 2017.

Docket: S136578

Registry: Vancouver

**[2017] B.C.J. No. 2636** | 2017 BCSC 2358

Between Lewis E. Misterly and Gayle Ann Misterly personally and as Trustees for the Lewis E. and Gayle Ann Misterly 1993 Family Living Trust, Plaintiffs, and Kenneth Nowicki, Defendant

(41 paras.)

**Case Summary**

**Civil litigation — Limitations of actions — Conflict between limitation periods — Conflict between jurisdictions — Time — When time begins to run — Application by the defendant for dismissal of the action as statute barred allowed — Plaintiffs commenced present professional *negligence* action in 2103 — Defendant, an Alberta lawyer, had acted for plaintiffs in a commercial transaction in 2000 — Ten-year limitation period under Alberta Limitations Act applied — Action was thus statute barred.**

|  |
| --- |
| Application by the defendant for dismissal of the action as statute barred. The present action for professional ***negligence*** was commenced in 2013. The action related to a commercial transaction for which the defendant, an Alberta lawyer, prepared the closing documents. The transaction occurred in 2000. The closing documents were prepared in the defendant's Alberta office. The plaintiffs argued that the defendant's failure to secure the additional documents and signatures necessary to perfect the transaction represented a continuing course of conduct or a series of related omissions that continued up to the commencement of litigation and that, accordingly, the 10-year ultimate limitation period had not expired.  HELD: Application allowed.  The substantive law governing the defendant's conduct and his solicitor-client relationship with the plaintiffs was the law of Alberta. Alberta was the jurisdiction with the closest and most real connection to the retainer agreement between the parties. All of the defendant's conduct on behalf of the clients took place in Alberta. The allegedly negligent acts or omissions all occurred in 2000. The defendant prepared and secured execution of the closing documents in 2000. His reporting letter was issued in 2000 enclosing some of the documents. The defendant's errors and omissions occurred in 2000. The plaintiffs could not avoid the 10-year ultimate limitation period in Alberta's Limitations Act by characterizing the omissions as either a continuing course of conduct or a series of related omissions, an argument which, if given effect, had the potential to defeat limitation periods in almost all solicitors' ***negligence*** claims. |

**Statutes, Regulations and Rules Cited:**

Limitations Act, [*R.S.A. 2000 c. L-12, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5NHH-T3X1-JP4G-64HM-00000-00&context=)(1)(b), s. 3(3)(b), s. 4

Limitation Act, [*S.B.C. 2012, c. 13, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0SP-00000-00&context=)(1)

Supreme Court Civil Rules, Rule 9-7

**Counsel**

Counsel for the Plaintiffs: Christopher J. Bolan.

Counsel for the Defendant: Craig A.B. Ferris, Q.C., Paul A. Kressock.

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|  |
| --- |
| **N.P. KENT J.** |

**Introduction and Overview**

**1**  This action is a professional ***negligence*** claim against an Alberta lawyer. The alleged ***negligence*** relates to a commercial transaction that occurred in May 2000 and in respect of which the lawyer prepared the closing documents.

**2**  This action was issued on August 30, 2013, some 13 years after the closing of the commercial transaction. The defendant lawyer, Mr. Nowicki, claims that he is "immune from liability" by virtue of s. 3(1)(b) of Alberta's *Limitations Act*, [*R.S.A. 2000 c. L-12*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-4RY1-JKB3-X1CT-00000-00&context=), which, in combination with s. 3(3)(b) of that Act effectively prohibits professional ***negligence*** actions after a period of 10 years following the conduct, act or omission on which the claim is based. Mr. Nowicki now applies for summary trial of the limitation issue and dismissal of the action in its entirety pursuant to B.C. Supreme Court Civil Rule 9-7.

**3**  For the reasons that follow, I agree that the legislation immunizes Mr. Nowicki from liability in this case and the action is dismissed with costs.

**Facts**

**4**  Mr. Nowicki had earlier made an application to dismiss this action for want of prosecution. That application was dismissed by Master Muir of this Court on July 31, 2017. Her oral reasons for judgment have not been transcribed and have not been made available to me.

**5**  I have been advised that the present application is based on the same affidavit materials that were before Master Muir. In his present Notice of Application Mr. Nowicki relies upon an affidavit he swore on February 5, 2016, an affidavit by plaintiffs' counsel sworn January 28, 2017, and an affidavit of the plaintiff Lewis Misterly sworn July 29, 2017.

**6**  In their Application Response the plaintiffs rely on the same three affidavits as well as an affidavit of Russell Cummins sworn July 30, 2012. Mr. Cummins' affidavit does not bear any style of cause. He died in January 2013, before this action was started. No objection was made by the defendant with respect to the admissibility of Mr. Cummins' affidavit or the ability of the plaintiffs to tender that evidence in support of their response.

**7**  It appears, however, there is little or no dispute respecting the background facts for summary trial purposes. In their Application Response the plaintiffs "accept as accurate" the following paragraphs that appear in Part 2 of the defendant's Notice of Application:

1. The defendant Kenneth Nowicki was, at all material times, a lawyer and member of the Law Society of Alberta with an office in Cochrane, Alberta.

...

***Factual Background***

1. The plaintiffs, Lewis and Gayle Misterly, have brought this action both personally and as trustees of the Lewis E. and Gayle Ann Misterly 1993 Family Living Trust (the "**Misterly Trust**"). At all material times, Mr. and Mrs. Misterly were residents of California. The Misterly Trust was settled in California.
2. On or about March or April 2000, Mr. Misterly advised Mr. Nowicki that he was preparing to advance funds to 575764 B.C. Ltd. (the "**Corporation**") to enable the Corporation's purchase of the assets of Jennings River Outfitters Inc. (the "**Asset Purchase**") and the issued and outstanding shares of Jennings River Air Services Inc. (the "**Share Purchase**"). The Corporation was owned in equal shares by Russell Cummins and Tina Cummins, who were married at the time. Mr. Misterly asked Mr. Nowicki to prepare certain documents in connection with the anticipated transactions, namely, a Share Purchase Agreement, a Loan Agreement, a Promissory Note and a General Security Agreement (together, the "**Closing Documents**"). There was no written retainer agreement between Mr. Nowicki and any of the plaintiffs.
3. The Asset Purchase and Share Purchase by the Corporation were to be financed by a loan from the Misterly Trust in the amount CAD $500,000 (the "Loan"). It was agreed that the Corporation would issue shares to the Misterly Trust in connection with the Loan, and that Mr. Misterly and Mr. Nowicki would be appointed as directors of the Corporation.
4. The closing date for the aforementioned transactions was set for May 2, 2000.
5. On May 1, 2000, Mr. Nowicki advanced CAD $499,990 on behalf of the Misterly Trust to Jeff Phipps, another Alberta lawyer and the Corporation's solicitor, on the express trust condition that no use be made of the funds until Mr. Nowicki gave written confirmation that they be released to the Corporation for the sole purpose of the Asset Purchase and the Share Purchase.
6. On May 2, 2000, the Misterly Trust and the Corporation arranged to execute the Closing Documents in connection with the Loan, namely:
7. Loan Agreement which provided, among other things, that the Loan would take the form of a shareholder loan from the Misterly Trust to the Corporation, and that the Corporation would pay interest at 7% per annum on all outstanding balances;
8. Promissory Note which provided, among other things, that the Misterly Trust would pay the sum of USD $339,000 on demand, together with interest thereon at the rate of 7% per annum;
9. Share Purchase Agreement which provided, among other things, that:
10. the Corporation would sell the Misterly Trust 100 Class "A" shares of the Corporation for $100;
11. the Corporation would sell Mr. Nowicki 4 Class "A" shares of the Corporation for $4.00 (as a tie-breaker);
12. the parties would to execute such Minutes, Share Transfers and Waivers as necessary to transfer full and complete title of shares to the Misterly Trust and Mr. Nowicki respectively; and
13. a General Security Agreement which provided, among other things, that the Misterly Trust would take a general security interest in all present and after- acquired property of the Corporation for a period of five years
14. On May 2, 2000, a shareholders' meeting of the Corporation was held at Mr. Nowicki's office in Cochrane, Alberta for the purpose of executing the Closing Documents (the "Meeting"). Mr. Cummins and Mr. Nowicki attended the Meeting in person; Mrs. Cummins, Mr. Misterly and Mr. Phipps attended the Meeting by telephone. At the time, Mr. and Mrs. Cummins were the sole directors and voting shareholders of the Corporation.
15. At the time the Closing Documents were executed, Mrs. Cummins advised that she could not execute the documents as her fax machine was not working, but gave her verbal consent to execution of the Closing Documents. Mr. Misterly was aware that Tina Cummins was not in a position to execute the documents, but expressly authorized Mr. Nowicki to the release of funds to Mr. Phipps in reliance on Mrs. Cummins' verbal assent to the Closing Documents.
16. At the Meeting, the Corporation resolved to approve the Share Purchase Agreement and the Loan Agreement, and the Closing Documents were executed on the Corporation's behalf by Mr. Cummins in the presence of Mr. Nowicki. Mr. Nowicki then drafted minutes of the shareholders' meeting (the "Minutes") and forwarded them to Mrs. Cummins on May 2, 2000. Finally, Mr. Nowicki advised Mr. Phipps that the trust conditions were removed and the funds advanced by the Misterly Trust could be applied to the Asset Purchase and the Share Purchase.
17. Following May 2, 2000, Mrs. Cummins refused to sign the Closing Documents despite her verbal assent to same at the Meeting. Despite Mr. Nowicki's requests, Mrs. Cummins would not return executed copies of the minutes of the shareholders' meeting. The Corporation did not issue shares to Mr. Nowicki as provided in the Share Purchase Agreement. ...

***The plaintiffs' claims in this action***

1. The plaintiffs filed the Notice of Civil Claim in this proceeding on August 8, 2013, approximately 13 years and 3 months after the events of May 2, 2000. Based on the allegations in the Notice of Civil Claim, the plaintiffs' claims against Mr. Nowicki appear to be that:
2. he failed to obtain executed copies of the Closing Documents and Minutes from Mrs. Cummins;
3. he did not amend the Corporation's shareholder records to reflect the shareholdings contemplated by the Share Purchase Agreement;
4. he did not inform the plaintiffs of the above-noted "errors"; and
5. he did not inform the plaintiffs that the Corporation could raise a limitations defence to the Loan even if the Misterly Trust did not make a demand on the Loan.

In Part 3 of the Notice of Civil Claim, the plaintiffs frame their claims against Mr. Nowicki in terms of professional ***negligence***, breach of contract, and breach of "his ethical and fiduciary duty to inform the Plaintiffs of the errors he had made."

**8**  Before the May 2, 2000 transaction, Mr. and Mrs. Cummins were the sole directors and voting shareholders of the corporation to whom the Misterly Trust loaned U.S. $339,000 in exchange for a demand promissory note and from whom 100 Class A shares were to be issued to Misterly Trust (along with four additional Class A shares to Mr. Nowicki). While the promissory note was issued to Misterly Trust, no Class A shares were actually issued to either Misterly Trust or Mr. Nowicki.

**9**  In May 2008 matrimonial litigation ensued between Mr. and Mrs. Cummins. In the matrimonial litigation Mrs. Cummins took the position that she remains a 50% shareholder of the corporation (instead of a 25% shareholder along with Mr. Cummins) and refuses to acknowledge either the shareholding interest asserted by Misterly Trust or the validity of any debt owed by the company to Misterly Trust. Mrs. Cummins' various manoeuvrings are outlined in detail in Mr. Cummins' July 30, 2012 affidavit.

**10**  In his July 28, 2017 affidavit, Mr. Misterly swears that he learned in 2012 of Mrs. Cummins' assertion that she was still a 50% shareholder in the corporation whereupon he demanded repayment of the outstanding loan as well as delivery of Misterly Trust's 100 shares of the corporation. He swears that Mrs. Cummins denied any entitlement of Misterly Trust to shares in the company and also claimed that the debt was unenforceable by virtue of Alberta's *Limitations Act*.

**11**  The assets of the corporation were ultimately sold in late 2016 and the sale proceeds of CDN $1.4 million did not come out of escrow until early 2017. The dispute respecting entitlement to these funds remains ongoing between Mr. Misterly Mrs. Cummins, the estate of Russell Cummins, the beneficiary under the latter's will, as well as another creditor of the corporation.

**12**  Attached to Mr. Misterly's affidavit is a July 27, 2000 letter to him from Mr. Nowicki enclosing some of the documentation relating to the May transaction. It includes a paragraph:

The minute book is in my office and I am under a trust condition to hold it and return it to lawyers in British Columbia if they ask for it. In the meantime, I will make sure it accurately reflects the shareholdings and I will provide you with copies of those in a further report in August.

**13**  In their lawsuit against Mr. Nowicki the plaintiffs allege three professional errors on the latter's part:

1. failing to secure the signature of Mrs. Cummins on any of the closing documents or the minutes of the shareholders meeting approving that transaction;
2. failing to perfect the corporate records to issue the necessary shares to Misterly Trust and to accurately update/amend the shareholdings of each party; and
3. failing to protect the enforceability of the loan/ promissory note and to advise the clients of any limitation periods applicable to enforcement.

**14**  In his affidavit, Mr. Misterly swears that Mr. Nowicki did not make any further report to him in August 2000 and that, although he saw Mr. Nowicki from time to time in the years subsequent to the transaction, "At no time, did Ken Nowicki advise me that Tina Cummins had refused to sign the closing documents or that the Company minute book did not reflect the shareholdings of Misterly Trust." The affidavit is silent respecting limitation periods applicable to the loan or promissory note or other "advice" expected to have been given respecting the same.

**The Issues to be Decided**

**15**  There are three issues to be decided on the summary trial application:

1. Is the limitation defence suitable for disposition by way of summary trial?
2. Is the plaintiffs' claim governed by Alberta's *Limitations Act*? and
3. If so, is the defendant immune from liability by virtue of the 10-year "ultimate" limitation period set out in s. 3(1)(b) of that Act?

I will address each issue separately.

**Is the limitation defence suitable for disposition by way of summary trial?**

**16**  While the court is usually averse to the summary trial procedure being used to "litigate in slices", the rule is sensibly employed if an issue can fairly be decided that would be dispositive of the entire proceeding. A limitation defence can be one such issue in an appropriate case.

**17**  The question, then, is whether on the whole of the evidence that has been tendered to the Court on this application, I can find the facts necessary to decide the limitation defence and whether there are other circumstances that might otherwise make it unjust to summarily decide that issue at this time.

**18**  Paragraph 15 of Part 2 of the defendant's Notice of Application states:

In the fall of 2000, Mr. Misterly and Mr. Nowicki attended a hunting camp in northern British Columbia with Mr. and Mrs. Cummins. Mr. Nowicki and Mr. Misterly spoke to Mrs. Cummins about executing the Closing Documents; she again refused to execute the documents and left the camp. Mr. Nowicki advised Mr. Misterly that he should retain independent counsel to protect the plaintiffs' interests in the Corporation. To Mr. Nowicki's knowledge, Mr. Misterly did not do so.

**19**  There is no evidence before me that in any way corroborates or supports this alleged fact. Mr. Nowicki says nothing about it in his February 5, 2016 affidavit. It is not expressly addressed in Mr. Misterly's affidavit, however it is implicitly denied in the affidavit excerpt referred to in paras. 10 and 14 above. I accept Mr. Misterly's evidence and find as a fact that Mr. Nowicki did not report further on the transaction in August 2000 nor did he at any time thereafter advise Mr. Misterly that Mrs. Cummins had refused to sign the closing documents for the transaction or that the company minute book had not been amended to accurately reflect the 49% shareholdings of Misterly Trust in the corporation.

**20**  I have set out the background facts as agreed between the parties. They represent my findings of fact on this application along with the finding of fact set out above. In my view, these findings of fact permit the limitation defence to be determined on this application and there are no circumstances that would make it unjust to dispose of this matter by way of a summary trial at this time.

**Is the plaintiffs' claim governed by Alberta's Limitations Act?**

**21**  In *Tolofsen v. Jensen*, [*[1994] 3 S.C.R. 1022*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GM-00000-00&context=), the Supreme Court of Canada held that tort claims are governed by the substantive law of the province where the tortious activity occurred, the *lex loci delicti*, and not by the substantive law of another province in which the action might be brought (the *lex fori*). The court also ruled that statutes of limitation are part of the substantive law applicable to the claim, *i.e.*, that the *Limitations Act* of the province where the tortious activity occurred will govern the claim. This law is now codified in s. 4(1) of British Columbia's current *Limitation Act*, *S.B.C. 2012, c. 13*, which provides:

**Conflict of laws**

4(1) If the substantive law of another jurisdiction is to be applied by the court in deciding a claim, the law of that other jurisdiction respecting limitation periods must be applied in relation to the claim.

**22**  What, then, is the substantive law governing the conduct of Mr. Nowicki and his solicitor-client relationship with the plaintiffs? In my view, it is clearly the law of Alberta and therefore the *Limitations Act* of that province applies to the claim.

**23**  Mr. Nowicki has at all times been a member of the bar of Alberta. His office was in Cochrane, Alberta. He performed all of the work for his clients in Alberta. His professional conduct was regulated by the Alberta Law Society. The money advanced by the trust in exchange for a promissory note from and shares in the numbered corporation was held in and transferred from his trust account in Alberta. The closing documents were prepared in his Alberta office. The shareholders meeting was held in the same office. Mr. Cummins attended that meeting personally and signed the various closing documents on his own behalf and on behalf of 575764 B.C. Ltd. While Mrs. Cummins was not physically present at the time, she attended the meeting by way of phone from Caroline, Alberta. The corporation's solicitor, Mr. Phipps, also attended the meeting by phone from his law office in Calgary, the location to which the funds from Mr. Nowicki's client had been sent by Mr. Nowicki in trust. The General Security Agreement signed by 575764 B.C. Ltd. expressly provided that it would be governed by the laws of Alberta and the corporation expressly attorned to the courts of that province (the other documents were silent on these issues).

**24**  Alberta is the jurisdiction with the closest and most real connection to the (unwritten) retainer agreement between Mr. Nowicki and his clients. All of Mr. Nowicki's conduct on behalf of those clients took place in Alberta. The acts and omissions that form the basis for the professional ***negligence*** claim against him all occurred (or in the case of omissions, did not occur) in Alberta. Mr. Nowicki's July 27, 2000 letter to Mr. Misterly undertaking to correct the minute book in his office to properly reflect the parties' shareholdings was issued in Alberta, as was the (broken) assurance that he would shortly send to Mr. Misterly the further documents.

**25**  In my view, there is no doubt that the substantive law governing Mr. Nowicki's tort and contractual duties of care to his clients is that of Alberta. This is confirmed by cases such as *Pan-Afric Holdings Ltd. v. Ernst & Young LLP*, [*2007 BCSC 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24J3-00000-00&context=), paras. 35, 36 and 56, *Coast Spas Inc. v. California Acrylic Industries Inc.*, 1997 CanLII 4279 (BC SC), para. 25, and *CIC Capital Fund Ltd. v. Rawlinson*, [*2016 BCSC 516*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JG1-HSD1-F5T5-M0T6-00000-00&context=), para. 64. All these cases provide that professional ***negligence*** claims are properly and sensibly governed by the laws and professional standards applicable to the jurisdiction where the (allegedly negligent) work was performed.

**26**  Paragraph 3 of Part 3 of the plaintiffs' pleading states as an additional "legal basis" for the claim that Mr. Nowicki had "breached his ethical and fiduciary duty to inform the plaintiffs of the errors he had made." Ironically enough, this appears to be a reference to Rule 7.7-1 of the Law Society of Alberta Code of Conduct, which reads:

[l] A lawyer has an ethical and fiduciary duty to disclose a material error or omission to a client.

**27**  A breach of ethics is not actionable *per se*. Rather, if the breach of ethics constitutes a tort (professional ***negligence***) or breach of a contractual term of the retainer, then it will be actionable as such.

**28**  There is a substantial difference between a claim in ***negligence*** and a claim for breach of fiduciary duties arising out of a solicitor-client relationship. Southin J. put it this way in *Girardet v. Crease & Company*, [*11 B.C.L.R. (2d) 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X1J8-00000-00&context=) (S.C.), pp. 1-2:

... The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty -- if not of deceit then of constructive fraud. ... Those who draft pleadings should be careful of words that carry such a connotation.

**29**  The claim against Mr. Nowicki does not allege dishonesty, deceit or constructive fraud. It is simply a claim for professional ***negligence*** in respect of which a cause of action exists in tort and contract. Even if it were an actionable breach of fiduciary duty claim, it would still be governed by the law of Alberta.

**Does Alberta's ultimate 10-year limitation period apply?**

**30**  The relevant provisions of Alberta's *Limitations Act* provide:

**Limitation periods**

3(1) ... if a claimant does not seek a remedial order within

...

1. 10 years after the claim arose,

... the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

...

1. For the purposes of subsections (1)(b) ...
2. a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;
3. a claim based on a breach of duty arises when the conduct, act or omission occurs; ...

...

1. Under this section,

...

1. the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b) ...

...

**Concealment**

4(1) The operation of the limitation period provided by section 3(1)(b) or (1.1)(b) is suspended during any period of time that the defendant fraudulently conceals the fact that the injury for which a remedial order is sought has occurred.

1. Under this section, the claimant has the burden of proving that the operation of the limitation period provided by section 3(1)(b) or (1.1)(b) was suspended.

**31**  The plaintiffs make no allegation of "fraudulent concealment" on the part of Mr. Nowicki and tender no evidence in that regard. As indicated, the claim is simply one for professional ***negligence*** and is framed in both tort and breach of contract.

**32**  The claim against Mr. Nowicki arose when the "conduct, act or omission" constituting the breach of his professional duty occurred. If those breaches resulted from a continuing course of conduct or a series of related acts or omissions, then the claim arose when the course of conduct terminated or the last act or omission occurred.

**33**  Mr. Nowicki's allegedly negligent acts or omissions all occurred in 2000. He prepared and secured execution of the closing documents in May 2000. His reporting letter was issued to Mr. Misterly on July 27, 2000 enclosing some of the documents. At that time he informed Mr. Misterly that changes would be made to the minute book to reflect the new shareholdings in the corporation and undertook to provide copies of the appropriate documents in August. He failed to do so, whether in the time promised or at all.

**34**  The commercial transaction occurred in May 2000 and the expectations of all parties was that it would be perfected at that time or shortly thereafter. The share purchase agreement expressly contemplated closing of the transaction on May 2, 2000 and further provided for prompt delivery of related documents:

Upon the signing of this Agreement, all parties shall execute such Minutes, Share Transfers and Waivers as may be necessary to transfer full and complete title of shares to Misterly and Mr. Nowicki. [Emphasis added.]

**35**  The plaintiffs' Notice of Civil Claim was filed in the Supreme Court of British Columbia on August 30, 2013, some 13 1/2 years after the closing of the transaction and 3 1/2 years after any 10-year "ultimate" limitation period referred to in s. 3(1)(b) had expired.

**36**  In an effort to circumvent the limitation defence, the plaintiffs argue that Mr. Nowicki's failure to secure the additional documents/signatures necessary to perfect the transaction represented a "continuing course of conduct" or a "series of related omissions" that continued up to the commencement of litigation and that accordingly the 10-year ultimate limitation period has not expired.

**37**  On this point I agree with the submissions of Mr. Nowicki: s. 3(3)(a) of Alberta's *Limitations Act* is intended to capture situations where damages are caused by a series of wrongs that occur over a period of time such as continuous torts (*e.g.*, ongoing nuisance or trespass) or successive contractual breaches. It does not operate to defeat a limitation period simply because a plaintiff frames a professional ***negligence*** claim as some sort of ongoing failure to warn of or to correct an error or omission that occurred many years earlier.

**38**  In *Bowes v. Edmonton (City)*, [*2007 ABCA 347*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9391-F7G6-64MD-00000-00&context=), the municipality was sued in ***negligence*** for issuing construction permits on land that collapsed two decades later. The plaintiffs argued the city was in breach of ongoing duties to warn which continued up to the time the harm was suffered and therefore that the 10-year ultimate limitation period did not apply. The court rejected the argument, observing "to regard every ancient failure to warn as occurring every day would be a fiction destroying all limitation periods". It also suggested that if such was permitted, "then most cases of delayed harm from a tort could be dressed up as failures to warn with no limitation period". The proposition was soundly rejected.

**39**  Similar observations were made in *RBC Life Insurance Company v. Heritage Insurance and Consulting Ltd.*, [*2014 ABQB 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93F1-F8D9-M09G-00000-00&context=), a professional ***negligence*** claim against an insurance broker framed as a claim for contribution and indemnity. In that case the argument was that the ongoing professional relationship between the parties constituted a "continuous failure to advise" of the problem with contract documents. The court stated, at para. 48:

In my view, s. 3(3)(a) of the *Limitations Act* does not apply merely by virtue of the fact of a continuing relationship between a professional and a client. If it did, in cases where a specific act of the professional which was in breach of any duties owed to the client could be identified, the ultimate limitation period would never arise. Section 3(3)(a) was intended to cover situations where damage does not result from a single act, but rather from the effect of many related acts occurring over time ...

**40**  Mr. Nowicki's errors and omissions occurred in 2000. The plaintiffs cannot avoid the 10-year ultimate limitation period in Alberta's *Limitations Act* by characterizing the omissions as either a "continuing course of conduct" or a "series of related omissions", an argument which, if given effect, has the potential to defeat limitation periods in almost all solicitors' ***negligence*** claims.

**Conclusion**

**41**  The plaintiffs' claim against Mr. Nowicki arose in 2000. Their lawsuit was not instituted until 13 1/2 years later. In the meantime, the 10-year limitation period contemplated by s. 3(1)(b) of Alberta's *Limitations Act* accrued. The result is that Mr. Nowicki is entitled to immunity from liability in respect of the plaintiffs' claim. As this conclusion is dispositive of the litigation between the parties, the action must be dismissed with costs.

N.P. KENT J.

**End of Document**

[***O'Brien v. Onstein, [2000] B.C.J. No. 1051***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61M6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.T. Edwards J.

Heard: April 17, 2000.

Judgment: May 25, 2000.

Vancouver Registry No. C971111

**[2000] B.C.J. No. 1051** | 2000 BCSC 818 | 97 A.C.W.S. (3d) 346

Between Gerald M. O'Brien, plaintiff, and Dr. W.R. Onstein, Dr. W.R. Onstein Optometric Corporation, Prince Rupert Optometry Clinic, Dr. K.R. Finlay and K.R. Finlay Ophthalmic Services Inc., defendants

(37 paras.)

**Case Summary**

**Medicine — Liability of practitioners — Professional occupations — Optometrists — *Negligence* — Standard of care — Burden of proof — Post-operative care.**

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| Application by each of Dr. Onstein, an optometrist, and Dr. Finlay, an ophthalmologist, for an order striking out O'Brien's claim under Rule 18A. O'Brien's claim was for professional ***negligence*** against both doctors in failing to provide adequate post-operative care following surgery he underwent to correct the beginning of retinal detachment. O'Brien telephoned Onstein when he began to have difficulties with his right eye, and was properly diagnosed. Onstein referred him immediately to Dr. Finlay who performed emergency surgery. He was told to make a follow-up appointment with Onstein. O'Brien did make the appointment, and claimed that Onstein failed to react appropriately to his complaint of trouble with his vision. Onstein claimed that no complaint or alarm was indicated by O'Brien when he called and there was no reason to see him on an emergency basis. His vision began to improve. A few days later, he took a flight to Prince George and when he arrived, he found that the vision in his right eye was almost gone. He waited until the Monday following the weekend to see an eye doctor at which point he was told that the retinal detachment had progressed too far for surgery to be useful. O'Brien claimed that he should have been told that it was hazardous to fly following the surgery in question because the change in altitude could cause distress. Finlay relied upon expert opinion that the flight restriction did not apply in cases of injection of airs as was done in this case. O'Brien relied upon no expert evidence in support of his claim.  HELD: Applications allowed.  O'Brien failed to discharge the onus of proof upon him to show that the actions of Drs. Finlay and Onstein fell below the applicable standard of care. He failed to show that Dr. Finlay should have warned him about flying after the surgery in that there was no causal connection proven between the surgery and the detachment which occurred during the flight. His vision improved after the surgery which militated against a finding that he had a retinal detachment at the time he contacted Dr. Onstein after the procedure. The totality of the evidence did not support a finding of ***negligence*** on Dr. Onstein's part in failing to react appropriately to the telephone call as O'Brien did not indicate that any emergency situation presented itself. The weight of expert evidence established that the detachment he experienced was unrelated to the care received from either doctor. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.

**Counsel**

Gerald M. O'Brien appeared in person. Andrea Stone, for the defendants, Dr. W.R. Onstein and Dr. W.R. Onstein Optometric Corporation and Prince Rupert Optometry Clinic. Lynn McBride, for Dr. K.R. Finlay and K.R. Ophthalmic Services Inc.

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| **J.T. EDWARDS J.** |

INTRODUCTION

**1**  These applications are two Rule 18A applications, heard together, seeking to strike out the plaintiff's claims against the two named doctors and their corporate entities.

FACTS

**2**  Prior to February 6, 1995, the plaintiff had attended upon Dr. Onstein for the purpose of having his vision tested for glasses. On February 6, 1995 Dr. Schweitzer the family doctor tentatively diagnosed that the plaintiff had a cyst in his left eye and referred him to Dr. Onstein who confirmed the diagnosis and referred him back to his doctor for treatment.

**3**  On February 27, 1995 the plaintiff telephoned Dr. Onstein because of difficulties with his right eye. He had undergone cataract surgery earlier in the year and had been advised of the symptoms of retinal detachment. He asked Dr. Onstein for an emergency appointment which was made that day. At that time Dr. Onstein diagnosed the beginning of retinal detachment and immediately arranged to have the plaintiff flown to Vancouver for emergency treatment by Dr. Finlay. Dr. Finlay performed the surgery and told the plaintiff to make a follow-up appointment with Dr. Onstein in Prince Rupert in three weeks' time. That appointment was made and was scheduled for March 23, 1995.

**4**  On March 13, 1995 the plaintiff telephoned Dr. Onstein's office and spoke to the receptionist seeking to have a consultation because the vision in his right eye. He sought assurances that the symptoms were consistent with a normal healing process. The assistant advised that Dr. Onstein would call him back.

**5**  When Dr. Onstein returned the plaintiff's call he, Dr. Onstein, asked what Dr. Finlay had told the plaintiff. Dr. Onstein says of the telephone conversation that he spoke to the plaintiff on March 13, 1995 and the plaintiff indicated he wanted to discuss the retinal detachment procedure and the details associated with it. The plaintiff did not indicate he was having any trouble with his vision. His tone was not one of alarm or concern.

**6**  In the days following March 13, 1995 the plaintiff's vision began to improve.

**7**  Several days later the plaintiff decided to go to Prince George to watch his son's basketball game. During the trip from Prince Rupert to Prince George the plaintiff was wearing dark protective glasses. When he arrived in Prince George he removed the glasses and found that the vision in his right eye was significantly reduced or gone.

**8**  He did not call his opthamologist Dr. Killoh because he believed that the office would be closed for the weekend. Nor did he attend at emergency at the hospital or call his family doctor or Dr. Onstein. On Monday he saw Dr. Killoh. Dr. Killoh's examination determined that too much time had elapsed and detachment of the eye was too far gone to require emergency treatment. He made an appointment for eight days following. In the interim the plaintiff returned to Prince Rupert for his regularly scheduled appointment with Dr. Onstein. Dr. Onstein immediately noted the detachment and inquired as to why the plaintiff had not been referred for emergency treatment. Dr. Onstein then called Dr. Killoh who confirmed that the plaintiff was "beyond the window of opportunity" by the time he had seen him and there was no hurry to repair.

**9**  Since the weekend in Prince George the plaintiff has been without sight in his right eye. The condition is apparently irreversible.

**10**  The plaintiff resides at Prince Rupert, British Columbia and brought this action for damages he alleges were caused by the ***negligence*** of the defendants in regard to the post-operative care given the plaintiff following retinal surgery. It should be noted at the beginning that there is no claim for damages for ***negligence*** caused during the surgery procedure or in advance of the retinal surgery.

**11**  Dr. Finlay carried out an operation on the right eye of the plaintiff on February 28, 1995. The surgery required specified post-operative care and a pamphlet which outlined the care that was needed to ensure a suitable recovery was given to the plaintiff.

**12**  The plaintiff was not told that he could not or should not return to his home in Prince Rupert by airplane as the change in altitude could cause distress. He flew home the day following surgery and did note some distress during and after the flight.

**13**  As to the non-fly claim, as part of the retinal procedure some air had been injected into the eye to avoid strain and bleeding during the flight. The expert evidence is to the effect that it is customary to advise patients who have had gas injected not to fly. However, the same restriction does not apply to the injection of air as was the case here.

**14**  An additional segment of the plaintiff's ***negligence*** claim is that Dr. Finlay had, for follow up, referred the plaintiff to Dr. Onstein, an optometrist, rather than to an ophthalmologist.

**15**  As to the referral to the optometrist, the medical evidence is that this is a common practice in northern British Columbia and is encountered particularly with optometrists working as a team with referrals back and forth being a useful professional arrangement in remote areas.

**16**  As to the warnings about the care of a post-operative eye, the expert's evidence was that the plaintiff was given a set of instructions before he left the hospital following the operation. He read and understood those instructions.

**17**  In the weeks following surgery Mr. O'Brien developed a Proliferative Vitreoretinopathy ("PVR") and a recurrent partial detachment in his right eye. He now has no vision in that eye.

LAW

Principles having Application

**18**  The following principles of law have application to these facts:

1. To succeed against Dr. Finlay or Dr. Onstein, Mr. O'Brien must establish that Dr. Finlay or Dr. Onstein, in providing post-operative care and advice failed to meet the standards of care of the ordinary competent ophthalmologist or in the case of Dr. Onstein, the ordinary competent optometrist, each in the same circumstances;
2. If, in a medical malpractice case, a physician establishes that he or she followed a generally accepted or standard of his or his peers there would be no ***negligence*** attached. A similar responsibility would have application to Dr. Onstein where negligent. To do this, he must tender expert medical advice to support these allegations;

Crnyouik v. Stockdill, [*[1998] B.C.J. No. 3187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1PG-00000-00&context=), 9 January 1998, New Westminster Registry No. S026054 (B.C.S.C.) Cohen J. at page 33:

1. The onus is on the plaintiff to prove his allegations against the defendants even on a summary trial pursuant to Rule 18A. See American Pyramid Resources Inc. v. Royal Bank of Canada [*(1986) 2 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3J0-00000-00&context=) at 105 (S.C.); Miura v. Miura [*(1992) 66 B.C.L.R. (2d) 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B14K-00000-00&context=) (C.A.); Steeves v. Air Canada, [*[1996] B.C.J. No. 2879*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1YR-00000-00&context=), 8 January 1996, Vancouver Registry No. C931493 (B.C.S.C.); Zeledon v. Kelowna General Hospital, [*[1996] B.C.J. No. 2868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1XM-00000-00&context=), 4 September 1996, Kelowna Registry No. 26347 (B.C.S.C.); Hampton v. Marshall, [*[1996] B.C.J. No. 1948*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61VX-00000-00&context=), 11 September 1996, Vancouver Registry No. B923834 (B.C.S.C.)

The plaintiff has the burden of showing that the defendant doctors failed to meet the standard of care expected in these circumstances and that this failure caused or contributed to his injuries. The plaintiff in these circumstances must present evidence from experts in the field of medicine corresponding with each of the two defendant doctors to support his allegations against them. See Zeledon v. Kelowna General Hospital, supra, at page 20.

1. The onus is upon Mr. O'Brien to establish that Dr. Findlay was negligent. To do this he must tender expert medical advice to support these allegations. Crnyouik, supra. Cohen J. at page 33:
2. Sopinka J. stated in ter Neuzen, supra at page 591 quoting from Professor J.G. Fleming's text, the Law of Torts, Seventh Edition, Sydney Law Book Company, 1987 at page 110:

Common practice plays a conspicuous role in medical ***negligence*** actions. Conscious at once of the layman's ignorance of medical science and apprehensive of the impact of jury bias on a particularly vulnerable profession. Courts have resorted to the safeguard of insisting that ***negligence*** in diagnosis and treatment (including treatment of risk) cannot ordinarily be established without the aid of expert testimony or in the teeth of conformity with accepted medical practice.

Although the plaintiff has been in possession of Dr. Finlay's reports since November 1996, he has not tendered expert medical evidence to support a cause of action of ***negligence*** against Dr. Stockhill or Shin. On the contrary, the end contradicted expert evidence of Drs. Finlay and Jamieson established that Dr. Shin administered the anaesthetic block in a standard and accepted manner for a general practitioner anaesthetist and that Dr. Stockhill performed the cataract surgery and provided follow up treatment in the standard and satisfactory manner, all of which was consistent with the usual standards of practice of an ophthalmologist in similar circumstances. I agree with defence counsel that the evidence tendered by Dr. Stockhill and Shin refutes the plaintiff's allegations and that there is no evidence to support a finding on the balance of probabilities that there was a needle perforation, and even if there were that is not evidence of ***negligence***.

1. Mr. O'Brien must present medical evidence in support of his claim that the failure to warn Mr. O'Brien about flying immediately following surgery is causally connected to the subsequent retinal detachment. In the case at bar, Dr. Parsons, an expert called by the defendants, gave evidence that Dr. Finlay met the standard of care required of him in providing post-operative care and treatment to Mr. O'Brien. Mr. O'Brien's loss of sight occurred despite the exercise of all due care and skill of Dr. Finlay.
2. With respect to Dr. Onstein, the expert called on his behalf, Dr. Rees, confirmed that there would be no retinal detachment occurring in circumstances such as here, where Mr. O'Brien's sight improved following the telephone inquiry of Dr. Onstein. The evidence at this point is that there could be no detachment if the vision had improved as it did. This evidence came from Dr. Rees.

**19**  On a summary trial pursuant to Rule 18A the onus is on the plaintiff to prove his allegations against the defendant. Steeves v. Air Canada, [*[1996] B.C.J. No. 2868*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1XM-00000-00&context=) (4 September 1996) Kelowna 26347 (S.C.):

1. The requirement to prove ***negligence*** or medical malpractice has been most recently dealt with by the Supreme Court of Canada in the decision, Kobe ter Neuzen v. Dr. Gerald Korn et al [*[1995] 10 W.W.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) and specifically references at pages 16, 17 and 18. The court there said that it is generally accepted that when a doctor acts in accordance with a recognized practice of the profession, he or she will not be found to be negligent. The court also said that generally, ***negligence*** cannot be established without the aid of expert testimony, or where there is evidence of conformity with accepted medical practice. The exception to that statement is where the standard practice is fraught with obvious risks, such that anyone would be capable of finding it negligent without the necessity of judging matters requiring diagnostic or clinical expertise, or where the conduct falls within the ordinary common sense of judges or juries, such as, for example, where a physician leaves a sponge in a patient during surgery.

**20**  The plaintiff has the burden of showing that the defendant doctors failed to meet the standard of care expected of them in the circumstances and that this failure caused or contributed to his injuries. Crnyouik, supra.

**21**  It is necessary to bring expert opinion evidence in medical malpractice cases where it is necessary to counter expert opinion evidence produced by the opposite party. 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=) at 473-474 (B.C.C.A.). In ter Neuzen v. Korn (1995) 11 B.C.L.R. (3d) 302 (S.C.C.), Sopinka J. said the following with regard to the standard of care and evidence of standard practice:

(At page 214)

It is well settled that physicians have a duty to conduct their practice in accordance with a conduct of a prudent and diligent doctor in the same circumstances. In the case of a specialist, such as a gynaecologist and an obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada in that field.

**22**  In this case the plaintiff is unrepresented at the hearing of the Rule 18A applications.

**23**  Dr. Meghan Rees, a practising ophthalmologist and clinical instructor at the University of British Columbia gave her expert opinion that Dr. Onstein provided excellent care in diagnosing the plaintiff's initial retinal detachment and that the second retinal detachment did not take place until the plaintiff was on route to Prince George. She opined that given the plaintiff's evidence that his vision improved after the telephone conversation with Dr. Onstein he could not have been suffering from a detachment at that time. It would be impossible to experience an improvement in vision after detachment had commenced and that no act on Dr. Onstein's part contributed to the loss of the plaintiff's vision.

**24**  In the expert report of Dr. Hugh Parsons filed in support of the co-defendant he confirmed that the detachment was unrelated to the therapy or management that the plaintiff received from Dr. Onstein and Dr. Finlay.

**25**  The expert evidence given by Dr. Rees and Dr. Parsons is not refuted by any expert evidence filed by the plaintiff.

STANDARD OF CARE

**26**  The first allegation of ***negligence*** against Dr. Onstein is for not responding to the telephone calls from the plaintiff on March 13, 1995. During that conversation the plaintiff admits that he did not tell Dr. Onstein of his concerns but stated that Dr. Onstein did not give him an opportunity to do so.

**27**  The plaintiff's prior experience with Dr. Onstein indicated that he knew that he could obtain an appointment with Dr. Onstein on an emergency basis. There was some suggestion in the evidence that Dr. Onstein advised the plaintiff that the medical services plan of British Columbia would not pay for a visit at that time. The plaintiff is not meek and if he had concerns of the nature expressed he could have suggested to Dr. Onstein that he needed to see him on an emergency basis.

**28**  The defendant's evidence with respect to this conversation is that the plaintiff simply told him he wanted to discuss the operation he had undergone and Dr. Onstein suggested they do that at the scheduled appointment date. No emergency concerns were expressed at that time.

**29**  Dr. Onstein did not breach any duty of care owed to the plaintiff by refusing to see him because he was not advised of any symptoms which would cause him to think it was necessary.

**30**  Dr. Rees gave her opinion that Dr. Onstein had met the standard of care to be expected of an optometrist in similar circumstances.

**31**  The improvement in the plaintiff's vision following the March 13th telephone call was offered by the plaintiff as a reason why he decided to travel to Prince George to see his son play basketball. On examination for discovery the plaintiff admitted that he did not make an appointment with Dr. Killoh in Prince George before setting out to travel and in fact he knew that Dr. Killoh's office would not be open until the following Monday. One has to wonder whether the proposed appointment with Dr. Killoh was anything other than imaginary. The plaintiff's contemplation was that he would return to Prince Rupert before the weekend.

**32**  Dr. Rees opined that the improvement noted by the plaintiff after March 13th could not have taken place if detachment had already begun. Dr. Rees was of the view that detachment did not take place until the plaintiff was on route to Prince George and upon noticing that his vision had worsened he did not take steps to seek emergency service from Dr. Onstein, Dr. Killoh or the emergency ward at the Prince George Hospital. He simply waited until Dr. Killoh's office was open two days later by which time there was no opportunity for repair.

**33**  The plaintiff has submitted no expert evidence with respect to the issue of standard of care or causation. The law is clear that expert evidence is required in cases where the other party to the litigation has submitted expert evidence.

SUMMARY

**34**  The plaintiff has not proven his allegations against the defendants or any of them. The onus is on the plaintiff to prove those allegations.

**35**  In the case at bar, the plaintiff has the burden of proving his allegations against the defendants, that the defendant doctors failed to meet the standard of care expected of them in the circumstances, and that this failure caused or contributed to his injuries.

**36**  The defendants have produced expert medical opinion of Drs. Rees and Parsons that the standard of care expected of the defendants has been met. The plaintiff produced no expert evidence to counter the expert opinions of Drs. Rees and Parsons.

**37**  In the result, the defendants succeed on the Rule 18A application, and the actions are dismissed with costs on Scale 3 in favour of the defendants.

J.T. EDWARDS J.

**End of Document**

[***Plattig v. Hart, [2002] B.C.J. No. 2516***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X37B-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Allan J.

Heard: September 3 - 6, 9 - 11, 13, 16 - 20,

24 - 27, 30, October 1 - 4, 7 - 10 and 21 - 23, 2002.

Judgment: November 6, 2002.

Vancouver Registry No. C971787

**[2002] B.C.J. No. 2516** | 2002 BCSC 1549 | 117 A.C.W.S. (3d) 992 | [2002] B.C.T.C. 1549

Between Jana Karolina Plattig, plaintiff, and David D. Hart and David D. Hart Personal Law Corporation, defendants

(205 paras.)

**Case Summary**

**Family law — Common law or same-sex relationships — Resulting or constructive trusts — Maintenance — Barristers and solicitors — *Negligence* — Considerations in determining liability — Particular negligent acts — Negligent advice — Re conduct of trial — Failure to protect client's interests.**

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| Action by Plattig against Hart and his law corporation for damages for ***negligence*** in connection with his representation of her in an action against her former spouse. Plattig had lived in a common law relationship for seven years. During the relationship she worked as a real estate agent. Shortly after their separation, Plattig suffered from depression and was disabled and unable to work. Plattig retained Hart to file a claim for a trust interest over her spouse's assets. At a mini-trial, the judge concluded that the trust argument was unlikely to succeed and suggested that the parties settle on lump sum maintenance. Hart amended the statement of claim to include a claim for spousal maintenance. The claim for maintenance was outside the one-year time limit, but the spouse's counsel consented to the amendment. Prior to trial, counsel agreed on a value to be attributed to the spouse's assets and income. At trial, all of Plattig's claims were dismissed. The court found that Plattig was not entitled to a constructive trust against any of the spouse's assets and that Plattig had not proved any entitlement to maintenance. On appeal, the court awarded Plattig monthly maintenance of $4,500 on the basis that she was in need of support and that the break up of the relationship had contributed to her difficulties. It dismissed her trust claim but stated that it was difficult to determine whether the outcome would have been different if counsel had not agreed to the statement of assets at the beginning of the trial. Plattig claimed that Hart failed to advance her claim for maintenance in a timely fashion, failed to obtain a proper valuation of assets and negligently agreed to a statement of assets without her consent. Plattig further claimed that Hart was negligent in his trial preparation and failed to introduce expert evidence as to the value of her real estate business which she sold during the relationship.  HELD: Action dismissed.  There was no evidence upon which a court could have granted Plattig an interest by way of trust in any of her spouse's assets. Plattig did not suffer any loss from Hart's failure to claim maintenance at an earlier date. An interim maintenance application would not have been successful in the circumstances. The agreement of the parties' counsel as to the spouse's assets was not determinative of the trust issue. The court had found that Plattig did not contribute to the assets. Plattig did not suffer any prejudice from the agreement. She also did not suffer any loss from Hart's failure to introduce the expert evidence on the valuation of her business, as the value was only relevant to the extent of proving some deprivation to Plattig, which had been established through other evidence. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 28, 60A. Evidence Act.

Family Relations Act, s. 57.

**Counsel**

The plaintiff, Jana K. Plattig, appeared on her own behalf. Carla Forth, for the defendants.

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| **ALLAN J.** |

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|  |  | worth was $5 million both in 1982 |  |  |  |
|  |  | and at the date of trial, and whose |  |  |  |
|  |  | annual income was $300,000 | para | 94 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (iv) | failing to obtain financial |  |  |
|  |  | information from Mr. Robillard and |  |  |
|  |  | a proper valuation of his business |  |  |
|  |  | assets | para 107 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (v) | preparation for and conduct of the |  |  |
|  |  | trial | para 117 |  |

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| --- | --- | --- | --- | --- |
|  | (vi) | failing to introduce the expert |  |  |
|  |  | report prepared by Wolridge Mahon |  |  |
|  |  | at trial | para 145 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (vii) | misappropriating funds in the |  |  |
|  |  | amount of $3,350 | para 191 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (viii) | swearing an affidavit prepared by |  |  |
|  |  | Mr. Promislow in the appeal |  |  |
|  |  | proceedings commenced by Mrs. |  |  |
|  |  | Plattig | para 194 |  |

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| --- | --- | --- | --- | --- |
|  | (ix) | Whether any damages resulted from |  |  |
|  |  | any ***negligence*** or breach of duty |  |  |
|  |  | by Mr. Hart | para 204 |  |

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| --- | --- | --- | --- |
|  | Conclusion | para 205 |  |

**1**  The plaintiff, Mrs. Plattig , alleges that the defendants, Mr. Hart and his law corporation, were negligent in their representation of her in an action (the "Robillard Action") commenced by her against her former common law spouse, John Robillard.

Background:

**2**  Mrs. Plattig lived in a common law relationship with Mr. Robillard from September 1982 until approximately July 1989. In May 1989, Mrs. Plattig retained Mr. Hart for legal advice. A writ and statement of claim filed on May 23, 1989 asserted the plaintiff's interest in some or all of Mr. Robillard's assets in the form of a constructive or resulting trust. Mrs. Plattig instructed Mr. Hart not to serve the proceedings on Mr. Robillard until July 1989, when she was ready to move into her own apartment.

**3**  A trial date set for October 29, 1990 was adjourned because Mrs. Plattig's family doctor was unable to attend the trial. A mini-trial was held before Mr. Justice Spencer in December 1990. On the basis of the information before him, Spencer J. opined that the plaintiff's trust claims were unlikely to succeed and suggested that it was an appropriate case for settlement on the basis of periodic or lump sum spousal maintenance.

**4**  A second trial date, April 29, 1991, was adjourned because Mrs. Plattig's father had died earlier that month and she was required to travel to Czechoslovakia for her father's funeral. She remained for about a month to attend to his estate.

**5**  On August 22, 1991, Mr. Hart amended the statement of claim to include a claim for spousal maintenance. Although that relief was not claimed within the one-year time limit required by the Family Relations Act ("FRA"), Mr. Promislow, counsel for Mr. Robillard, consented to the amendment.

**6**  Prior to the trial, counsel had reached an agreement that the value of Mr. Robillard's net assets was $5 million, both at the commencement of the relationship and at the date of trial, and that his annual income was approximately $300,000.

**7**  The Robillard Action was tried on February 3-6, 27 and 28, 1992 (the "Robillard Trial"). In written reasons for judgment dated August 18, 1992, ( [*[1992] B.C.J. No. 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S168-00000-00&context=)) Mr. Justice Oliver dismissed all of the plaintiff's claims.

**8**  Oliver J. found the following facts:

1. Mrs. Plattig, a real estate saleswoman, met Mr. Robillard, a businessman, in 1980. Mrs. Plattig was divorced and Mr. Robillard was married but separated from his wife. When they met, Mrs. Plattig was engaged to another man but she broke off that engagement.
2. Marriage was discussed several times a year but Mr. Robillard did not wish to institute divorce proceedings against his wife who was suffering from cancer. In fact, Mr. Robillard's wife commenced divorce proceedings against Mr. Robillard in December 1987 and she died in April 1988.
3. In September 1982, Mrs. Plattig moved into Mr. Robillard's condominium. In November 1982, she opened her own real estate office, False Creek Realty Ltd. ("FCR"), which she operated on a full time basis until she sold it in December 1988. After she sold it, she continued to work there until April 1989. She was then employed by Remax Realty Inc. until August 1989, when she took a leave of absence because of "clinical depression." She returned to work in November 1991.
4. The parties enjoyed a relatively affluent lifestyle, taking frequent vacations. During their relationship, Mr. Robillard purchased a motor home and a boat and remodelled the condominium in which they lived at Mrs. Plattig's request. Mr. Robillard purchased jewellery, an $8,000 grand piano and a fox fur coat for Mrs. Plattig.
5. Both parties kept their financial affairs separate and Mrs. Plattig retained the proceeds from the operation and sale of her real estate business.
6. Mr. Robillard paid the cost of household supplies and expenses, entertainment, and recreation. Mr. Robillard gave Mrs. Plattig a monthly allowance and assisted her when she had financial difficulties.
7. In November and December 1987, both parties had consulted solicitors with respect to negotiations for a cohabitation agreement. No agreement was reached.
8. In August 1988, Mrs. Plattig moved out of the bedroom they shared and they separated on July 20, 1989.

**9**  Mr. Justice Oliver concluded that Mrs. Plattig had not made any significant contribution to the "acquisition, improvement or maintenance" of either Mr. Robillard's condominium in which they resided or his business assets. The parties' one-time intention that Mrs. Plattig should receive a half-interest in the condominium (while they were negotiating a cohabitation agreement) was not sufficient to create a resulting trust. Oliver J. did not accept Mrs. Plattig's evidence that Mr. Robillard had executed a will in 1986 leaving her 20% of his estate. He found no evidence to support a claim for a resulting trust with respect to any of Mr. Robillard's property.

**10**  Oliver J. held that Mrs. Plattig had not enriched Mr. Robillard. He found that the parties had conducted their own financial affairs and that, by assuming responsibility for all day to day living expenses, Mr. Robillard had contributed at least indirectly to the ability of Mrs. Plattig to earn an independent income and build up a business which she ultimately sold, retaining the proceeds. He concluded "that whilst at the end of the relationship, Mr. Robillard's financial position was essentially unchanged, Mrs. Plattig left the relationship in substantially better financial shape than when she entered it." He rejected her testimony that she had participated in Mr. Robillard's financial affairs. With respect to Mrs. Plattig's allegation that she had suffered a deprivation by selling her real estate business at Mr. Robillard's insistence, Oliver J. gave minimal weight to the evidence of Ms. Schweitzer, a chartered accountant with Wolridge Mahon, on the basis that the latter's conclusions did not rest on any adequate factual basis.

**11**  Finally, Oliver J. rejected Mrs. Plattig's maintenance claim. Mr. Hart had introduced the evidence of Mrs. Plattig's family doctor, Dr. Buhler, and her psychologist, Dr. Neufeld. They both expressed the opinion that, at the termination of Mrs. Plattig's relationship with Mr. Robillard, she was clinically depressed and unable to work for a period of time. While Oliver J. observed that Mrs. Plattig was "very hurt and defensive" about her break-up with Mr. Robillard, he was not satisfied that her depressed state was attributable to Mr. Robillard to any substantial degree. He preferred the evidence of Dr. O'Shaughnessy, a psychiatrist, who had examined Mrs. Plattig on behalf of the defence and concluded that she was not clinically depressed and could work if she were motivated to do so.

**12**  Oliver J. concluded that Mrs. Plattig had the ability and capacity to support herself. He was not satisfied that she had proved either an entitlement to, or a need for, maintenance.

**13**  Mrs. Plattig discharged Mr. Hart in September 1992 and filed a notice of appeal on her own behalf. The appeal was heard on June 29 and 30, 1995. In reasons for judgment dated August 1, 1995 ([*10 B.C.L.R. (3d) 109*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0TD-00000-00&context=)), the Court of Appeal dismissed the plaintiff's trust claims but awarded her monthly spousal maintenance of $4,500.

**14**  The Court of Appeal upheld the trial judge's conclusion that Mrs. Plattig had not established a constructive or resulting trust on the basis of his findings of fact. The Court accepted Mrs. Plattig's submission that Mr. Robillard had made a number of proposals with respect to her financial security. However, none of the proposals, which included giving her an interest in the condominium in which they had lived, an interest in his estate, a substantial bequest and an assured income, had been finalized. The Court declined to admit fresh evidence as to the value of Mr. Robillard's assets because that evidence could have been adduced at trial but was thought unnecessary because of the agreement reached by counsel. McEachern C.J.B.C., for the Court, stated at para. 9:

It is impossible to say whether the plaintiff, but for the agreement just mentioned [that Mr. Robillard's net assets were $5 million at the commencement of the cohabitation and the date of trial and his annual income was $300,000], might have been able to establish some enrichment and deprivation with respect to particular assets, but that was not attempted at trial.

**15**  Unfortunately, Mrs. Plattig has interpreted those words to mean that if Mr. Hart had not entered into that agreement with Mr. Promislow, she would have succeeded in her claim for a constructive trust.

**16**  The Court of Appeal overturned the trial judge on the issue of maintenance. McEachern C.J.B.C. stated at paras. 15-16:

It is unfortunate that the learned trial judge concentrated on causation, when the plaintiff's entitlement to maintenance should have been determined in accordance with the principles stated in Part 4 of the Family Relations Act. Causation in relation to the plaintiff's disability is not determinative of the plaintiff's right. To his credit respondent's counsel practically conceded entitlement and concentrated his submissions on the question of quantum.

Since the trial, the plaintiff has been unable to return to gainful employment. Obviously, she has become obsessed with her misfortune and with this litigation which has been a great worry to her.... However, it is impossible to say that the break-up of her relationship with the defendant did not contribute to her continuing difficulties.

**17**  The Court considered fresh evidence adduced by Mrs. Plattig with respect to her disability for which she received benefits, her psychiatric treatment and hospitalization, her inability to work, and the likelihood that she would be unable to re-enter the real estate market as a realtor. At the hearing of the appeal in 1995, Mrs. Plattig was aged 54 and Mr. Robillard was 69. The factors considered by the Court included the length of the parties' cohabitation, their ages and circumstances, Mr. Robillard's implied or expressed intention to provide for her financial security and his ability to pay, and Mrs. Plattig's inability to become self-sufficient.

**18**  Mrs. Plattig retained new counsel, James Clarke, to clarify the terms of that judgment. After numerous applications and submissions, the Court of Appeal issued a supplementary judgment on October 11, 1995 that established that the award was retroactive to September 1992, the month following Oliver J's judgment; it was to continue for her lifetime and bind Mr. Robillard's estate; it was not tax-free; and it was to be secured in a form satisfactory to the Registrar. Proceedings in the Court of Appeal continued as Mr. Promislow vigorously opposed Mr. Clarke's efforts to effectively secure the judgment.

**19**  The defendants have calculated the total maintenance payments made to Mrs. Plattig to August 2002 as $535,500. Actuarial evidence estimates the present value of her future maintenance payments as $671,706.

**20**  Mr. Hart has practiced in the area of family law in British Columbia since 1962 and specialized in that area since 1969. As counsel in the trial and appeal courts, he has had extensive experience with respect to maintenance claims, interim applications, actions involving FRA issues, as well as constructive and resulting trust claims. He has participated in Continuing Legal Education courses on these family law issues and has been involved in many family law professional organizations. He sat as a provincial court judge from 1973 to 1977, primarily in the family division.

The plaintiff's claims in this action:

**21**  Mrs. Plattig asserts that Mr. Hart was negligent with respect to his conduct of her file. Particulars of her allegations of ***negligence*** include: his failure to advance a claim for maintenance in a timely fashion, his failure to apply for interim maintenance prior to trial; his failure to obtain a proper valuation of assets and financial information from Mr. Robillard; his agreement with Mr. Promislow that Mr. Robillard was a semi-retired businessman with a net worth of $5 million and an annual income of $300,000, made without her knowledge or consent; his failure to prepare adequately for trial and examinations for discovery; and a number of issues regarding the preparation and use of an expert report prepared by Wolridge Mahon.

**22**  Mrs. Plattig also complains that Mr. Hart breached his fiduciary duty and duty of confidentiality to her when, after ceasing to act for her, he swore an affidavit in proceedings in the Court of Appeal at the behest of Mr. Promislow.

**23**  Finally, Mrs. Plattig complains that Mr. Hart was an alcoholic at the time he acted for her and had serious medical problems that impaired his abilities as her counsel. Those allegations, which are wholly without merit, can be disposed of briefly. There is not a scintilla of evidence that Mr. Hart's conduct of Mrs. Plattig's file -- in court, in discoveries, or in the office -- was impaired by any consumption of alcohol. Mr. Hart suffered a mild stroke in 1989 and thereafter had a number of seizures, from which he recovered rapidly. He ceased drinking any alcohol in September 1991, when his doctor advised him that alcohol was reacting adversely with Dilantin, the drug prescribed for his medical condition.

**24**  Throughout the trial, it was often difficult to separate the plaintiff's complaints against Mr. Hart, Mr. Promislow and Mr. Robillard. Many of her allegations against Mr. Hart are inextricably woven into the fabric of her obsession with what she perceives as the cruel injustice of the denial of her claims against Mr. Robillard. That obsession was, I think, initially fuelled by the statement of defence Mr. Promislow drafted for his client. The final paragraph reads thus:

In answer to the whole of the Plaintiff's claim herein, the Defendant states that the mutual agreement was that the Plaintiff during the whole of the cohabitation would retain solely and without sharing all of the fruits of her profession and make her own decisions as to disposable income available to her and otherwise, would have all expenses paid for by the Defendant during such cohabitation and that in return she would be, for as long as both were satisfied, a playmate and a companion, and the Defendant states that such relationship beyond that was stifled by the Plaintiff's selfishness and greed, if the relationship could have proceeded further.

**25**  In my opinion, the tone of that pleading was needlessly cruel and demeaning to the plaintiff and caused her unnecessary and continuing distress.

The defendants' response:

**26**  In their statement of defence, the defendants deny generally that they breached any contract or duty of care. They plead that they acted in a careful, diligent and competent manner and deny that they were guilty of any act or omission or failure to exercise due care, skill and diligence or that they breached any fiduciary or contractual duty to Mrs. Plattig. In the alternative, the defendants say that nothing they did or failed to do contributed to any loss or damage sustained by Mrs. Plattig. Ms. Forth submits that Mr. Hart took all steps to properly represent Mrs. Plattig and acted on her express instructions.

**27**  A counterclaim for fees owing was abandoned prior to trial.

The relevant law:

**28**  The onus is on Mrs. Plattig to prove, on a balance of probabilities, that any of Mr. Hart's acts or omissions fell below the standard of care expected of a reasonably competent and diligent family practitioner and, if so, that she suffered any loss as a result.

The standard of care:

**29**  The relevant standard of care was described by the Supreme Court of Canada in Central Trust v. Rafuse, [*[1986] 2 S.C.R. 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BN-00000-00&context=) at para. 58:

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.

**30**  While errors in the exercise of judgment in the conduct of a case will generally not constitute ***negligence***, an egregious error may constitute ***negligence***: Demarco v. Ungaro et al. [*(1979), 21 O.R. (2d) 673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DYFH-X49P-00000-00&context=) (Ont. H.C.J.).

**31**  The remarks of the Saskatchewan Court of Appeal in Garrant v. Moskal [*(1985), 40 Sask. R. 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-F4GK-M0TG-00000-00&context=) are relevant to the case at bar. There, the plaintiff wife was dissatisfied with the results of a trial dividing matrimonial property and commenced actions against her former husband, his counsel and her own counsel. All three defendants successfully applied to set aside the statement of claim on the basis that it disclosed no cause of action. The Saskatchewan Court of Appeal upheld that decision. At paras. 8 and 9, the Court stated:

Turning now to the claim against Mr. Moskal, her own lawyer at the first trial, Matheson J. accepted he did have a duty to act with reasonable competence in the performance of his professional duties; however, the mere fact he did not present every item of evidence or take every objection at trial, as is perceived to be of importance to the client, did not of itself constitute a ground for a claim of professional ***negligence*** or misconduct.

This court agrees with the learned chambers judge and would go further to point out that the courts have long recognized the difficulty facing lawyers in the conduct of litigation where decisions are made in what might be described as the heat of battle with the result that there is a limited degree of immunity provided from actions of this nature.

**32**  At paras. 10 and 11, the Court continued:

It is understood that the results of the trial were a great disappointment to the appellant. It is also understandable that she would like to turn the clock back and have the whole action tried again with the assistance of different counsel and before another judge. However, the judicial system does not permit this and certainly the three actions under appeal would not accomplish such a result. They are little more than a litany of her complaints at the injustice she perceives herself to have suffered as a result of the earlier litigation.

It will probably be small consolation to the appellant, but it is perhaps worthy of noting that in a common law jurisdiction such as this, based as it is on an adversary system, there is always a disappointed litigant who tends to feel let down by either the judge or counsel. It is also probably trite to say that every counsel who is disappointed in the result would do some things differently if given another opportunity, and that does not of itself indicate negligent conduct of the action. However, in the interests of finality there must come an end to the matter, and issues which were raised and considered in the first trial and the appeal are no longer the proper subject of litigation.

Causation between negligent conduct and damages:

**33**  Even if a solicitor's conduct is found to be negligent, the plaintiff cannot recover unless the ***negligence*** is causally connected to the plaintiff's loss: Wilder (Estate) v. Kluge [*[1998] B.C.J. No. 492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3XP-00000-00&context=) (S.C.). In other words, if no damage is occasioned by the actions or omissions of counsel, there is no ***negligence*** in law.

**34**  The element of causation is essential in claims for both ***negligence*** and breach of fiduciary duty.

**35**  In Graybriar Industries Ltd. v. Davis & Co. [*(1990), 46 B.C.L.R. (2d) 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0N4-00000-00&context=) (S.C.) aff'd [*46 B.C.L.R. (2d) 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0N4-00000-00&context=), in considering a claim for damages for solicitor's ***negligence***, the trial judge stated at p. 181:

A plaintiff who proves duty, breach of the standard of care and damage will still be unsuccessful in the action unless it is proved that there is a causal link between the breach of the standard of care and the damage. The causal link is tested in two ways: the defendant's conduct must be both the actual cause, or cause in fact and the legal cause or proximate cause of the loss.

**36**  In Canson Enterprises 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=), the plaintiff's claim was for breach of fiduciary duty. Madam Justice McLachlin, speaking for the minority, concurring in the result, stated at pp 556-7:

... it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach

...

There is no link between the breach of fiduciary duty and this loss.

Constructive trust:

**37**  Mrs. Plattig's claim for a remedy by way of constructive trust required that she establish the three pre-conditions for unjust enrichment: Mr. Robillard had been enriched, Mrs. Plattig had been correspondingly deprived, and there was no juristic reason (such as contract) for the enrichment: Pettkus v. Becker, [*[1980] 2 S.C.R. 834*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1Y0-00000-00&context=); Sorochan v. Sorochan, [*[1986] 2 S.C.R. 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23BF-00000-00&context=). In Pettkus, the parties lived together in a common law relationship for 19 years. They started with virtually nothing and accumulated assets together. At the end of the relationship, the defendant owned real property and a successful beekeeping business. The Court concluded that causal connection between the acquisition of property and corresponding enrichment was met. The plaintiff's contribution was sufficiently substantial and direct to entitle her to a portion of the profits realized by the defendant. He had had the benefit of 19 years of the plaintiff's unpaid labour and income contributions while she received little or nothing in return.

**38**  In Sorochan, the parties cohabited for 42 years. Mr. Justice Dickson described the appellant's contributions, which both enriched the respondent and constituted a deprivation at paras. 12-15:

... the appellant worked on the farm for forty-two years, during which time she received no remuneration from the respondent. She did all of the household work, including the raising of their six children. In addition, she looked after the vegetable garden, milked the cows, raised chickens, did farmyard chores, worked in the fields, hayed, hauled bales, harvested grain and helped to clear the land of rocks. She also sold garden produce, milk and eggs to pay for food and clothing for the family and for the schooling of the youngest child. On numerous occasions when Alex Sorochan was engaged in his sales activities, Mary Sorochan was left with sole responsibility for the operation of the farm.

The trial judge held that there was "clear evidence of enrichment" to the respondent. The Court of Appeal found that Mary Sorochan "performed all the work of a diligent farm wife". In my view, it is clear that the respondent derived a benefit from the appellant's many years of labour in the home and on the farm. This benefit included valuable savings from having essential farm services and domestic work performed by the appellant without having to provide remuneration....

In addition, through the appellant's years of labour, the farm was maintained and preserved as valuable farmland. It did not deteriorate in value through neglect or disuse, as it no doubt would have in the absence of Mary Sorochan's faithful and long years of labour. The appellant's maintenance and preservation of the land, therefore, conferred a significant benefit on the respondent. As noted in Rochon v. Emary [*(1981), 21 R.F.L. (2d) 366*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-DXWW-23B1-00000-00&context=) (B.C.S.C.), at p. 370, affirmed on appeal [*(1982), 32 R.F.L. (2d) 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JNS1-M02W-00000-00&context=) (B.C.C.A.), "the plaintiff ... made a valuable contribution by way of her services as housekeeper and in assisting the defendant in maintaining and improving the property".

On the other side of the coin, the labour done by Mary Sorochan during those forty-two years constituted for her a corresponding deprivation. The trial judge concluded that this was the case. Moreover, the case law indicates that the full-time devotion of one's labour and earnings without compensation can readily be viewed as a deprivation.

**39**  In Sorochan, the respondent owned the property in question at the beginning of the cohabitation. That judgment made it clear that a contribution could be made by preserving and enhancing assets as well as acquiring them.

**40**  While there must be a causal connection between the contribution and the acquisition, maintenance or enhancement of the disputed assets, a constructive trust remedy is not limited to property to which the claimant has made a direct contribution. For example, a plaintiff might contribute to her partner's business assets indirectly through making contributions to the family income, or undertaking uncompensated domestic or other services in the home that enrich the partner who owns the assets. The reported cases have considered such diverse contributions as child rearing, housework, gardening, renovations, providing health care, and entertaining services.

**41**  Mrs. Plattig's statement of claim alleged that she had made the following contributions to Mr. Robillard:

Throughout the period of cohabitation, the Plaintiff has provided housekeeping services, has also provided entertainment for clients of the defendants and for the children of the Defendant by his former marriage, and his friends and acquaintances, and has undertaken all those duties that would normally be associated with that of a wife who was legally married. In addition she has conducted her own business and through that business contributed to the maintenance of her family unit (if not directly, then at least indirectly)....

**42**  Mr. Justice Oliver referred to those alleged benefits in his reasons. Applying the legal principles of Pettkus to the facts that he found in the evidence, he concluded that the plaintiff had failed to establish an unjust enrichment and dismissed her claim for a constructive trust remedy.

Resulting trust:

**43**  The Court in Pettkus also reiterated that a party may obtain an interest in an asset through a resulting trust where there is an agreement or a common intention, express or implied, to share an asset.

**44**  In this case, Oliver J. considered Mrs. Plattig's claim for a resulting trust in Mr. Robillard's assets acquired prior to, and the course, of their cohabitation. He concluded that she had not made any significant contribution to the "acquisition, improvement or maintenance" of the condominium in which they resided. In his opinion, Mr. Robillard's one-time intention that Mrs. Plattig should receive a half-interest in the condominium as a term of the cohabitation agreement was insufficient to give rise to a resulting trust. A shared intention, without evidence of contribution, amounted to no more than an unexecuted gift. He found no evidence on which to base a claim for a resulting trust over Mr. Robillard's other assets.

**45**  Mr. Justice Oliver did not refer to the evidence that, in November 1986, Mr. Robillard had instructed Mr. Promislow to draft a will that bequeathed her the condominium. Subsequently, that provision was revoked. The relevant portion of that will, showing that provision crossed out, was in evidence at the Robillard Trial.

**46**  Mrs. Plattig also alleged, unsuccessfully, that Mr. Robillard had, at one time, bequeathed 20% of his estate to her. In support of that assertion, Mr. Hart referred to some ambiguous evidence Mr. Robillard had given on his examination for discovery. There was no documentary evidence that such a will had ever been drafted or executed.

**47**  In my opinion, there is no evidence upon which a Court would grant Mrs. Plattig an interest by way of a resulting or constructive trust in any of Mr. Robillard's personal or business assets.

The plaintiff's allegations of ***negligence*** and breach of fiduciary duty:

1. was Mr. Hart negligent in failing to advance a claim for maintenance in a timely fashion?

**48**  The statement of claim filed May 23, 1989 did not contain a claim for spousal maintenance and no claim was made within the one year period following Mrs. Plattig's cohabitation with Mr. Robillard or before the first trial date, scheduled for October 29, 1990.

**49**  Following the mini-trial on December 17, 1990, Mr. Justice Spencer filed a memorandum on January 7, 1991 expressing his impression of the case that the plaintiff would not be found to have a resulting or constructive trust in any of Mr. Robillard's assets. In his opinion, it was an appropriate case for settlement by way of an agreement for either period or lump sum maintenance as Mr. Promislow had apparently suggested. A letter dated February 25, 1991 from Mr. Hart to Mr. Promislow seeks the latter's agreement to a consent order adding a claim for maintenance to the statement of claim. The letter refers to previous discussions regarding that issue. Richard Hart, a lawyer employed by Mr. Hart in 1990 and 1991, assisted Mr. Hart on Mrs. Plattig's case. Richard Hart's file note of March 7, 1991 records a telephone conversation with Mr. Promislow in which the latter agreed to the proposed amendments. A consent order was filed on July 12, 1991 and the amended statement of claim was filed on August 22, 1991.

**50**  Mrs. Plattig submits that Mr. Hart's failure to claim spousal maintenance represented a failure to recognize her entitlement to support. She says that she only learned that she was entitled to maintenance after she had consulted Alison MacLennan, a family lawyer, whom she hoped would take over her file. Ms. MacLennan testified that Mrs. Plattig had attended her offices in February and March 1991, expressing her concerns about Mr. Hart and seeking her advice. Ms. MacLennan declined to take her case because of her other commitments. She reviewed certain documents given to her by Mrs. Plattig, attempted to assist Mrs. Plattig repair her relationship with Mr. Hart, and gave her the name of another lawyer who might take over her file. Ms. MacLennan believed that there should be a claim for maintenance and she advised Mrs. Plattig accordingly.

**51**  However, there is evidence that Mrs. Plattig knew Mr. Harts planed to seek maintenance prior to her meeting with Ms. MacLennan. In fact, Mr. Hart had written to Mrs. Plattig on January 22, 1991 and confirmed that at an earlier meeting on January 18, they had agreed that he would seek Mr. Promislow's consent to amend the pleadings to include a prayer for relief for lump sum and periodic maintenance as an alternative to a remedy for unjust enrichment. Accordingly, I conclude that Mrs. Plattig was aware that Mr. Hart would seek to make the necessary amendment prior to her discussions with Ms. MacLennan.

**52**  In 1989, s. 57 of the FRA set out the factors that a Court would consider on an application for spousal support:

1. A spouse is responsible and liable for the support and maintenance of the other spouse having regard to
2. the role of each spouse in their family;
3. an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
4. custodial obligations respecting a child;
5. the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves; or
6. economic circumstances.
7. Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

**53**  Mr. Hart testified that on the basis of the relevant law and the information he received from Mrs. Plattig when he met her in May 1989, he determined there was no potential basis for a claim for maintenance. He took into account her employment, her income, and her assets. Indeed, it is probable that if Mrs. Plattig, an independent business woman, was sufficiently involved in Mr. Robillard's business affairs to justify an entitlement to an interest in them, then she would not be granted spousal support.

**54**  Mr. Hart stated that up until the October 29, 1990 trial date, he believed that her trust claims would likely succeed and, as a result, her asset position would be such that she would not be entitled to maintenance. In fact, by late 1989, she become seriously depressed and left her employment. Her only source of income was her monthly tax-free disability benefits. She had moved to Saturna Island to recuperate and reduce her living expenses, and she had begun to sell off her assets.

**55**  In any event, Mr. Hart vigorously advanced her claim for maintenance at the trial in February 1992. He led ample evidence with respect to the issues of her need for, and entitlement to, support. He filed the reports of Dr. Buhler, Mrs. Plattig's family physician and Dr. Neufeld, her treating psychologist. Mr. Promislow cross-examined those witnesses at trial and tendered the report of Dr. O'Shaughnessy, who had conducted an independent medical examination of the plaintiff.

**56**  Mrs. Plattig's failure to receive maintenance at trial was not attributable to any negligent act or omission on the part of Mr. Hart. The Court of Appeal ultimately determined that Oliver J. had erred in his approach to the issue of spousal support and that Mrs. Plattig's circumstances had changed dramatically since the trial.

**57**  Mrs. Plattig argues further that a timely claim for maintenance would have entitled her to obtain interim maintenance between May or July 1989 and the date of trial. I will deal with that issue in the next section of this judgment.

**58**  On November 1, 1989, Mr. Hart served Mr. Promislow with Mrs. Plattig's Statement of Property. In response, Mr. Promislow stated that he did not equate the action with an FRA proceeding and he did not intend to prepare a Statement of Property for Mr. Robillard. Mrs. Plattig submits that if a support claim were pleaded, Mr. Promislow would have been required to file a Statement of Property or a Property and Financial Statement. In fact, until September 1, 1990, Rule 60A only required a Statement of Property when a claim was made by a married spouse under FRA for relief respecting family property. Rule 60A was amended to require an applicant for spousal support to file a Property and Financial Statement ("Form 89"). The applicant could then serve the respondent with notice to deliver a Form 89 in response.

**59**  Mr. Hart says that a Form 89 prepared by Mr. Robillard would not have assisted the plaintiff. It was conceded that Mr. Robillard could pay any amount of maintenance that a Court would be likely to order and had he listed his companies, he would have estimated their values as "unknown" as was the practice at that time. Mrs. Plattig was aware of the existence and value of his personal assets, such as his yacht and motor home.

**60**  I conclude that Mr. Hart was not negligent in failing to claim spousal maintenance initially and that Mrs. Plattig suffered no loss as a result of the fact that the claim was not formalized until August 1991.

1. was Mr. Hart negligent or in breach of his duty to Mrs. Plattig by failing to advance a claim for interim maintenance?

**61**  Mrs. Plattig submits that Mr. Hart is "stuck with" the Court of Appeal's determination that the proper amount of maintenance is $4,500 monthly and that she should have received those amounts from the date of Mr. Hart's retainer until the Robillard Trial.

**62**  It is beyond dispute that in May 1989, an application for interim maintenance could not have succeeded. Mrs. Plattig was still living with Mr. Robillard and, after she left him in July 1989, she was employed and owned substantial (albeit mortgaged) assets. Her Statement of Property filed in October 1989 listed three properties with a total net equity value of $160,000; household items and vehicles totalling $49,100; commissions pending of $13,100; personal debts and business debts of about $66,000; and mortgages and loans of about $383,000. However, soon after the separation, Mrs. Plattig became physically and emotionally ill and by November 1989, she had ceased working and was dependent upon monthly disability payments.

**63**  The plaintiff's further Form 89, filed April 24, 1991, discloses income of $2,000 monthly and estimated monthly expenses of $7,696.08. The value of her household items and vehicles remained at $49,100. She had disposed of her condominiums: one in November 1989 (net equity $68,007.41); one refinanced in June 1990 giving her $39,124.55 cash and later sold in January 1991 (net equity $36,324.33); and one sold in March 1991 (net equity $37,918.71). She estimated that her debts exceeded $128,000, including legal fees of $35,000; accountants' fees of $3,800; and personal and business income taxes of $70,000.

**64**  Mrs. Plattig continued to receive her disability payments until October 17, 1991 when she returned to work as a realtor. At that time, her insurer made a lump sum payment of $12,000, for a further six months, to assist her return to work.

**65**  The parties disagree as to when Mrs. Plattig told Mr. Hart that she was financially distressed. Mrs. Plattig testified that she told Mr. Hart in 1989 or 1990 that she was running out of money for her day to day expenses. Mr. Hart says that Mrs. Plattig first raised the issue in her letter to him of March 26, 1991: "As you are aware, my financial situation have [sic] changed and I believe that a new statement of my worth should be made." She also met with him that day to discuss that and other issues. The following day, Mr. Hart replied:

... as I advised you the issue of maintenance is one which would be decided by a judge on the basis of your present position and that is the reason for having you complete an updated form at this time. ... I would hope that we could complete that material and have it typed and ready for you at the time of our next meeting. I would propose at that time to draft a fairly simple affidavit addressing the issue of maintenance and serve this on Mr. Promislow so that if for any reason the trial does not proceed on the 29th of April I will have a Motion before the Court at that time to ensure that our application for interim maintenance pending any adjourned trial date is dealt with by the judge on that first day of trial.

**66**  To some degree, that letter contradicts Mr. Hart's evidence at trial that throughout, he considered that the interim application should be filed but not spoken to while Mrs. Plattig continued to receive disability benefits as it would have little or no hope of success. Ms. Forth notes Mr. Hart's advice was premised on the basis that there was no automatic entitlement and that Mr. Promislow would have strenuously opposed any interim maintenance application prior to trial when Mrs. Plattig had not yet proved an entitlement to any of Mr. Robillard's assets. In my view, that analysis is flawed. A common law spouse is entitled to spousal maintenance if he or she can qualify as a "spouse" within the meaning of the FRA (that is, a person who has lived together with another person in a marriage-like relationship for at least two years and brings the application within a year of separation) and meets the criteria articulated in the relevant section (then s. 57). Claims by common law spouses to entitlement to assets on the basis of a constructive trust are relatively rare. The only remedy for the majority of common law spouses is maintenance, relief that is unrelated to entitlement to assets.

**67**  Mr. Hart testified that Mrs. Plattig also advised him in March 1991, that she intended to return to work and move to Vancouver and, in April, she told him that she expected her disability payments would cease in November 1991.

**68**  Mrs. Plattig's evidence that, from at least April 1991, she pressed Mr. Hart to bring an application for interim maintenance directly conflicts with Mr. Hart's testimony that he never intended to bring the application unless her disability benefits ceased prior to the trial and that Mrs. Plattig was in agreement with that plan.

**69**  On April 24, 1991, Mrs. Plattig attended Mr. Hart's office to give him instructions to adjourn the trial and bring an application for interim maintenance. She is adamant that on that day, Mr. Hart had her swear "blank pages". She said she signed the jurat at the bottom of a blank page and he later filled in the affidavit without her instructions or knowledge.

**70**  The particularly contentious paragraphs are these:

1. THAT in my Statement of Claim herein I restricted my claims against the Defendant to relief by way of an application for a Declaration of a Resulting and Constructive [sic] with respect to the assets of the Defendant and at that time had every confidence that I would be continuing in my capacity as a real estate agent which had been my field of employment during the course of my relationship with the Defendant and that I would thereby be in a position to meet my monthly financial requirements until the matter came to trial.

...

1. THAT following Discoveries in this matter the trial was set for the 25th of October, 1990, and in view of the imminence of the trial I did not instruct my counsel to amend the Statement of Claim to include a claim for maintenance and lump sum maintenance in the hopes that the trial would be concluded in my favour and I would not have to take recourse against the Defendant for financial assistance by way of maintenance.

...

1. ... I have instructed my counsel to set my application for interim maintenance to be heard on the date presently set for trial, namely the 29th of April, 1991, and to consent to an adjournment of such motion generally with liberty to apply to reset the motion to be heard at the time of trial of this matter when that date is eventually settled.

**71**  Mrs. Plattig insists that she did not give, and would not have given, those instructions to Mr. Hart or sworn to those facts in an affidavit.

**72**  The typing on the penultimate page occupies a little more than half the page. At the end of the last typed line there is a diagonal line that extends to the bottom left hand corner of the page and a straight line running to the bottom right corner. The typing on the last page, including the jurat, occupies less than half a page. Mrs. Plattig believes that Mr. Hart had the substantive paragraphs of the affidavit typed in after she had sworn the jurat and left the office.

**73**  Mr. Hart's secretary testified that she did all of Mr. Hart's typing. She testified that it was standard practice to insert a sort of "Z" when there was insufficient room on the page to include the rest of the text and the jurat. She identified her printing on the exhibits prepared for Mr. Hart's signature. She denied that she had ever received a blank page with the signatures of the client and Mr. Hart and then prepared an affidavit. The original affidavit, which Ms. Forth obtained from the court file, was identical to the copy kept in Mr. Hart's file.

**74**  Mrs. Plattig had been anxious that the trial scheduled for April 29, 1991 proceed. She was worried that her only source of income, her disability benefits, would cease in November 1991. Unfortunately, shortly before April 24, she learned of her father's death in Czechoslovakia and made plans to fly to Europe on April 24 for the funeral and to attend to her father's affairs. On her way to Mr. Hart's office that day, she was involved in an automobile accident. Mrs. Plattig is a highly excitable and emotional person. One can only imagine her state of mind exacerbated by the additional factors of her father's death, the automobile accident and the adjournment of the trial.

**75**  While I reject Mrs. Plattig's assertion that she signed blank pages, I expect that if she had carefully read the affidavit, she would likely have objected strenuously to certain paragraphs, including the two cited above. However, in all of the stressful circumstances of that day, I doubt that she put her mind to the particulars of the affidavit she signed.

**76**  On April 24, Mr. Hart filed Mrs. Plattig's affidavit with a notice of motion seeking interim maintenance in the amount of $3,500 monthly and an adjournment of the trial. On April 29, Mr. Hart attended in Court and obtained an adjournment of both the trial and the maintenance application.

**77**  Mrs. Plattig was adamant that she had left instructions to Mr. Hart to bring on an interim maintenance application while she was in Czechoslovakia. A note of Richard Hart made May 4, 1991 indicates that she telephoned from Czechoslovakia inquiring about the court date for that application. His further note indicates that he told Mr. Hart that Mrs. Plattig was under the impression that Mr. Hart would be bringing such an application. Richard Hart made a note of Mr. Hart's response:

Not so - just wanted to amend pleadings to include claim for maintenance. I had said, and she's agreed, that there would be no claim for interim maintenance during the period that long-term disability payments netted her $2300 tax free/month and she has $$ in bank - ct wouldn't order maintenance.

**78**  Mr. Hart reiterated at trial that was his position at that time, although he could not explain why he had referred to payments in the amount of $2,300.

**79**  There was clearly a breakdown in communication between solicitor and client on this issue. On July 9, 1991, Mr. Hart confirmed his agreement with Mrs. Plattig that the application would only be dealt with prior to trial if her disability benefits ceased. On August 7, 1991, Mr. Hart wrote to Mr. Promislow advising him that Mrs. Plattig was in "financially straightened circumstances" and had instructed him to bring on the application for interim maintenance as quickly as possible. He suggested some dates in mid August. On August 13, 1991, Mr. Hart wrote to the plaintiff, explaining that if Mr. Promislow did not agree to a chambers date in August, it would be virtually impossible to set the application during the Court's summer recess and advising her he would be on holidays from September 3-16. He enclosed a Form 89 for Mrs. Plattig to complete to update her financial situation and asked for information regarding the status of her disability benefits. He outlined at some length the factors which a Court was likely to consider on an interim maintenance application. He told her that if her necessary expenses exceeded her benefits, a Court might award her the amount of the deficiency.

**80**  Mr. Hart continued to press Mr. Promislow for an acceptable chambers date, without success. Apparently in July, Mr. Promislow had agreed to recommend that Mr. Robillard pay Mrs. Plattig $6,000 on a without prejudice basis to tide her over until the February 1992 trial if her benefits ceased in November 1991. On August 26, 1991, Mrs. Plattig sent Mr. Hart an angry letter berating him for, inter alia, failing to bring on an application. She made the allegation that she had signed empty pages of an affidavit on April 24. The following day, she cashed her life insurance policies for their surrender values. Mr. Hart replied in a letter dated September 5 that he had dictated on September 1. He noted again that an interim maintenance application would likely not be successful if her disability benefits continued to trial.

**81**  By this time, relations were severely strained between Mrs. Plattig and Mr. Hart. Mrs. Plattig's numerous and lengthy letters of detailed inquiries and complaints were met with Mr. Hart's reiterations of the history and status of the proceedings and the legal requirements relating to the remedies sought by the plaintiff.

**82**  On September 13, Mrs. Plattig faxed further letters requesting that if Mr. Promislow had not responded by the time Mr. Hart returned on September 16, he was to proceed immediately with a an application for maintenance on a rush basis. She described herself as "puzzled" by the contradictory views he had expressed in August 13 and September 1 letters regarding the likely success of an application.

**83**  After his return from vacation, Mr. Hart became ill and briefly hospitalized. He was required to convalesce at home until the end of September. In his absence, Richard Hart attempted, unsuccessfully, to obtain Mr. Promislow's cooperation in setting down an interim application.

**84**  At trial, Mr. Hart testified that Mrs. Plattig did not provide him with the updated financial and expense information he had requested in his letter of August 13, which he again requested on October 29, 1991. In that letter, he reiterated the purpose of interim maintenance and the obstacles to success in the circumstances of her case. At that time, he was unaware that Mrs. Plattig had returned to work two weeks earlier. He was still attempting to set the application down. In early November, Mr. Promislow became ill and the matter was again delayed. No further efforts were made to set down the matter. Although Mrs. Plattig was and remains adamant that she was not mentally or physically ready to return to work in October, Dr. Buhler considered her return to work to be a positive step in her recovery.

**85**  Jeffrey Rose, a barrister and solicitor, who has practiced matrimonial law in Vancouver for 15 years, prepared an expert report for the defendants on this issue. After reviewing numerous documents and an extensive statement of facts prepared by Ms. Forth, he concluded that it was highly unlikely that a reasonably competent matrimonial lawyer in Vancouver would have brought an interim maintenance application on behalf of Mrs. Plattig.

**86**  Mr. Rose was cross-examined on his report at trial. Many of the facts he considered were not disputed; however, some were denied by Mrs. Plattig and others are simply incorrect. For example, Mr. Rose considered Mr. Justice Spencer's characterization of the relationship between Mrs. Plattig and Mr. Robillard as a limited form of relationship that might be categorized as one of "roommates." That is an inaccurate characterization. All the evidence points to the fact they resided in a common law relationship for almost seven years. Mr. Rose also took into account Mrs. Plattig's evidence in her affidavit sworn April 24, 1991, which she alleges was completed by Mr. Hart without her knowledge or consent after she had signed "blank pages." However, Mr. Rose testified at trial that his opinion would have been the same if he had not considered those facts. He expressed the opinion that a reasonably competent matrimonial lawyer would not have brought an application for interim maintenance before April 1991 for the following reasons:

1. Dr. O'Shaughnessy stated in his report that Mrs. Plattig was capable of working and not disabled. She was living on Saturna Island where there was no work available to her in her profession.
2. Mrs. Plattig was receiving monthly tax-free disability benefits of $2,000.
3. The initial judicial impression of the case was Spencer J.'s opinion that Mrs. Plattig's financial position had improved during the relationship.
4. There was no evidence that Mrs. Plattig's earning capacity had been impaired during the relationship.
5. Mrs. Plattig advised Mr. Hart in March 1991 that she was considering a return to work as a real estate agent in Vancouver.

**87**  Mr. Rose further opined that a reasonably competent matrimonial lawyer would not have brought an application for interim maintenance after April 1991 for the following reasons:

1. Mrs. Plattig continued to receive her disability benefits up to trial in February 1992. (In October 1991, she had received a lump sum of $12,000 to assist her return to work.)
2. Her interim maintenance application set in April 1991 was adjourned generally to be dealt with at trial or earlier if her disability payments terminated. "Clearly the lawyer would have considered that the client's expectation was that interim maintenance would replace the disability payments when they expired."
3. By October 17, 1991, Mrs. Plattig had returned to work as a real estate agent and the trial was only four months away. Any interim application would likely have been adjourned until trial with the possibility of retroactive maintenance if entitlement and need were established.

**88**  In Mr. Rose's opinion, a reasonably competent family lawyer would expect a judge to rule that the tax-free disability benefits removed the need for interim maintenance.

**89**  Mr. Rose conceded that it was for the client to decide whether or not to pursue an application for interim maintenance. In circumstances such as these, it would be the duty of the lawyer to advise the client that she would be unlikely to succeed on such an application while she was in receipt of disability benefits and to advise her of the cost. However, it would be the client's decision whether or not to proceed with the application.

**90**  Mr. Rose is an extremely able and well-respected member of the family bar in Vancouver and his analysis was helpful. However, in my opinion, a trial judge who has the benefit of hearing the witnesses, reviewing the documents and finding the relevant facts can determine whether or not a lawyer was negligent in failing to bring an interim maintenance application in all of the relevant circumstances without the benefit of an expert opinion.

**91**  On the evidence, it is clear that Mrs. Plattig vehemently pressed Mr. Hart to proceed with an interim maintenance application from April 24, 1991 until November 1991. However, I conclude that Mrs. Plattig cannot establish, on a balance of probabilities, that Mr. Hart's failure to set down such an application constituted ***negligence***. I consider it more likely than not that an application, which would have been vigorously opposed, would not have succeeded for the following reasons: (a) prior to receiving disability payments in November 1989, Mrs. Plattig was employed and had significant assets; (2) she received tax-free disability benefits from November 1989 until the date of trial; (3) in January and March 1991, she received cash from her sales of her assets; (4) she was in Czechoslovakia from April 24 until June, 1991; (5) Dr. O'Shaugnessy expressed the opinion in April 1991 that Mrs. Plattig was not clinically depressed or disabled from working as a real estate agent and she could return to her profession if she was motivated to do so; (6) she was living on Saturna Island from November 1989 until October 1991; and (7) she returned to work on October 1991, while still in receipt of benefits. Any minimal "top-up" of her disability benefits to meet her necessary living expenses would likely have been offset by the legal costs associated with pursuing the application to its conclusion.

**92**  Mrs. Plattig views her entitlement to maintenance between 1989 and 1992 from the vantage point that, in 1995, the Court of Appeal awarded her the sum of $4,500 a month retroactive to September 1992. However, by the time she argued her appeal, her only source of income was social assistance, she had been hospitalized for her psychiatric distress and it was clear that she would never be able to return to her profession. Further, McEachern, C.J.B.C. noted that "to his credit respondent's counsel practically conceded entitlement...." None of those circumstances pertained to the period between 1989 and the Robillard Trial.

**93**  I conclude that Mrs. Plattig suffered no loss as a result of Mr. Hart's failure to follow her instructions to proceed with a claim for interim maintenance.

1. was Mr. Hart negligent or in breach of his duty to Mrs. Plattig in reaching an agreement with Mr. Promislow that Mr. Robillard was a semi-retired businessman, whose net worth was $5 million in 1982 and at the date of trial and whose annual income was $300,000?

**94**  Mrs. Plattig is adamant that she was unaware of, and did not consent to, any agreement between counsel that Mr. Robillard's net worth was $5 million and he had an annual income of $300,000. She also reiterated several times during the trial Mr. Robillard was not semi-retired, rather he was "actively busy", expanding his businesses and establishing new ones. She asserts that Mr. Hart entered into the agreement with Mr. Promislow in an attempt to cover up the fact that he had not obtained expert evidence or the necessary financial documentation to substantiate her trust claims.

**95**  I accept Mr. Hart's evidence that the purpose of making the impugned agreement was to benefit Mrs. Plattig: it saved her the considerable expense of proving Mr. Robillard's financial circumstances and it eliminated a lengthy and potentially risky dispute on those issues at trial. The only significance of Mr. Robillard's income was that it was sufficient to satisfy any maintenance award the Court might make. Similarly, the fact that Mr. Robillard was described as "semi-retired" because he had ceased his active involvement in the construction industry and now dealt with the income from his properties and his investments was irrelevant to Mrs. Plattig's claims and chance of success.

**96**  Regrettably, Mrs. Plattig is convinced beyond any doubt that the primary reason that she failed to establish her claims in resulting and constructive trust is because Mr. Hart "negligently" agreed with Mr. Promislow that Mr. Robillard's net worth was $5 million at the time the cohabitation commenced and concluded and at the date of trial. She asserts that Mr. Hart "shot [her] case fatally in its heart" because the agreement constituted an admission that there was no enrichment.

**97**  In fact, that agreement played no role in Mr. Justice Oliver's analysis. He took into account the law relating to resulting and constructive trusts and determined on all of the evidence that Mrs. Plattig had neither made a contribution to Mr. Robillard's assets, nor suffered a corresponding deprivation, to entitle her to a remedy.

**98**  In order for Mr. Hart to plead her case, Mrs. Plattig had to provide Mr. Hart with the necessary facts relating to the nature and extent of her contributions and corresponding deprivation. At trial, both Mrs. Plattig and Mr. Robillard had the opportunity to testify with respect to those issues. It is clear that Oliver J. considered and weighed their evidence, and that of the other witnesses, and reached his conclusions accordingly. Mr. Robillard's net worth at any given time was irrelevant to that process. Nothing I have heard in this trial, which occupied some 29 days, has led me to the conclusion that there was any additional evidence that Mr. Hart could have adduced to further advance Mrs. Plattig's case.

**99**  Mrs. Plattig attempted to establish an evidentiary foundation that Mr. Robillard's assets were undervalued at the Robillard Trial. She called Mr. Promislow and Mr. Robillard as witnesses in this trial. Mr. Promislow invoked solicitor-client privilege and, because he had not reviewed his file, he was unable to recall most of the events of the Robillard litigation. He was not a helpful witness to Mrs. Plattig. It would be an understatement to say that there is no love lost between Mrs. Plattig and Mr. Promislow and the questions and answers too frequently degenerated into rancorous feuding.

**100**  Mr. Robillard is 77 years old and suffers from health problems. He testified that he was unable to estimate what his net worth was in either 1982 or 1989 because of the fluctuations in the real estate market. He testified that he did not quarrel with the $5 million figure that counsel agreed to but he did not know, or could not remember, how it was arrived at. He had not brought any documentation to this trial and was reluctant to commit himself to answers relating to the nature or value of his property holdings. After answering, or not answering a number of questions, Mr. Robillard removed a note from his pocket that indicated that his lawyer, Mr. Hobbes, had told him to tell the Court that these issues had been litigated and to inquire whether or not he had to answer Mrs. Plattig's questions. It was also obvious that neither Mrs. Plattig nor Mr. Robillard understood the concept of the client's right to claim solicitor-client privilege. I asked Mr. Robillard to return the following week with his counsel.

**101**  Mr. Robillard was re-called with Mr. Hobbes in attendance. Mr. Hobbes indicated that Mr. Robillard had been advised of, and was claiming solicitor-client privilege. Mr. Hobbes pointed out that the issues concerning the relevance of Mr. Robillard's financial worth had been canvassed extensively in 2000, when Mrs. Plattig brought a Rule 28 application to examine Mr. Robillard on the nature and value of his assets between 1982 and 1992. Madam Justice Stromberg-Stein dismissed Mrs. Plattig's application. In reasons for judgment issued October 27, 2000, she concluded that Mr. Robillard's financial affairs were immaterial to claims against Mr. Hart for solicitor's ***negligence***. Mrs. Plattig's application for leave to appeal that order was dismissed.

**102**  I ruled that Mrs. Plattig could not question Mr. Robillard about his financial affairs between 1982 and 1989 because he had little recall of past events, he had not reviewed any financial documentation, and that issue is simply not relevant to Mrs. Plattig's claims against Mr. Hart. I advised Mrs. Plattig that her claim for unjust enrichment depended upon her proving that she had made a direct or indirect contribution to Mr. Robillard's assets and suffered a corresponding deprivation. Merely proving that Mr. Robillard's assets had increased over the period of their cohabitation would not have entitled her to a remedy. Mrs. Plattig's evidence at trial with respect to the contributions she said she made and the losses she said she incurred did not satisfy the trial judge that Mr. Robillard had been unjustly enriched. That finding was not overturned on appeal. Regrettably, my ruling, which she interpreted as yet another denial of justice, greatly upset Mrs. Plattig.

**103**  Mr. Hart testified that he advised Mrs. Plattig of his agreement with Mr. Promislow on January 16, 1992 and she raised no objection. The documentary evidence confirms that counsel reached the agreement prior to a pre-trial conference held on January 17, 1992. The judge's pre-trial notes indicate that both counsel indicated that "full disclosure of financial position" had been made by both parties and that "parties can agree on net worth of defendant." On January 24, 1992, Mr. Hart wrote to Mr. Promislow, requesting further financial disclosure and asking him to confirm "as you indicated at the pretrial conference that you are prepared to admit for the purposes of trial that your client's current net worth stands at $5,000,000 and that this was the case at the time of separation." Although the letter was copied to Mrs. Plattig, she testified that she did not receive it. I find her evidence improbable as the copy of the letter placed in evidence bears Mr. Hart's signature. Mr. Hart and his secretary testified as to the office practice with respect to correspondence. Three copies of that letter would have been prepared: Mr. Hart would have signed the original letter to Mr. Promislow and a copy to the client. The third copy, unsigned, would have been placed in the file.

**104**  Mrs. Plattig was not present at the pre-trial conference. However, she was present at trial, when on the first day, the following exchange took place:

THE COURT: What are the assets you're fighting over; value?

MR HART: The approximate amount of Mr. Robillard's assets in total is $5 million net I believe.

MR. PROMISLOW: We have agreed, rather, Mr. Robillard was a semi-retired businessman at the time of the commencement of the relationship with assets of approximately five million and still has assets of approximately five million net.

**105**  Mr. Promislow testified that he did not recall when he and Mr. Hart had reached an agreement that Mr. Robillard's assets were worth $5 million or who had initiated the agreement. However, he did recall that the purpose was to expedite the trial and avoid the problems created by the fact that there were shareholders other than Mr. Robillard in some of the companies in issue. He testified that Mr. Hart had been "a pit bull" on behalf of Mrs. Plattig and the agreement saved her money. In his opinion, the $5 million figure was an accurate assessment of Mr. Robillard's net worth, after calculating his net equity and interest in the properties if they were liquidated, mortgages paid, etc.

**106**  I conclude that Mrs. Plattig was made aware of the agreement between counsel either prior to the pre-trial conference or when she received a copy of Mr. Hart's letter confirming the agreement. In any event, she heard counsel articulate the agreement on the first day of trial. I reject her evidence that she did not learn of the agreement until 1993 when she obtained and reviewed the transcripts of the trial. Further, I find that Mr. Hart was not negligent in reaching the impugned agreement with Mr. Promislow and Mrs. Plattig's case was not prejudiced by that agreement.

1. was Mr. Hart negligent or in breach of his duty to Mrs. Plattig in failing to obtain financial information from Mr. Robillard and proper valuation of his business assets?

**107**  Valuing Mr. Robillard's business assets was complicated by the fact that they consisted of shares in privately owned companies (not solely owned by Mr. Robillard) that owned real estate. Much of this trial centred on Mrs. Plattig's complaints that Mr. Hart failed to obtain sufficient financial information regarding Mr. Robillard's assets and then procure formal business valuations of those assets. She complains that he should have conducted corporate searches of Mr. Robillard's companies and Land Title Office searches of his properties, taken steps to obtain Mr. Robillard's relevant financial documents or a Property and Financial Statement or other sworn statement with respect to his assets, and examined him for discovery on those issues. She states that after he successfully obtained a court order from Master Doolan for production of certain documents in April 1991, Mr. Hart then failed to compel Mr. Robillard to comply with that order.

**108**  There is no question that Mrs. Plattig vigorously pressed Mr. Hart to obtain that financial information. Most of Mr. Hart's many attempts to obtain Mr. Promislow's cooperation failed. On July 12, 1990, Mr. Hart served a demand for discovery of documents. Mr. Promislow responded by sending copies of the front pages of Mr. Robillard's personal tax returns. He declined to produce corporate tax information and Mr. Hart subpoenaed Mr. Robillard to bring that financial documentation to the trial set for October 29, 1990. Mr. Hart obtained the assessed values, as well as a "drive-by appraisal", of Mr. Robillard's properties. He obtained corporate and land title searches.

**109**  On March 11, 1991, Mrs. Plattig swore an affidavit prepared by Mr. Hart in support of an application for production of documents relating to Mr. Robillard's companies. She swore, inter alia, that the documents were necessary

1. To show the increase in the value of the Defendant's assets either in specific figures or proportionately between the time of the commencement of the common law relationship alleged in the Statement of Claim and the separation date as alleged therein.

**110**  Mrs. Plattig is correct when she points out that counsel's agreement negates that stated purpose for which the documents were sought. However, while an increase in the value of assets that are potentially family assets is relevant in an action between married spouses who are entitled to an interest in family assets pursuant to the FRA, the Act's provisions do not apply to common law spouses. Mrs. Plattig's trust claims depended upon her ability to demonstrate contribution to the acquisition, maintenance or enhancement of Mr. Robillard's assets, regardless of whether or not they increased during cohabitation. The value of those assets would only become relevant after she established her entitlement to an interest in them.

**111**  Mrs. Plattig conceded in this trial that she suspected that Mr. Robillard owned assets that she was unaware of and hoped that a diligent investigation would disclose them. Again, the existence of undisclosed assets would not be relevant to her claims. She could hardly claim to have made a contribution to assets if she did not know of their existence.

**112**  On April 6, 1991, Master Doolan ordered that certain documents be produced and others made available for inspection. Mr. Hart and Richard Hart were given access to some but not all of the documents covered by the order.

**113**  Mr. Hart testified that in January 1991, another family lawyer, Mr. Warren, advised Mrs. Plattig that the cost of obtaining valuations of Mr. Robillard's companies and properties would be approximately $40,000 and that she instructed Mr. Hart that she did not have the funds to retain a business valuator to pay for the valuations of those assets. Mrs. Plattig denies that Mr. Warren gave that advice or that she told Mr. Hart she could not afford business valuations.

**114**  In Mrs. Plattig's opinion, Mr. Hart testified that she lacked the money for the valuations in order "to justify his ***negligence***". She testified that she was in real estate and could have obtained money if she needed it. She said she would have sold her fur coat, paintings, and furniture if she had been advised they needed the documents and the valuations. She had friends who would have done the valuation without "payment up front", but Mr. Hart had failed to obtain the necessary underlying documentation. However, her assertions must be viewed in the context that she was apparently unable or at least unwilling to pay Mr. Hart's legal fees after April 24, 1991 and all or part of Wolridge Mahon's account.

**115**  Mrs. Plattig also suggested that Mr. Hart could have applied to Court for an order that would require Mr. Robillard to pay for the searches. In my opinion, a Court would have been unlikely to make such an order in favour of a common law spouse.

**116**  Mr. Hart obtained substantial information with respect to the value of Mr. Robillard's properties. I conclude that Mrs. Plattig would not have been willing to incur the expense of expert valuations of Mr. Robillard's assets at the material times. In any event, and most importantly, valuations would not have assisted Mrs. Plattig in proving any entitlement to an interest in those assets.

1. was Mr. Hart negligent in his preparation for and conduct of the trial?

**117**  Mrs. Plattig asserts that Mr. Hart failed to prepare her for her examination for discovery and failed to prepare adequately for his discovery of Mr. Robillard. She says that Mr. Hart failed to properly examine Mr. Robillard as to his assets and their values. He should have demanded a list of documents and examined those documents before conducting his discovery of Mr. Robillard.

**118**  Mrs. Plattig submits that Mr. Hart failed to identify and assess the issues in the action and failed to prepare adequately for the mini-trial and for trial. She says that he failed to prepare Mrs. Plattig to give her direct evidence at trial.

**119**  Those allegations, which are groundless, do not merit further discussion.

**120**  Mrs. Plattig asserts that Mr. Hart negligently failed to file a lis pendens. The relief sought in the statement of claim included a claim for a lis pendens against Mr. Robillard's condominium in which they had cohabited. However, Mr. Hart did not take steps to register a lis pendens in the Land Title Office. He testified that it was his practice to plead that relief and proceed to register a lis pendens if necessary. However, in this case, there was never any question that Mr. Robillard had sufficient assets to satisfy any judgment a Court ordered. Mrs. Plattig did not suffer any loss.

**121**  Mrs. Plattig complains that Mr. Hart failed to pursue the issue of promissory estoppel even though he knew that Mr. Robillard had made certain promises to induce her to move in with him and sell her business, that Mr. Robillard had promised her 20% of his estate in his will, and that Mrs. Plattig had relied on those promises. The short answer to this complaint is that the doctrine of promissory estoppel does not constitute an independent cause of action: Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co., [*[1970] S.C.R. 932*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JBDT-B539-00000-00&context=); Combe v. Combe, [1951] All E.R. 767.

**122**  Mrs. Plattig was critical of the proceedings at the mini-trial in December 1990 and Mr. Justice Spencer's memorandum. She testified that at the beginning of the mini-trial, Mr. Promislow characterized her as "a gold-digger". She said that she was so upset, she began crying and left. She testified that she could not return to the courtroom and Mr. Hart never told her what happened in Court. She pointed to a number of factual errors in the memorandum: e.g. a statement that Mr. Robillard's housekeeper had come twice a week rather than twice a month; a finding that her financial position had improved by $300-400,000; a failure to refer to the medical evidence; and a characterization of their relationship as "roommates".

**123**  Mrs. Plattig also alleges that Mr. Hart attempted to settle her claim prior to trial without having sufficient facts regarding its value. Prior to the October 29, 1990 trial date, Mr. Hart and Mrs. Plattig discussed making a settlement offer to Mr. Robillard. A drive-by appraisal of the real estate owned by Mr. Robillard's companies estimated their collective property value at $11.4 million. Their collective assessed value was $8,951,000. Those figures did not take into account encumbrances on the properties or the interests of other shareholders. After extensive discussions with Mrs. Plattig, Mr. Hart delivered a settlement offer to Mr. Promislow on October 22, 1990 offering to settle Mrs. Plattig's claims for $1,476,730. Mr. Promislow flatly rejected that offer and, on October 26, he filed a notice of payment into Court in the amount of $62,500. Mr. Promislow withdrew that offer on October 31, 1990.

**124**  Mrs. Plattig also complains that, in January 1991, Mr. Hart arranged for Mrs. Plattig to have "independent legal advice" by taking her to Mr. Warren, a lawyer that he had chosen. She testified that on January 18, 1991, Mr. Hart gave her Spencer J.'s mini-trial memorandum to read in the hallway of his office and presented her with another bill for $10,000; he told her there was an offer from Mr. Promislow and advised her to settle for $70,000; and he said they were going to see Mr. Warren, who had offices in the same building. She said Mr. Warren asked questions for about half an hour and then opined that "it was on the cutting edge." She said she was in shock and lost faith in Mr. Hart completely from that day. She thought it was wrong to go for a second opinion without having the proper documentation regarding Mr. Robillard's properties.

**125**  Mr. Hart testified that he had set up the meeting with Mr. Warren the previous day and given him substantial documentation to review, including the pleadings, the written submissions for the mini-trial, Mr. Justice Spencer's memorandum, and a response to that memorandum that Mr. Hart and Richard Hart had prepared. He said that Mr. Warren agreed to provide a second opinion for approximately $1,000. Mr. Hart said that he and Richard Hart and Mrs. Plattig met with Mr. Warren for approximately an hour and a half on January 18. He said that Mr. Warren generally concurred with Mr. Justice Spencer's opinion, felt that pursuing a constructive trust remedy was dicey or risky on the current law and the facts, and considered that the cost of valuing Mr. Robillard's business assets would be exorbitant, in the nature of $40,000, and unrealistic given the risks involved. When they returned to Mr. Hart's office, Mrs. Plattig was distressed and decided that she did not wish to get a formal opinion from Mr. Warren.

**126**  Mrs. Plattig adamantly denies that Mr. Warren gave them an estimate of the cost of business valuations.

**127**  Mrs. Plattig called Mr. Warren as a witness. Although there is no doubt the meeting took place (almost 12 years ago), Mr. Warren did not recall the meeting. He had no recollection of meeting Mrs. Plattig or discussing her file with Mr. Hart.

**128**  Mrs. Plattig complains that at two pre-trial conferences, one before Mr. Justice Fraser on September 14, 1990 and another before Mr. Justice Cohen on January 17, 1992, Mr. Hart stated that Mr. Robillard had "made full disclosure of documents" when he knew that was not the case. She was present at the first conference but not the second. In both cases, Mrs. Plattig was extremely anxious that her trial proceed on the scheduled date. Informing the pre-trial judge that the opposite side had not made full disclosure would have jeopardized the trial date. In the event, the agreement between counsel as to Mr. Robillard's net worth satisfied any need for further disclosure of financial documents.

**129**  Mrs. Plattig is also critical of Mr. Hart's conduct of the Robillard Trial. She says Mr. Hart was unable to enter certain important documents at trial relating to Mr. Robillard's properties and to her financial situation. Those documents were reviewed at length in this trial. I am satisfied the documents that did not make their way into evidence were either unnecessary because of the agreement as to Mr. Robillard's net worth or they related to matters that Mrs. Plattig testified to or were admitted by Mr. Robillard. None of the documents in question could have advanced Mrs. Plattig's claim that she had contributed to Mr. Robillard's assets.

**130**  Mrs. Plattig also complains that Mr. Hart failed to enter documents to refute Mr. Promislow's assertion that she had rented her old suite effective January 1, 1989 (some six months before the separation). However, she testified extensively regarding that issue and explained the significance of a misleading document in evidence that contained the reference to the January date.

**131**  Mrs. Plattig says that Mr. Hart's failure to examine her from written questions illustrates the fact that he was unprepared for trial. Mr. Hart testified that it is not his practice to use a set of written questions at trial and that he examined Mrs. Plattig from an extensive chronology that he, Richard Hart, and Mrs. Plattig had prepared and updated during the litigation.

**132**  Mrs. Plattig points out that Mr. Hart made a number of factual errors, e.g., he said in opening that Mrs. Plattig sold FCR concurrent with the separation when in fact the sale was in November 1988 and the separation was July 1989. However, Mrs. Plattig gave extensive evidence on that issue as well as all of the factual matters relevant to her claim.

**133**  Mrs. Plattig complains that Mr. Hart should not have called Mr. Bianco as a witness and that he failed to call certain witnesses that she wished to testify. In particular, she had pressed Mr. Hart to call Mr. Aaron and Ms. Somers to testify regarding the negotiations for a prenuptial agreement. She wanted her personal friends, including Mrs. Najman, called to testify as to various aspects of her relationship with Mr. Robillard.

**134**  Mrs. Plattig called Mr. Aaron, Ms. Somers and Mrs. Najman as witnesses at this trial. Mr. Aaron, a family lawyer, testified that he had met with both Mrs. Plattig and Mr. Robillard in 1984 with respect to a cohabitation or prenuptial agreement. Mr. Aaron told them that he could not act for both of them and that he considered Mr. Robillard, who had made the appointment, to be his client. He recommended that Mrs. Plattig obtain her own lawyer. His subsequent conversations with Mr. Robillard were covered by solicitor-client privilege.

**135**  Mr. Aaron agreed that in 1991, Mr. Hart had contacted him and discussed calling him as a witness at the trial. Mr. Aaron had said that Mr. Hart would not be doing his client any service by calling him and, in any event, he could not disclose what Mr. Robillard had told him.

**136**  Ms. Diane Somers, a solicitor, testified that she met Mrs. Plattig in the fall of 1986 when Ms. Somers joined the law firm that was the registered and records office for FCR. In 1987, Mr. Robillard had come to her office, unannounced, to tell her that he wanted to enter into a cohabitation agreement with Mrs. Plattig. He gave her his card and told her that his lawyer, Mr. Promislow, would be calling her. Her notes at the time recorded that Mr. Robillard told her Mrs. Plattig was distraught that the issue was not settled and hoped that Ms. Somers could advise her and reassure her. Ms. Somers attempted to negotiate a settlement but little progress was made.

**137**  Mrs. Najman, who has known Mrs. Plattig since 1972 or 1973, worked as a realtor with Mrs. Plattig at FCR. She testified that Mr. Robillard had wanted Mrs. Plattig to sell her business because that might give them the opportunity to travel and enjoy life but Mrs. Plattig was reluctant because that was her only source of income. In October 1989, Mrs. Plattig needed financial assistance and Mrs. Najman borrowed $4,525 for Mrs. Plattig against a commission. Mrs. Plattig subsequently repaid that loan with interest.

**138**  I am satisfied that those witnesses would not have assisted Mrs. Plattig's case at the Robillard Trial. Mr. Robillard conceded that (a) at the beginning of the relationship he wanted to marry her, (b) he had agreed to provide her with security in his will, (c) subsequently, he had hoped to conclude a cohabitation agreement with Mrs. Plattig, and (d) he had consulted counsel in that regard. Mr. Robillard testified that operating FCR was stressful to Mrs. Plattig and that stress interfered with their relationship.

**139**  Mr. Bianco, who was one of Mr. Robillard's best friends and a business associate, did not give evidence that was helpful to Mrs. Plattig. Mr. Hart had hoped that, placed under oath, without advance warning of the questions to be put to him, Mr. Bianco would testify as to Mr. Robillard's intention to marry Mrs. Plattig and her involvement in his business affairs. However, Mr. Bianco's evidence clearly favoured Mr. Robillard's characterization of their relationship.

**140**  Every trial lawyer must make a judgment call when deciding what witnesses to call at a trial. In hindsight, many a lawyer has regretted calling a particular witness. Such an error in judgment, apparent after the fact, does not constitute ***negligence*** unless it can be characterized as "egregious". The decision to call Mr. Bianco cannot be described as egregious.

**141**  At this trial, Mr. Clarke testified that while acting for Mrs. Plattig in 1984, Mr. Robillard had attended at his office to discuss his love for Mrs. Plattig and his desire to enter into a relationship with her. At that time, Mr. Robillard discussed his personal and business affairs and apparently disclosed his net worth at approximately $3 million. However, the evidence is clear that Mrs. Plattig never disclosed that meeting to Mr. Hart prior to Oliver J's reasons for judgment. She had advised him of Mr. Clarke's involvement in a proposed partnership between Mrs. Plattig and Mr. Robillard's sons that did not come to fruition. In any event, Mr. Clarke's evidence on either issue would not have advanced her case.

**142**  Mrs. Plattig is critical of Mr. Hart's decision not to cross-examine Dr. O'Shaughnessy at trial. On Mrs. Plattig's instructions, he had required that Dr. O'Shaughnessy be available for cross-examination. Mr. Hart testified that after Mrs. Plattig had testified, he considered that it would be counterproductive to give Dr. O'Shaughnessy an opportunity to comment further on her demeanour during his independent medical examination of her on April 2, 1991. In his report, Dr. O'Shaughnessy had noted:

The assessment was rather unusual in that Mrs. Plattig was a difficult person to interview in that she frequently would not respond to direct questions and tended to repeat those things she seemed to wish me to hear and avoid other areas of my enquiry. This led to some confrontation between us in the middle of the interview at which point she grew distressed and told me she felt I was biased in that I was not sympathetic to her cause. I comment on this since this is a very unusual experience for me despite the fact that I assess numerous people monthly for third part assessment purposes.

**143**  Dr. O'Shaughnessy concluded his report by saying that he was unable to express a full opinion because he did not have the necessary data from Dr. Buhler and Ms. Ross who had treated her. Mr. Hart then obtained the necessary authorizations from Mrs. Plattig to enable Dr. O'Shaughnessy to get that information but the latter had not followed up. In Mr. Hart's opinion, if Dr. O'Shaughnessy testified, he would have been given an opportunity to bolster the "vague conclusions" in his report.

**144**  In the circumstances, Mr. Hart's decision not to cross-examine Dr. O'Shaughnessy was probably a wise one.

1. was Mr. Hart negligent or in breach of his duty to Mrs. Plattig in failing to introduce the expert report prepared by Wolridge Mahon at trial?

**145**  To establish her claim for unjust enrichment, it was necessary that Mrs. Plattig demonstrate that she had suffered a deprivation as a result of her relationship with Mr. Robillard. It was her evidence that Mr. Robillard pressured her to sell her successful real estate business, FCR, so that she could spend more time with him, with a view to retiring together. She alleged that she had incurred a loss as a resulting of selling her business in December 1988 at his insistence. She said she had been offered $150,000 for the business earlier in 1988 but had rejected that offer after she received a letter from Mr. Promislow stating that Mr. Robillard had not asked her to sell it. She testified that problems in the relationship, which had arisen in August 1988, had been sorted out and Mr. Robillard once again urged her to sell the business. She sold it for $100,000.

**146**  In December 1990, Mr. Hart retained the accounting firm of Wolridge Mahon and instructed Mr. Selman, a senior partner at that firm, to estimate the loss Mrs. Plattig had incurred in selling her business. Ms. Schweitzer, a partner under the supervision of Mr. Selman, prepared a single page of handwritten calculations dated December 17, 1990 (the "Handwritten Report") and faxed it to Mr. Hart that day for use at the mini-trial. Ms. Schweitzer described the components of Mrs. Plattig's loss:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 1. |  | loss of earnings if award is taxable: | $251,700 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | loss of earnings if award is not taxable: | 143,200 |  |

(assumption under 1 and 2: pre-judgment interest will compensate for foregone interest on the above loss of earnings.)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | value of foregone capital gains exemption |  |  |
|  |  | utilized on 1988 sale (not discounted) | 34,700 |  |

1. difference between Abramson offer of $150,000 (requiring Jana to stay with FCR (for five years) and accepted offer (of $100,000 with no such requirement)

|  |  |  |  |
| --- | --- | --- | --- |
|  | pre-tax | 50,000 |  |
|  | after tax | 32,700 |  |

(this point assumes Jana could sell the business at November 30, 1990, for $150,000.)

**147**  Thus Ms. Schweitzer's calculation of Mrs. Plattig's loss from selling her business would be either $319,100 or $210,600.

**148**  In his written submissions for the mini-trial, Mr. Hart stressed the fact that Mrs. Plattig had accumulated a sizeable asset base as a result of her hard work. The considerable energy she expended in fulfilling her spousal role had been to the detriment of her own financial situations. She lost business opportunities and sold her successful real-estate company at Mr. Robillard's request in an attempt to salvage the relationship.

**149**  On December 20, 1990, Wolridge Mahon rendered an account for $3,350 to Mrs. Plattig "c/o David Hart" for "meetings, discussions and calculations" regarding FCR.

**150**  On February 12, 1991, Mrs. Plattig wrote to Ms. Schweitzer, requesting details of the summary of her conclusions and supporting documentation, and a breakdown of Wolridge Mahon's account. On February 20, 1991, Ms. Schweitzer replied, describing the work done and noting that the bulk of any research for a formal report had been done. If no formal report were required, their account would be adjusted; if a formal report was required, then "the additional costs to do so would not be substantial."

**151**  On March 19, 1991, Mr. Hart wrote to Wolridge Mahon requesting a formal report (the "Final Report"). He advised Ms. Schweitzer that the trial date was set for April 28, 1991 and reminded her that the Evidence Act required that expert reports be submitted not less than 30 days before trial. He stated that he and Mrs. Plattig agreed "that it is necessary and appropriate for this report to be finalized and delivered to me as soon as possible so that I can serve it on Mr. Promislow in accordance with the provisions of the Evidence Act." He added:

I have indicated to Mrs. Plattig that in preparing the faxed handwritten report that I used for the mini trial you had prepared this on an urgent basis but in preparing this you had also done the necessary research and obtained the appropriate documentation to back up your formal valuation and she now understands this a realizes that this research was included in your account for the "urgent" handwritten report.

**152**  Although Mrs. Plattig noted that the letter was not copied to her, it is clear from the contents of the letter that she was present when Mr. Hart dictated it.

**153**  On March 22, 1991, Ms. Schweitzer made a note on that letter, indicating that in a telephone conversation with Mr. Hart, he had asked her to fax sections of the report to him for his review and indicated that he would be seeing Mrs. Plattig that day. He had stated "previous bill to be paid before final report is released." Mr. Hart testified that not "releasing" it meant it would not be used at trial. His notes of his conference with Mrs. Plattig that day contain no reference to the Wolridge Mahon account or report.

**154**  On March 26, 1991, Ms. Schweitzer made a note "spoke to David 12:25. Hold off sending out draft. He will call later this p.m." Her file contains a phone message bearing the same date, presumably written by a receptionist, indicating that at 1:40 David Hart had telephoned and left a message: "Please fax ASAP Draft Platigg [sic] Report this afternoon. Please note that Mr. Hart will pay Ms. Platigg's bill." Mr. Hart denied that he left a message indicating that he would pay Mrs. Plattig's account. Ms. Schweitzer did fax the Final Report to Mr. Hart later that day.

**155**  On March 26, 1991, Mrs. Plattig wrote to Mr. Hart, addressing a number of issues. With respect to the valuation of FCR and loss of earnings, she referred to the invoice from Wolridge Mahon for $3,350 "which everyone agreed was very expensive". She noted the correspondence between herself and Ms. Schweitzer and stated:

On March 22, 1991, you stressed to me that the formal report is of importance for our claims. You then requested the full payment of $3,350 - to be paid into your trust account. You have told me that if I will not pay under these conditions that I will not possibly get the report on time for the 30 days requested by Promislow as our evidence. I told you that I felt manipulated and exposed to undue pressure to pay an invoice that I cannot justify and which has not been presented to me properly.

There has been enough time since I have met with Ms. Schweitzer sometime before December 17th mini-trial.

What is the situation now and what steps have been taken by you to protect our claim?

**156**  In that letter, she had outlined six issues that concerned her and enclosed a cheque for $5,000 on her account, stating that she reserved the right to withhold further payment until all issues had been attended to and the trial proceeded on April 29th. When she attended at Mr. Hart's office on the same day, he insisted that she pay $10,000 and she did so. Mr. Hart signed her letter stating that he "agreed to accept $10,000 on a/c of fees and disbursements and to provide written report by 4:00 p.m. March 27 to address above concerns."

**157**  Mrs. Plattig testified that she gave Mr. Hart a cheque for $10,000 on the condition that he place $3,500 into his trust account to pay Wolridge Mahon. Mr. Hart testified that he had made it clear that the $10,000 would be applied against his outstanding account of $17,720.39. Indeed, that transaction is reflected on Mr. Hart's computer billing sheets.

**158**  On March 27, 1991, Mr. Hart wrote a lengthy reporting letter to Mrs. Plattig. In the first sentence, he confirmed that he had received her cheque for $10,000 "by way of a part payment of my outstanding account." He then addressed the concerns she had raised in her letter of March 26. He stated that he had received the Final Report from Wolridge Mahon:

[It] is being submitted to Mr. Promislow's office in accordance with the provisions of the Evidence Act so that he will receive the same before close of business on the 28th of March in order to avoid any possibility of an application for an adjournment on the grounds that this is late. For your information, I enclose a copy of the draft which I have approved and have made only one amendment (page 7) .... I am very satisfied with the form of the report and the conclusions and I will now have to wait to see whether Mr. Promislow will serve notice that he requires the business valuer to be present at trial to support the report to be available for cross-examination. ... Ms. Schweitzer is aware of the trial dates and the possible need to have the business valuer present.

**159**  His letter makes no reference to the fact that if Mrs. Plattig failed to pay for the Final Report that it would not be entered at the trial. Mr. Hart testified that, at that time, he had not made any arrangement with Mr. Selman and had the trial proceeded in April 1991, he would have guaranteed Wolridge Mahon's fees; however, he was not prepared to incur the cost of updating the Final Report for the February 1992 trial.

**160**  On March 28, 1991, Ms. Schweitzer wrote to Mr. Hart enclosing five copies of the Final Report, which consisted of ten pages with four appendices. It calculated the quantum of the loss as $485,500 (earnings component: $321,600 and capital component: $163,400). On the same day, Mr. Hart said he wrote and couriered a letter to Mr. Promislow, enclosing the Final Report "in adherence to the Evidence Act."

**161**  On March 28, Mr. Hart also wrote the following letter to Ms. Schweitzer:

With regards to your account, Ms. Plattig has previously written to you expressing her concerns regarding this matter. The instructions from Ms. Plattig are that although she appreciates that the bill is predicated upon the fact that your handwritten synopsis of the valuation which was provided by fax immediately prior to the mini trial was prepared on the basis of the background material that you had intended to use in the formal report and that therefore your bill reflects this additional work, she expects to receive the full written report (which we now have and which will be forwarded to her) before she pays your bill. My instructions from Ms. Plattig are that upon receipt of the written report within the time necessary to allow me to meet the requirements of the Evidence Act she will place me in funds or will deliver directly to you funds in payment of your account.

|  |  |
| --- | --- |
| (emphasis added) |  |

**162**  That letter, signed by Mr. Hart's secretary on his behalf, was not copied to Mrs. Plattig. Mr. Hart testified that omission was inadvertent.

**163**  After Mrs. Plattig received the Final Report, she telephoned Ms. Schweitzer to say that the report did not take into account her 1990 commission earnings from Remax of $25,707.21. Ms. Schweitzer testified that a correction would reduce the loss component of $321,600 by that amount. She advised Mr. Hart that the Final Report required an amendment but no changes were made before trial.

**164**  On June 17, 1991, Wolridge Mahon sent Mrs. Plattig, c/o Mr. Hart, an account for services to the period ending May 3, 1991. The account was for $2,809.66 for preparation and delivery of the Final Report. On June 25, Mr. Hart forwarded that account to Mrs. Plattig.

**165**  On August 26, 1991, Mrs. Plattig wrote to Mr. Hart enquiring why Wolridge Mahon's account had increased to $6,329.18 from $3,417. She also asked why he had not told her Mr. Promislow's reaction to the Final Report. Mr. Hart replied on September 5, noting that Mr. Promislow had not replied and was not required to do so, and confirming that Ms. Schweitzer would be available if required.

**166**  On February 3, 1992, the trial commenced. At the end of Mrs. Plattig's direct evidence the following day, Mr. Hart indicated that he would enter a valuation report regarding the sale of FCR that Wolridge Mahon had prepared in October 1990 in preparation for trial when Ms. Schweitzer testified. Oliver J. described the Handwritten Report as "this handwritten thing" and commented that it would be helpful if accountants could save sufficient money out of their fees to buy a typewriter. Mr. Hart replied that Ms. Schweitzer would explain why the document was not in final form. (In fact, that document had been prepared in December 1990, well after the trial set for October 29 had been adjourned.) Ms. Schweitzer was available to testify on February 6 but the trial was adjourned that day and she was not called until February 27.

**167**  In this trial, Mr. Hart gave two versions as to when he learned that Mr. Promislow had not been served with the Final Report. One version was that on February 27, when the Robillard Trial recommenced, Mr. Promislow said he understood Mr. Hart was calling Ms. Schweitzer and advised him that he had not been served with the Wolridge Mahon report. Mr. Hart testified that he wanted to proceed, he did not have time to telephone his office and have his file searched, and was "still stuck" with the agreement he had made with Mr. Selman, and so elected to proceed on the basis of the Handwritten Report.

**168**  Mr. Hart's second account is that the conversation with Mr. Promislow took place on February 3, either during the plaintiff's opening or when they were waiting for the trial to begin. The trial was delayed because Mr. Justice Spencer, the judge assigned, was not acceptable to counsel because he had conducted the mini-trial. If the latter version were correct, Mr. Hart had more than three weeks from the opening of the trial on February 3, 1991 until his statements to the Court on February 27 to ascertain whether or not Mr. Promislow had been served with the Final Report.

**169**  When Ms. Schweitzer was called as a witness on February 27, 1992, Mr. Hart elicited the fact that Wolridge Mahon had been asked by Mr. Hart in late 1990 to perform "a quick and dirty estimate of what loss might have been suffered by Miss Plattig because of the sale of her shares in False Creek." He stated (erroneously) to the Court:

The reason for the handwritten calculation was we were rapidly coming up to the trial. The final report hasn't been submitted under the Evidence Act.

**170**  He repeated that the Final Report dated March 28, 1991 "has not been submitted to my friend ... under the Evidence Act, and I am not intending to submit it other than for the purpose of clarifying, providing a typed incorporation of this written report." Following objection by Mr. Promislow, the Final Report was not shown to the Court.

**171**  Mr. Hart proposed to put to the witness the Handwritten Report submitted at the mini-trial, of which Mr. Promislow had notice. Oliver J. commented again on the fact that the calculations were handwritten and inquired why Mr. Promislow had no notice of the Final Report:

THE COURT: Tell me this, Mr. Hart: Why is it that there is a report dated March 28th, 1991, roughly a year ago, of which your learned friend has not had notice?

MR. HART: My lord, I will have to do this by way of a submission which is effectively evidence. My client, at the time of the preparation of this report, was, immediately prior to the date previously set in April of 1991 for the trial of this matter, had to adjourn the hearing. My client went to Czechoslovakia as a result of the death of her father at that time. At that time my client had not paid Miss Schweitzer's offices account, and Mr. Salman (sic) of that office and I discussed the matter, and it was delivered to me on the understanding that I would not deliver to my friend or submit it to the court at that time because their account had not been paid. It was delivered to me for my information. My client has since not been able to pay the account, which she did not have the money, therefore I'm bound by the arrangement I made with Mr. Salman on a professional basis that I would not submit that report. However, at this point, as we have got into the trial, Mr. Salman and Miss Schweitzer have agreed that Miss Schweitzer would attend for the purpose of clarifying her conclusions as contained in the handwritten report. And all I am merely doing with this report is attempting to use it to assist your lordship, because it is in typed form. I'm quite prepared that the items my friend refers to, which are sources and opinions, should not form part of the record here. The report itself was intended to produce a conclusion to show your lordship that there was a loss, substantial loss, to Miss Plattig by virtue of her selling the business at the time that she did. The reasons and so on are all a matter for evidence and argument. The question is merely purely and simply is if she had sold it - if she had not sold at that time would she have gained financially by retaining the business.

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| (emphasis added). |  |

**172**  In this trial, Mr. Hart testified that his explanation was not entirely correct. He said the inaccuracy related to the assertion that he had made an agreement with Mr. Selman "that I would not deliver it to my friend." He said the agreement was that he could deliver the Final Report to counsel but not submit it at trial. He added that his assertion to Oliver J. that the Final Report was delivered to him only for his information compounded the inaccuracy.

**173**  Mrs. Plattig is adamant that she gave Mr. Hart sufficient money in trust to cover Wolridge Mahon's account and that she was unaware the Final Report would not be put into evidence at the trial. She was unaware of any such arrangement between Mr. Hart and Mr. Selman.

**174**  At the Robillard Trial, Ms. Schweitzer testified from her Handwritten Report that the loss was comprised of (1) lost earnings of $251,700 if award taxable or $143,200 if not taxable, and (2) foregone capital gains exemption of $34,700, and (3) after tax difference between the missed sale of $150,000 and the actual sale of $100,000 or $32,700. That loss, $319,100 or $210,600, depending on whether the award was taxable, was considerably less that the loss of $485,000 that Ms. Schweitzer had calculated in her final report.

**175**  In written argument following the evidence, Mr. Hart submitted that the sale of FCR had resulted in a loss to Mrs. Plattig of a sum in excess of $300,000 by way of loss of capital and loss of income. He described Ms. Schweitzer as a witness who remained steadfast under cross-examination with respect to the validity of her conclusions and the underlying valuation principles.

**176**  In his cross-examination and written argument, Mr. Promislow questioned Ms. Schweitzer's methodology and the factual assumptions upon which her opinion relied. Mr. Justice Oliver was not satisfied that Mrs. Plattig had suffered any employment or business loss but concluded that even if she had, it was not related to any act or omission of Mr. Robillard. He clearly rejected Mrs. Plattig's evidence that Mr. Robillard had induced her to sell FCR.

**177**  In March 1992, Wolridge Mahon rendered an additional bill of $1,198.77 for Ms. Schweitzer's attendance in court on February 6 and 27.

**178**  Ms. Schweitzer testified in this trial. She said that her partner Don Selman had asked her to do an analysis of Mrs. Plattig's lost income. She was asked to prepare the Handwritten Report for the mini-trial in December 1990 and then the Final Report for the trial anticipated in April 1991.

**179**  On February 3, 1992, Mr. Hart told Ms. Schweitzer that the Final Report could not be put into evidence but did not explain why. She testified that she never learned why the Final Report could not be presented at trial. Mr. Hart testified that he was sure he had told her why the Final Report could not be put into evidence.

**180**  On February 27, 1992, she heard Mr. Hart tell the Court that the Final Report could not be admitted in evidence but said that she paid little attention to what was said because she was suffering from the effects of a severe flu. She recalled that, at a break in the proceedings after her direct examination, Mr. Hart took her to the lawyers' lounge and asked her "if you are asked on cross-examination about why the report wasn't in evidence, would you say it is because you were not paid?" and she replied that she could not do that.

**181**  Ms. Schweitzer testified that Wolridge Mahon's account was never paid. Mr. Selman, the partner who had brought in the file, was responsible for collection issues.

**182**  Mr. Selman also testified. Understandably, he had trouble independently recalling events that occurred more than twelve years earlier. He did not remember a specific arrangement he had made with Mr. Hart regarding the Final Report and their fees and had no notes on these issues. He relied on his interpretation of the material in the Wolridge Mahon file, particularly Ms. Schweitzer's note of March 22, 1991 that related Mr. Hart having told her "previous bill to be paid before final report is released." On the basis of those documents, he believed that because the deadline for delivery of the Final Report to opposing counsel was at hand, he had agreed to give Mr. Hart the Final Report to deliver to counsel but that it was not to be used in court unless paid for.

**183**  Although Mrs. Plattig was their client, not Mr. Hart, Mr. Selman said it would not be the firm's policy to advise her specifically of the arrangement he had made with Mr. Hart. He assumed that Mr. Hart would advise Mrs. Plattig of the fee arrangement. Wolridge Mahon would get the necessary information from the client and otherwise deal with counsel. In family matters, it is customary for clients to pay Wolridge Mahon's accounts. Very rarely do counsel agree to pay their client's account.

**184**  Mr. Hart testified that just before the February 1992 trial, he asked Mr. Selman about updating the Final Report. Mr. Selman replied that he was not prepared to update it because their fees remain unpaid; however, Ms. Schweitzer could attend and give evidence on the basis of her Handwritten Report. Mr. Selman had no recollection or notes of that discussion.

**185**  Mr. Hart did not recall exactly when he had made the arrangement with Mr. Selman. He testified that if he had tendered the Final Report in the April 1991 trial, he would have personally guaranteed payment. However, he was not prepared to pay for updating it for the February 1992 trial. I have difficulty reconciling Mr. Hart's evidence at trial with his statement to Mr. Justice Oliver that the arrangement was made before the Final Report was delivered to him in March 1991, as well as the fact that he apparently referred to that arrangement in his discussion with Ms. Schweitzer on March 22, 1991.

**186**  The alleged arrangement between Mr. Selman and Mr. Hart is not documented. The fact that Mr. Hart never specifically advised Mrs. Plattig in writing of such an arrangement is a surprising omission given the volume and detailed nature of the correspondence between them and his repeated acknowledgement of the arrangement to Wolridge Mahon. Mr. Hart wrote to Mrs. Plattig on June 17, 1991 enclosing a further account from Wolridge Mahon. On September 5, 1991, he wrote to Mrs. Plattig saying that Ms. Schweitzer was prepared to attend at the trial if required. In neither case, did he refer to the fact that the Final Report could not be used at trial unless paid for.

**187**  Mr. Hart was asked why he put a copy of the Final Report in the plaintiff's supplementary book of documents less than a week before the trial. He replied that Mrs. Plattig might still have paid the bill and because he wanted the judge to know it existed.

**188**  Whether or not Mr. Promislow was ever served with the Formal Report remains a mystery. Mr. Promislow was not questioned on that issue at this trial. Mr. Hart did not apparently follow up the issue after the Robillard Trial because, as Ms. Forth notes, he had not intended to enter the Final Report in any event. No courier slip indicating delivery was located but Ms. Forth points out that Mr. Hart's entire file was given to Mrs. Plattig in 1992.

**189**  In his letter to Mr. Hart of September 29, 1994, enclosing a draft affidavit in the Court of Appeal proceedings, Mr. Promislow stated: "if you wish to deal with the formal accountant's report that can be dealt with by the simple expediency of explaining that the report could not be produced until paid for and it was not paid for by Mrs. Plattig." Mr. Hart did not recall his conversation with Mr. Promislow regarding this issue and the affidavit he subsequently swore contained no reference to the Final Report.

**190**  Even allowing for the fact that more than 10 years have passed since the Robillard Trial, Mr. Hart's evidence as to why the Final Report was not introduced at trial is unsatisfactory. However, assuming that Mr. Hart was at fault in failing to have it introduced at trial by failing to serve it on Mr. Promislow or failing to tell Mrs. Plattig of his arrangement with Mr. Selman, I find that Mrs. Plattig suffered no damage as a result. She paid no fees to Wolridge Mahon for the preparation of either the Handwritten Report or the Final Report and, after April 24, 1991, no fees or disbursements to Mr. Hart. The purpose of both the initial "quick and dirty" calculation and the Final Report was to demonstrate to the Court that Mrs. Plattig had suffered a tangible loss as a result of her relationship with Mr. Robillard. She did not claim damages, in the amount of her loss, against Mr. Robillard. Nor could she. The alleged loss was relevant only to prove that she had suffered a deprivation, an essential element in her claim for unjust enrichment. Thus, the amount of the loss was irrelevant, so long as there was a meaningful loss. Ms. Schweitzer testified as to the fact that Mrs. Plattig had suffered a loss and explained the components of that loss.

1. did Mr. Hart misappropriate funds in the amount of $3,350 given to him by Mrs. Plattig?

**191**  There is no question that, at the present time, Mrs. Plattig firmly believes that from the $10,000 she paid Mr. Hart on March 26, 1991, $3,350 was for the purpose of paying Wolridge Mahon's account. However, she did not make that allegation in her voluminous complaint about Mr. Hart to the Law Society or in her statement of claim in this action.

**192**  I accept Mrs. Plattig's evidence that when she gave Mr. Hart a cheque for $10,000 on March 26, 1991, rather than the $5,000 she had intended to deliver, she wanted part of those funds to be used to satisfy Wolridge Mahon's outstanding account. However, Mr. Hart's handwriting on that letter and his letter of the following day specifically acknowledge that the $10,000 was to be applied to his outstanding account. On January 30, 1991, his account stood at $23,720.89. Mrs. Plattig made two payments of $3,000 each on February 6 and February 17. Her payment of $10,000 on March 26 and a further payment of $5,000 on April 24 reduced the outstanding balance to $2,720.39. That amount was reflected on Mr. Hart's account to her for further services on July 18, 1991.

**193**  All of the evidence supports Mr. Hart's assertion that he applied the entire $10,000 to his unpaid account on March 26, 1991. He did not misappropriate funds in the amount of $3,350 paid to him in trust.

1. did Mr. Hart breach his fiduciary duty to Mrs. Plattig by swearing an affidavit prepared by Mr. Promislow in the appeal proceedings commenced by Mrs. Plattig?

**194**  Mrs. Plattig alleges that Mr. Hart breached his duty to her when he provided Mr. Robillard's counsel with an affidavit to be used against her in her application to extend the time for hearing her appeal.

**195**  In the Court of Appeal proceedings, Mrs. Plattig sought and obtained a number of adjournments, generally because of her ill health and impecuniousity. She also sought to adduce fresh evidence. On August 15, 1994, she swore an affidavit, in which she referred to the "gross misconduct" by Messrs. Hart and Promislow in the course of the Robillard Action. She appended a letter and a two-volume complaint she had made to the Law Society against them alleging ***negligence*** and professional misconduct. She expressed the conviction that

the complaint will prove that the evidence neglected by the lawyers was essential to my case and had due diligence been applied with regard to the production of documents for the February 3, 1992 Trial, the Judgment would have been favourable for the Appellant.

**196**  In her letter to the Law Society, she set out a number of allegations against Mr. Promislow and Mr. Hart, described their behaviour as unethical, and accused them of jointly abusing the legal system.

**197**  On September 28, 1994, Mrs. Plattig swore a further affidavit in support of her application to adjourn the appeal for health reasons. She swore, inter alia,

that the Appellant was forced to appeal the Judgment of the Honourable Judge Mr. Oliver due to the Appellant's counsel's professional misconduct in handling the case, coupled with the Defendant's contempt of Court by ignoring a subpoena along with his counsel's unethical behaviour all of which caused the Appellant to suffer mental, financial and emotional stress.

**198**  Mrs. Plattig had advised the Law Society that she would be forwarding extensive additional material to support her complaints. On September 20, 1994, a Law Society staff lawyer wrote to Mrs. Plattig, stating that they had not commenced an investigation because they were awaiting that additional information. Accordingly, neither Mr. Hart nor Mr. Promislow had been notified by the Law Society of Mrs. Plattig's complaints.

**199**  However, because Mrs. Plattig had appended the original complaint to her affidavits in the Court of Appeal, Mr. Promislow was aware of it. On September 29, 1994, he forwarded Mrs. Plattig's material to Mr. Hart. He made the following suggestion:

It would be my request that you provide me with an Affidavit although I appreciate if you feel you are unable to as her former solicitor. However with respect I think it is important for the profession that the record be set straight and that you are not guilty of ***negligence*** and that during the trial all documents provided to you and obtained by you for the purpose of trial were presented to the Court notwithstanding objection as to some of the documents by Defence Counsel.

...

I write the above letter from my vantage point that neither of us are guilty of any misconduct towards Mrs. Plattig (she may not be happy with my so called sexist remarks calling her in front of Judge Spencer a gold digger but I stand by that. ) ... If I have an erroneous recollection of facts and either of us are guilty of misfeasance or malfeasance then obviously I do not want you to make any commitment ....

**200**  Mr. Promislow appended a draft affidavit. After discussing it with Mr. Hart over the telephone, Mr. Promislow had the affidavit amended and then sent to Mr. Hart, who swore and returned it. Mr. Hart denied that Mr. Robillard or Mr. Promislow had been in contempt of Court for failing to comply with a subpoena duces tecum requiring that Mr. Robillard "produce financial statements for companies of which he was a part shareholder." Mr. Hart stated:

Upon instructions from Mrs. Plattig and in my position as her counsel very shortly before trial I served Mr. Promislow with a subpoena duces tecum requiring inter alia that Mr. Robillard produce financial statements for companies of which he was a part shareholder.

It was my belief that the subpoenas were necessary as Mrs. Plattig did not have the financial resources for us to seek to have independent valuation of those companies made and we were concerned as to proof of Mr. Robillard's net worth. Mr. Promislow indicated that while there were other shareholders and he was not prepared for that reason to proved the financial statements he was prepared to make admissions as to the Defendant's net worth and those admissions were made and that in my opinion disposed of the need for the subpoena and disposed of any requirement of further evidence.

**201**  He also stated that Mrs. Plattig had urged him to add documents to the document briefs that he advised her may not be admissible. He added:

Where documents were objected to by Mr. Promislow at trial I strenuously urged for their admission and in most cases was able to have the Court overcome his objection and allow those documents to be entered as exhibits. I categorically deny that am [sic] in breach of trust or that I did not follow Mrs. Plattig's instructions as she alleges or at all.

**202**  Mrs. Plattig claims that by swearing that affidavit, Mr. Hart breached his fiduciary duty and duty of confidentiality to her. She believes that Mr. Hart should not have added his support to Mr. Promislow, who was opposing her application to extend the time for the hearing of her appeal.

**203**  In my opinion, Mr. Hart's affidavit is neutral on the issue of whether Mrs. Plattig was entitled to the extension she sought (and obtained). It discloses no confidential information. It simply responds to serious allegations made to the Law Society and published to the Court relating to his ethical and professional conduct. In the event, Mrs. Plattig's actions clearly waived solicitor-client privilege. Moreover, she suffered no damages as a consequence.

1. has Mrs. Plattig suffered any damages as a result of any ***negligence*** or breach of duty by Mr. Hart?

**204**  Mrs. Plattig sought substantial damages against Mr. Hart in this lawsuit. I will briefly summarize the reasons why they cannot succeed under each head:

1. an amount equal to interim maintenance of $4,500 between May 1989 and September 1, 1992: It is probable that a Court would not have awarded her interim maintenance;
2. $800,000 for her constructive trust claim calculated on the basis of 40% of $2 million representing the increase in Mr. Robillard's assets during the period of cohabitation: Mrs. Plattig has never established that Mr. Robillard was unjustly enriched at her expense or that she is entitled to a resulting or constructive trust in any of his assets;
3. $485,000 for her business loss incurred in the sale of FCR: there was never a claim for the business loss against Mr. Robillard and the amount of the loss was always irrelevant; the only significance of obtaining the Wolridge Mahon report was to attempt to show that she had suffered a deprivation;
4. $45,200 paid in legal fees to Mr. Clarke and Mr. Somers to clarify and secure the Court of Appeal judgment: the difficulties involved in clarifying the Court's award of spousal maintenance appear to have arisen solely from Mr. Promislow's (and presumably Mr. Robillard's) lack of cooperation.
5. the return of $31,000 in legal fees paid to Mr. Hart up to April 24, 1991: the Court can order disgorgement of fees where the services rendered were so negligent or valueless that there has been a fundamental breach of the contract or a total failure of consideration: Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw [*[1999] B.C.J. No. 1414*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4P3-00000-00&context=) (S.C.). Those circumstances do not pertain in this case. Mrs. Plattig has never paid Mr. Hart's fees and disbursements of $38,000 from April 24, 1991to the conclusion of the trial in February 1992 and subsequent written argument. She clearly benefited from Mr. Hart's services by obtaining, on appeal, a support award worth more than $1.2 million over her lifetime.
6. the sum of $4,931.72 to lawyers who assisted her in the preparation of her appeal factum: those costs are not recoverable from Mr. Hart.
7. $1,000 for legal fees paid to Ms. MacLennan: Mr. Hart suggested that Mrs. Plattig obtain a second opinion to assess the case following Mr. Justice Spencer's memorandum but he is not responsible for cost of Ms. MacLennan's advice.
8. $8,085.04 owing to Wolridge Mahon: that amount has been written off and there is no claim for that amount against Mrs. Plattig.
9. punitive and exemplary damages, and costs in this action: there are no grounds for any award of costs to Mrs. Plattig.

Conclusion:

**205**  For the foregoing reasons, I conclude that Mrs. Plattig has not suffered any damages as a result of any act or omission by Mr. Hart. The defendants are entitled to their costs.

ALLAN J.

**End of Document**

[***Proprietary Industries Inc. v. CIBC World Markets Inc., [2002] B.C.J. No. 1531***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G31W-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Harvey J.

Heard: April 26, 2002.

Judgment: July 3, 2002.

Vancouver Registry No. S016291

**[2002] B.C.J. No. 1531** | 2002 BCSC 999 | 114 A.C.W.S. (3d) 1146

Between Proprietary Industries Inc., plaintiff, and CIBC World Markets Inc., defendant

(22 paras.)

**Case Summary**

**Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a reasonable cause of action or defence — Professional occupations — Investment bankers — *Negligence*.**

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| Application by the defendant CIBC World Markets to strike Proprietary Industries' statement of claim for failure to disclose a reasonable cause of action. Proprietary was a minority shareholder of eDispatch.com Wireless Data, a target for takeover by AirIQ. The directors of eDispatch contracted CIBC to prepare a fairness opinion respecting the proposed takeover by AirIQ. Proprietary reviewed the fairness opinion, launched a competing bid and then ultimately voted against the transaction with AirIQ. Proprietary brought an action in ***negligence*** and negligent misrepresentation against CIBC alleging economic losses suffered as a result of the ***negligence*** by CIBC in the preparation of the fairness opinion. CIBC argued that Proprietary had failed to pleaded reliance on the fairness opinion in what was really a claim of negligent misrepresentation.  HELD: Application dismissed.  The claim for negligent misrepresentation was fatally defective because the pleadings did not allege actual reliance on the part of Proprietary. However, the claim for negligent performance of services remained. The law was unsettled respecting the existence of a duty of care between investment bankers preparing fairness opinions and non-privity shareholders in the context of corporate mergers. It was clear that the fairness opinion was produced for the purpose of influencing Proprietary. The issue of whether the fairness opinion was produced for the plaintiff's benefit was not fully canvassed before the court and thus was best dealt with in the context of a full factual matrix. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(24), 19(24)(a).

**Counsel**

P. Griffin and L.E. Thacker, for the plaintiff. J.B. Laskin and D. Chernos, for the defendant.

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| **HARVEY J.** |

INTRODUCTION

**1**  This matter comes before the court as an application to have the pleadings struck out under 19(24) for failing to disclose a reasonable cause of action.

**2**  The pleadings concern a minority shareholder, Proprietary Industries Inc. ("Proprietary") who has suffered economic losses as a result of alleged ***negligence*** by CIBC in the preparation of a fairness opinion (the "Fairness Opinion"). The Fairness Opinion was contracted for by the Board of Directors of eDispatch.com Wireless Data Inc. ("eDispatch") regarding a takeover of eDispatch by AirIQ.

**3**  Proprietary has brought an action ostensibly in ***negligence*** and negligent misrepresentation against CIBC. CIBC asks that the action be struck out because, regardless of the factual claim in ***negligence***, the claim is one of negligent misrepresentation, and Proprietary has not obviously plead reliance on the impugned fairness opinion. Proprietary argues that the concept of reasonable reliance ought to be extended to cover what Proprietary actually did: purchasing eDispatch shares, reviewing the fairness opinion which was contained in a management circular, and launching a competing bid. Proprietary also hired its own financial advisor who recommended against the transaction and made such representations to the eDispatch Board of Directors. Proprietary ultimately voted against the transaction. In the alternative, Proprietary argues that, because the claim of negligent misrepresentation and ***negligence*** are bound up with one another, the claim of negligent misrepresentation should not be struck.

ANALYSIS

1. Under what circumstances should an action be struck out under 19(24)(a)?

**4**  Rule 19(24)(a) of the Rules of Court provide as follows:

At any stage of the proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

1. it discloses no reasonable claim or defence as the case may be...and the court may grant judgment or order the proceeding to be stayed or dismissed and may order costs of the application to be paid as special costs.

**5**  The test under Rule 19(24)(a) was settled by the Supreme Court of Canada in Hunt v. Carey Canada Inc. *(1990), 74 D.L.R. (4th) 321* (S.C.C.), where the Court stated at 335-6:

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of court 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 suceed, 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 the plaintiff's statement of claim be struck out under rule 19(24)(a).

**6**  The Court also stated at 344:

The fact that a pleading reveals "an arguable difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

**7**  However this does not mean that every ***negligence*** claim must be allowed to proceed. In Kripps v. Touche Ross & Co. [*(1992), 69 B.C.L.R. (2d) 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S0W5-00000-00&context=) [leave to appeal refused, [*[1993] 2 S.C.R. viii*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SC1-FJTD-G51C-00000-00&context=)], the British Columbia Court of Appeal stated at 88:

A court might be tempted, at the present point in the development of the Canadian law of ***negligence***, to permit every ***negligence*** claim to proceed to trial. But that would lead to a long and costly period of uncertainty, one particularly costly in the commercial world where certainty in the law is of considerable importance. It seems to me that the courts would fail in their duty to the community were they to decline to exercise jurisdiction under Rule 19(24) simply because of the current state of the jurisprudence in this area of law. It is, I think, important in some cases that the court make a decision at this stage concerning the extent to which recovery in ***negligence*** can be enlarged, and I believe this to be such a case.

**8**  Accordingly, it is necessary at this stage to determine whether there is a possibility that the categories of ***negligence*** ought to be enlarged so as to permit recovery for negligent misrepresentation in the circumstances of this case.

1. Is reasonable reliance a necessary component of negligent misrepresentation?

**9**  In negligent misrepresentation cases, reasonable reliance is often discussed in the context of the Anns/Kamloops test for a duty of care. In Hercules, La Forest J. explained that the relationship of proximity in the first part of the Anns/Kamloops test is not satisfied unless it was foreseeable that the plaintiff would reasonably rely on the impugned representation. This discussion of reliance in the context of duty of care, however, is concerned with theoretical reliance, not actual reliance, which is in issue in the instant case. Actual reliance functions as the causal connection between the misrepresentation and the loss. As in all types of ***negligence***, the damage must be caused by the tortfeasor.

**10**  Negligent misrepresentation is one of the few types of ***negligence*** in which it is possible to recover pure economic losses. Because negligent speech has the potential to cause economic loss to individuals who are very remote from the speaker and indeterminate liability is a very real possibility, actual reliance on the impugned communication is necessary to found a cause of action. The Supreme Court of Canada has never wavered on this point. The elements of the tort of negligent misrepresentation are set out in Queen v. Cognos Inc. [*(1993), 99 D.L.R. (4th) 626*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) at 643 as follows:

1. there must be a duty of care based on a "special relationship" between the representor and representee;
2. the representation in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making said representation;
4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
5. the reliiance must have been detrimental to the representee in the sense that damages resulted.

**11**  In Hercules Management Ltd. v. Ernst & Young, [*[1997] 2 S.C.R. 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3VR-00000-00&context=), La Forest J. stated at 184:

Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses ...

**12**  In my view, it is settled law that reliance in fact is a necessary component of a cause of action in negligent misrepresentation. If Proprietary's pleadings do not disclose such reliance, the claim in negligent misrepresentation is bound to fail.

1. What is the nature of Proprietary's claim?

**13**  Under the heading "CIBC ***Negligence*** and Negligent Misrepresentation" Proprietary pleads as follows:

1. Proprietary states that shareholders who voted in favour of the AirIQ merger relied on the Fairness Opinion and/or other representations or statements made by CIBC in deciding to vote in favour of the AirIQ merger. As a result of such reliance on the CIBC Fairness Opinion and/or other statements, the AirIQ merger was approved and the Proprietary bid was unsuccessful.
2. The conclusion of CIBC within the Fairness Opinion that the AirIQ merger was fair from a financial point of view to the shareholders of eDispatch was a material negligent misrepresentation.
3. CIBC owed in the particular circumstances of the preparation and use of its Fairness Opinion a duty of care to all eDispatch shareholders, which included a duty to exercise due care and skill in preparing, delivering and publishing the CIBC Fairness Opinion and a duty to exercise due care and skill in making its presentations and other representations and statements at the information meetings.
4. CIBC was negligent in the preparation of and expression of its opinion in the CIBC Fairness Opinion. The CIBC Fairness Opinion was wrong and misleading to eDispatch shareholders.
5. Particulars of CIBC's ***negligence*** include:
6. wrongly concluding the AirIQ merger was fair from a financial point of view to eDispatch shareholders;
7. placing an implicit value on the business of AirIQ of $38 million;
8. failing to consider and properly allocate realizable synergies, if any;
9. failing to carry out or obtain any valuation or appraisal of the value of AirIQ's business of eDispatch's business;
10. failing to adequately review and consider any AirIQ business plans and financial forecasts;
11. failing to adequately investigate and consider the precipitous finacial position of AirIQ, including negative working capital, shareholders equity of only $3.2 million, a cash burn rate of over $1.0 million per month, an inability to raise new capital or other financing, and the meaning and effect of the "going concern" risk note in AirIQ financial statements;
12. failing to consider AirIQ's technology risk and other business and market risks and uncertainties;
13. failing to consider the steep decline in technology stock values;
14. failing to consider the scarcity of venture capital for private technology companies with historical losses and no profits;
15. failing to include a control premium in the value of eDispatch shares;
16. failing to consider values of comparable companies and transactions;
17. placing itself in a conflict of interest acting in face of such a conflict of interest;
18. participating in or acquiescing in the provision of materially misleading information to eDispatch shareholders at the four shareholder information meetings.

**14**  Proprietary claims that they have plead a cause of action in ***negligence*** and negligent misrepresentation. It is clear from the pleadings quoted above that the loss caused to Proprietary allegedly resulted from a majority of eDispatch shareholders approving the AirIQ takeover bid in reliance on the correctness of the CIBC fairness opinion.

**15**  I do not accept that Proprietary's actions, which included commissioning their own fairness opinion, can be characterized as reliance on CIBC's Fairness Opinion. But even assuming such actions could be characterized as reliance, the loss suffered by Proprietary was not caused by Proprietary's reliance on the Fairness Opinion - Proprietary, after all, voted against the transaction. The facts pled indicate that it was the reliance of some of the other shareholders that ultimately led to the approval of the transaction, which in turn resulted in loss of share value and the dilution of Proprietary's holdings. The pleadings do not allege actual reliance on the part of Proprietary, and that is fatal to the claim for negligent misrepresentation. What is left, in my opinion, is a claim for negligent performance of services.

**16**  "Negligent performance of a service" is discussed by Bruce Feldthusen in Economic ***Negligence***, 4th edition, (Scarborough: Carswell, 2000) in a chapter so titled at pp. 119-58. At p. 131 he states:

In misrepresentation cases, reliance is a necessary part of the casual sequence. In other cases not limited to negligent will drafting, reliance is not a necessary element in the casual sequence. If the defendant assumes responsibility for the plaintiff's interests and damages them directly, it would be incoherent to require reliance as an element of the action.

**17**  In CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman, [*[2001] O.J. No. 4622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDF1-JXNB-64K0-00000-00&context=) (Ont. Sup. Ct.), Cumming J. found that two corporate plaintiffs did not have a cause of action in negligent misrepresentation because, in purchasing their shares, they did not rely on the alleged negligently prepared prospectus. Nonetheless, Cumming J. found that there remained an underlying claim in ***negligence*** on the following basis (at para. 61):

... as discussed below, the pleading is sufficient in allowing Conner Clark and Royal Trust to assert a claim in ***negligence*** against Cassels and Wilder on the theory that there was a special relationship of sufficient proximity at the time of the public offering such that a duty of care was owed which was not negativized by policy considerations. Conner Clark and Royal Trust argue that if Cassels and Wilder had not misrepresented the 1997 Prospectus to the securities regulators it would not have been reciepted, there would not have been any public offering, and Connor Clark and Royal Trust would have been left with their Notes and substantial real security, rather than worthless shares. That is, the plaintiffs, including Conner Clark and Royal Trust, assert that Cassels and Wilder were negligent in enabling the public offering to come to fruition through the 1997 Prospectus.

**18**  Proprietary's claim in ***negligence*** is of a similar sort. The allegation is that, if CIBC had not negligently prepared its Fairness Opinion, the takeover by AirIQ would never have been approved by the shareholders. There would have then been no consequent loss of share value and dilution of holdings.

**19**  Whether a prima facie duty of care can be said to arise in a case of negligent performance of a service depends, according to Feldthusen, on whether the defendant has directly or indirectly assumed responsibility for the plaintiff's economic interests. Feldthusen suggests that in cases where there was no direct undertaking to assume responsibility for the interests of the plaintiff, a duty of care may be founded on the fact that the information was produced for the very purpose of benefiting the plaintiff.

**20**  As it concerns the existence of a duty of care between investment bankers preparing fairness opinions and non-privity shareholders in the context of corporate merger, the law is unsettled. It is clear in the instant case that the information was produced for the purpose of influencing the plaintiff. It is less clear that the information was for the plaintiff's benefit, but that issue was not fully canvassed before the court and would best be dealt with in the context of a full factual matrix.

**21**  In my view, the existence of a duty of care in this case must also overcome significant policy hurdles, including, on the particular facts of this case, the rule in Foss v. Harbottle (1843), 67 E.R. 189, that shareholders are not permitted to sue in an individual capacity for losses suffered by the company. Nonetheless, that issue was not canvassed before this court and I would decline to strike Proprietary's pleadings on that basis.

**22**  In the result, the application to strike Proprietary's claim as disclosing no reasonable cause of action is dismissed.

HARVEY J.

**End of Document**

[***Rimmer (Guardian Ad Litem of) v. Langley (Township), [2007] B.C.J. No. 487***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S46S-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Scarth J.

Supplementary hearing: February 19, 2007.

Supplementary judgment: March 9, 2007.

Vancouver Registry No. M022368

**[2007] B.C.J. No. 487** | 2007 BCSC 340 | 32 M.P.L.R. (4th) 213 | 156 A.C.W.S. (3d) 30 | 2007 CarswellBC 515

Between Jeffrey Rimmer by his Guardian ad litem, Keith Rimmer and the said Keith Rimmer, Plaintiffs, and Township of Langley, Defendant

(28 paras.)

[Editor's Note: Original reasons for judgment were delivered May 1, 2006. See [*[2006] B.C.J. No. 968*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22D-00000-00&context=).]

**Case Summary**

**Civil procedure — Costs — Where success divided — Assessment or fixing of costs — Considerations — Application by the plaintiff for 100 per cent of his taxable costs and disbursements from the defendant allowed in part — Defendant was found 60 per cent liable while the plaintiff was found to be 40 per cent contributorily negligent — Plaintiff was entitled to 60 per cent of his costs — Costs award was not unjust.**

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| Application by Rimmer for costs -- Rimmer sued the defendant Township of Langley as a result of injuries sustained when he drove on a road maintained by the Township during a rainstorm -- He claimed that he was injured because the Township was negligent in the maintenance of the road -- Trial judge found the Township liable in ***negligence*** because it failed in its duty of care to make the road reasonably safe for travel and to take reasonable steps to prevent injury to users of the road because of hazardous flooding conditions -- Judge found Rimmer contributorily negligent because he drove too fast -- Liability was apportioned on the basis of 60 per cent to the Township and 40 per cent to Rimmer -- Rimmer claimed he was entitled to 100 per cent of his taxable costs and disbursements -- Township maintained he was only entitled to 60 per cent of his costs -- HELD: Application allowed in part -- Costs were apportioned according to findings of liability made by the court -- Township suffered no damage or loss -- It had to pay to Rimmer the same proportion of Rimmer's costs as it was liable for Rimmer's damages -- It therefore had to pay 60 per cent of Rimmer's costs while Rimmer was not obligated to pay any portion of the Township's costs -- Court had the discretion to depart from these rules but chose not to do so in this case because the result would not be unjust -- Trial on the issue of liability was hard-fought, long and difficult -- Parties took legitimate but starkly different positions on liability -- Township did not misconduct itself in the litigation and was not to be penalized in costs when it exercised its right to proceed to trial where there was an arguable issue -- It had sound reasons for forcing Rimmer to go through with this trial. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B068-00000-00&context=), s. 3(1)

**Counsel**

Counsel for the Plaintiffs: Christopher R. Bacon.

Counsel for the Defendant: Alan A. Hobkirk.

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| **SCARTH J.** |

**1**   The question before the Court is whether, as asserted by the plaintiffs, the plaintiff Jeffrey Rimmer is entitled to recover 100 percent of his taxable costs and disbursements without set-off in respect of the trial to determine the issue of liability, or whether the appropriate award of costs, as contended by the defendant Township of Langley, is 60 percent of such costs in favour of the plaintiff at Scale B.

**2**  The factual background is set out in the reasons for judgment delivered on 1 May 2006 with respect to the issue of liability as follows:

Around 10:00 o'clock in the evening of Thursday, 13 December 2001, the plaintiff Jeffrey Rimmer left the service station in Cloverdale where he worked as a service attendant and cashier and drove toward his home on 70A Avenue in the Township of Langley. At the time he was 18 years of age. He was alone in his car, a 1988 4-cylinder Turbo Coupe Thunderbird. It was a stormy night and very windy. It had been raining heavily for two days. The waters of the Salmon River were swollen. Mr. Rimmer turned off No. 10 Highway onto 72nd Avenue, a picturesque country road which runs parallel to and is three blocks north of 70A Avenue. He drove in an easterly direction over the Salmon River bridge. The road was pitch black. East of the bridge water was flowing over the road in the direction of the river, from south to north. Mr. Rimmer's car encountered this water. It went out of control and collided with some logs at the foot of the embankment on the south side of the road.

**3**  Mr. Rimmer alleges that as a result of the accident he sustained severe personal injuries. He claimed against the Township both for its ***negligence*** and in nuisance. The issues of liability and quantum of damages are being tried separately. Up to the present time only the issue of liability has been tried.

**4**  Following a 14-day trial in September and October 2005 the Court found the defendant Township liable in ***negligence*** because it:

... failed in its duty of care to make 72nd Avenue reasonably safe for the purpose of travel and to take reasonable steps to prevent injury to users of the road by reason of the hazardous flooding conditions. (Reasons for Judgment, 1 May 2006, [paragraph] 196)

**5**  The Court found the plaintiff Jeffrey Rimmer contributorily negligent because he:

... was driving too fast for the conditions ... (Reasons, *supra*, [paragraph] 200)

**6**  The Court apportioned liability on the basis of 60 percent to the defendant Township and 40 percent to the plaintiff Jeffrey Rimmer.

**7**  The order of the Court made on 1 May 2006 and entered 27 October 2006 provides as follows:

1. The apportionment of liability for the Plaintiff's damages will be 60 percent to the Defendant Township of Langley and 40 percent to the Plaintiff Jeffrey Rimmer.
2. The Parties shall be at liberty to apply for an order as to costs.

**8**  Pursuant to paragraph 2 of the order the parties seek an order as to costs. The question is whether Mr. Rimmer is entitled to an award of 60 percent of his taxable costs and disbursements or whether the appropriate award of costs in this case would be an award of 100 percent of his taxable costs and disbursements. The defendant Township concedes that it ought not to be awarded any portion of its costs.

**9**  The general rule is that costs are apportioned in accordance with the findings of liability made by the Court.

**10**  Subsection 3(1) of the ***Negligence Act***, *R.S.B.C. 1996, c. 333*, provides 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.

**11**  Where, as here, however, the defendant has suffered no damage or loss, and liability is divided, the defendant must pay the plaintiff the same proportion of the plaintiff's costs as the defendant is liable for the plaintiff's damages, but the plaintiff is not liable to pay any portion of the defendant's costs: ***Flatley v. Denike*** [*(1997), 32 B.C.L.R. (3d) 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21G4-00000-00&context=) (C.A.), at [paragraph] 19-22; ***Brown v. Black Top Cabs Ltd***. [*(1997), 43 B.C.L.R. (3d) 76*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-2494-00000-00&context=) (C.A.), at [paragraph] 16. In relation to the case at bar this means that the defendant Township must pay the plaintiff Jeffrey Rimmer 60 percent of his taxable costs and disbursements whilst on the other hand Mr. Rimmer is not obliged to pay any portion of the Township's costs.

**12**  Subsection 3(1) of the ***Negligence Act***, set out above, begins with the words: "Unless the court otherwise directs". These words vest in this Court a discretion to depart from the general rule in s. 3(1) of the Act if an apportionment of costs would lead to an unjust result: ***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.), at [paragraph] 8; ***Peters v. Davidson***, [*[1981] B.C.J. No. 987*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-DY89-M32P-00000-00&context=), at [paragraph] 19; [*(1981), 125 D.L.R. (3d) 753*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-DY89-M32P-00000-00&context=) (B.C.S.C.), at p. 757; affirmed [*(1982), 141 D.L.R. (3d) 763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JC0G-62GW-00000-00&context=) (B.C.C.A.); ***Tourigny v. McSween***, [*[1998] B.C.J. No. 441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1XT-00000-00&context=) (B.C.S.C.), at [paragraph] 20.

**13**  In ***Sayers v. Fediuk***, *supra*, Braidwood J. (as he then was) wrote at [paragraph] 8:

... the principal consideration is whether an injustice will result in following the rule set out in s. 3.

His Lordship identified certain of the factors in that case which, in his view, warranted a departure from the application of the general rule in s. 3 of the ***Negligence Act*** on the ground that to deny the plaintiff her full cost would be unjust. These factors included: (a) a shortfall in the amount paid into Court prior to trial compared with the ultimate award with the result the plaintiff was forced to go to court to recover an appropriate amount of compensation for the serious injuries she sustained [[paragraph] 9]; (b) although the Court found that the plaintiff failed to mitigate some of her damages, that finding did not alter any finding of contributory ***negligence*** [[paragraph] 11]; (c) the seatbelt defence, which affected the apportionment of costs and triggered the apportionment of costs, played only a minor part in the trial [[paragraph] 12]; (d) the defendants' expert evidence relating to the seatbelt defence was of little significance on the finding of contributory ***negligence*** [[paragraph] 12]; (e) certain of the defendants' claimed costs related to disbursements for experts that were not accepted at trial [[paragraph] 13].

**14**  In ***Logeman v. Rossa***, [*[2006] B.C.J. No. 963*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22B-00000-00&context=) (S.C.), [*2006 BCSC 692*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22B-00000-00&context=), Madam Justice Sinclair Prowse wrote at [paragraph] 71-75 as follows:

71 ... the phrase "unless the court otherwise directs" in s.3 confers on a Judge a broad discretion to depart from the general rule that costs are to be apportioned according to the findings of liability: *Peters v. Davidson* [*(1981), 125 D.L.R. (3d) 753*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-DY89-M32P-00000-00&context=) (B.C.S.C.), aff'd [*(1982), 141 D.L.R. (3d) 763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JC0G-62GW-00000-00&context=) (B.C.C.A.).

72 As was set out in the case of *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.), the principle consideration for a Judge deciding whether to exercise his or her discretion is whether the imposition of the general rule under s.3 of the ***Negligence*** *Act* would be unjust in the circumstances of the case:

73 The B.C. Court of Appeal in *Brown v. Blacktop Cabs Ltd.* [*(1997) 43 B.C.L.R. (3d) 76*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-2494-00000-00&context=) (C.A.), held that in determining whether an unjust result would occur due to the imposition of a costs rule, it is the nature and the conduct of the litigation that are to be considered. Although in *Brown* the Court of Appeal was considering Rule 29 of the *Court of Appeal Rules*, this decision is of assistance in the present case because it provides guidance on how to interpret the word "unjust" with respect to a costs award. In my opinion, the interpretation given to "unjust" in *Brown* is consistent with the interpretation that has been given in other cases that have considered the discretion to depart from the general rule in s.3 of the ***Negligence*** *Act*.

74 Thus, the specific question that I must address is whether, having regard to the nature and conduct of the litigation, I should exercise my discretion, depart from the general rule in s.3 of the ***Negligence*** *Act*, and order that the Plaintiff be paid 100% rather than 65% of her costs, because to impose the general rule would be unjust.

75 Cases such as *Ferguson v. Henshaw*, [*[1989] B.C.J. No. 1199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1YG-00000-00&context=) (S.C.); *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.); *Forsyth v. Sikorsky Aircraft Corp.* [*(2002), 100 B.C.L.R. (3d) 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0N5-00000-00&context=), [*2002 BCCA 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0N5-00000-00&context=); *Secord v. Doulis*, [*2002 BCSC 675*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G126-00000-00&context=); *Graham v. Lee*, [*2004 BCSC 1287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S31X-00000-00&context=); and *C.(T.L.) v. Vancouver (City)* [*(1995), 13 B.C.L.R. (3d) 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B23Y-00000-00&context=) (S.C.) illustrate that when determining whether the imposition of the general rule would be unjust, most, if not all, aspects of the nature and conduct of the litigation may be considered. 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.

**15**  In the ***Logeman v. Rossa*** case, *supra*, Sinclair Prowse J. awarded the plaintiff 100 percent of her costs notwithstanding the jury, in a suit for assault, false arrest and false imprisonment, brought against, amongst others, two members of the Skytrain police, Rossa and Dorby, apportioned the liability of Rossa at 65 percent in respect of the claim of assault, the plaintiff's liability at 35 percent, and dismissed the claim of assault against Dorby and the claims of false arrest and false imprisonment against both Rossa and Dorby. In awarding the plaintiff 100 percent of her costs Sinclair Prowse J. wrote:

80 The blatant untruthfulness of both of these Defendants [Rossa and Dorby] on this pivotal issue [how the Plaintiff's eye injury occurred] has had an adverse effect on both the nature and the conduct of this litigation. The complete denial of any involvement or knowledge of the circumstances in which this injury occurred rendered settlement impossible and made it more difficult for the Plaintiff to pursue her claims than it should have been, because it complicated rather than clarified the issues. [my insertions]

...

82 In addition to this, the Defendants chose to have this action tried by a Jury, thereby increasing both the costs and the stress of the trial.

...

84 ... having regard to the nature and conduct of this litigation, I am satisfied that an injustice would arise if I imposed the general rule set out in s. 3 of the ***Negligence*** *Act* and apportioned costs in accordance with the findings of liability.

**16**  On behalf of the plaintiffs, Mr. Bacon submits that it would be unjust in the circumstances of this case, given the nature and conduct of the litigation, to award costs to the plaintiffs in accordance with s. 3 of the ***Negligence Act***. The Court, it is said, ought to exercise its discretion and award the plaintiffs 100 percent of their costs.

**17**  In his written submissions Mr. Bacon argues that the Court ought to take into consideration the following factors when determining whether to exercise its discretion in this case:

1. At the time these proceedings were commenced, namely May 31, 2002, the Plaintiff, Mr. Rimmer, was an infant.
2. Mr. Rimmer was involved in a single vehicle accident on December 13, 2001 when the vehicle he was driving on a pitch black road and over a bridge in Langley encountered water flowing over the road. His vehicle went out of control and collided with some logs at the foot of the embankment off the road. Mr Rimmer's vehicle was badly damaged by the collision and he alleges he sustained severe personal injuries, including a closed head injury and severe traumatic brain injury.

...

1. Mr Rimmer candidly and properly admitted he was driving too fast for conditions at the outset of the trial.
2. In contrast, the Defendant vigorously denied all liability. It alleged throughout the litigation and trial that Mr. Rimmer was solely responsible for his injuries thereby forcing the Plaintiffs to go to trial in order to obtain any recovery.
3. The proceedings were complex and difficult. The Plaintiffs alleged at Trial that the Defendant was liable on five separate bases: (1) that it was negligent with respect to the design and construction in 2000 of the Salmon River bridge, either in failing to address the flooding problem or in exacerbating the nature of the flooding problem at the eastern approach to the bridge; (2) that it was negligent with respect to the maintenance of the river as a drainage course in failing to carry out creek cleaning at this site prior to the accident; (3) that it was negligent in failing to patrol the Salmon River bridge at 72nd Avenue during the storm event of 13 December 2001; (4) that it was negligent or liable in nuisance in failing to remove the logs from the south embankment into which the plaintiffs vehicle collided; and (5) that it was negligent in failing to erect a warning sign to alert motorists to the flood hazard that exists at the location of the accident.
4. The Defendant denied any knowledge that 72nd Av tended to flood at the subject location, making testimony necessary from several witnesses, despite Mr Veer's admission he was told by his foremen December 13th the road "flooded once a year". The Defendant tried to disavow statements made to the Department of Fisheries acknowledging that flooding was a regular occurrence at the subject location. It defended it's [sic] system of inspection, despite obvious flaws in it's [sic] Storm Contingency Patrol Map and crew numbers which fell below standard on the night in question. It denied any capacity to cut logs Mr Rimmer hit, let alone knowledge of their existence.
5. As a result, the liability trial took 14 days to complete with 21 lay witnesses and 3 experts testifying.
6. The Defendant did not make any offer to settle the issue of liability.
7. If costs are apportioned according to liability, the costs recovery available to the Plaintiffs will bear little relationship to their costs in obtaining the results achieved. Notwithstanding that Mr. Rimmer was found to be 40% contributorily negligent, the Plaintiffs were substantially successful, as the Defendant maintained throughout the proceedings that he was solely responsible. The Plaintiffs' "success" would be substantially reduced if the Plaintiffs are only awarded costs in accordance with section 3 of the ***Negligence*** *Act*.

**18**  In his oral submissions at the hearing on 19 February 2007, Mr. Bacon emphasized that the plaintiff had no choice but to go to trial in order to achieve recovery. The defendant did not offer one nickel by way of settlement, it is said, and fought every point at the trial. The Township was very adversarial, it is argued, and forced the plaintiff to call as witnesses members of its staff to prove there had been flooding at the accident site prior to 13 December 2001. The defendant's adversarial stance is reflected in the length of the trial and expense incurred. The plaintiff, on the other hand, conducted himself well at trial and made concessions, such as the fact his excessive speed contributed to the accident. Mr. Bacon responds to the defendant's contention that the concession regarding the plaintiff's speed was not made until the end of the trial by saying that if the admission as to contributory ***negligence*** had been made at the beginning of the trial the evidence would occupy the same amount of time; each and every witness would still have had to be called. A core issue at the trial was whether the defendant had prior knowledge of flooding at the accident site. That issue used up most of the trial time and necessitated calling witness after witness. The defendant's denial of knowledge of any prior flooding made the plaintiff's position more difficult.

**19**  On behalf of the defendant Township of Langley, Mr. Hobkirk concedes that the Township is not entitled to recover any portion of its costs from the plaintiff, but submits that there is no basis for departing from the general rule in s. 3 of the ***Negligence Act*** that costs are to be apportioned according to the findings of liability. It is only in exceptional and unusual circumstances where the court should depart from the provisions of the ***Negligence Act*** and "otherwise direct", it is said. This is not one of those cases.

**20**  Mr. Hobkirk refers to ***Wells (Guardian ad litem of) v. McBrine***, [*[1986] B.C.J. No. 3082*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24SB-00000-00&context=), [*70 B.C.L.R. 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-24SB-00000-00&context=) (S.C.) in which McLachlin J. (as she then was) dealt with the question of the apportionment of costs in the context of a jury finding that the defendant was 40 percent liable for the plaintiff's injuries, the plaintiff was contributorily negligent to the extent of 20 percent, and the remaining ***negligence*** was attributable to persons who were not joined as defendants. At [paragraph] 14-20 [B.C.J.], pp. 38-40 [B.C.L.R.] Madam Justice McLachlin wrote the following:

[paragraph] 14 The issue is what costs the plaintiff and the defendant should have in view of the division of liability. The defendant submits that costs should follow the jury's apportionment of liability, which would result in a partial set-off, the plaintiff recovering 40 per cent of her costs against the defendant and the defendant recovering 20 per cent of his costs against the plaintiff. The plaintiff asks this Court to exercise its discretion to make one of the following awards:

1. Full costs and disbursements to the plaintiff with no set-off;
2. 40 per cent of the plaintiff's costs and full disbursements, with no set-off;
3. 40 per cent of the plaintiff's costs and 40 per cent of her disbursements with no set-off.

[paragraph] 15 It is not disputed that normally costs follow the event (Rule 57(5)) and that the ***Negligence*** *Act*, s. 3, provides that unless the Court otherwise directs, liability for costs shall be in the same proportion as the parties' respective liability. These provisions, while establishing the normal rule, grant the Court a discretion with respect to the apportionment of costs where there is a division of liability. Additionally, the *Supreme Court Act*, s. 63(2), confers on the Court a discretion to award or refuse to award costs to any litigant in any civil proceedings in the Court. The question in this case is whether the Court should exercise the discretion granted it by these provisions, and if so, how.

[paragraph] 16 I was referred to a large number of decisions of this Court, making a variety of orders as to costs where there was an apportionment of liability. They establish that the trial judge's discretion must be exercised judicially and ought not to be exercised except for some reason in connection with the case: *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.). In general, an order varying costs from the normal rule may be appropriately made where adherence to that rule would work an injustice upon a party to the action.

[paragraph] 17 Factors which may be considered include the difficulty and length of the trial, particularly as it relates to the enquiry into the plaintiff's personal injuries, and whether the plaintiff was found liable to make good any loss or damage sustained by any one else in the accident: *Griffith et al. v. Martin et al*. [*(1984), 58 B.C.L.R. 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F8SS-62WD-00000-00&context=) (C.A.). The fact that the defendant is insured or has greater means than the plaintiff should not be considered: *Griffith et al. v. Martin et al., supra*; *McDowell v. Barry*, (1985), 1 C.P.C. (2d) 278. Payments into court and offers of settlement made under the Rules of Court are always relevant to costs if the judgment is less than the payment in or greater than the offer to settle. Short of this, settlement negotiations ought not to be taken into account, since to do so would undermine the system of payment in and offers to settle established by the rules: *Swanson v. British Columbia Packers Ltd., supra*. Nor should the normal rule as to costs be varied merely because the plaintiff had to "go to court" to get his or her remedy: *McDowell v. Barry, supra*.

[paragraph] 18 The trial in the case at bar was hard-fought, long and difficult. The costs and disbursements sustained by the plaintiff in the proof of her case must clearly have been substantial. The plaintiff, while found partially at fault for her own injuries, was not liable for loss or injuries to anyone else. On the other hand, the defendant, who was successful to the extent of avoiding 60 per cent of liability for the plaintiff's injury, must also have sustained substantial disbursements in the course of his defence. It has not been suggested that the defendant acted improperly or unfairly in requiring that the plaintiff prove her case.

[paragraph] 19 The Court has great sympathy with the plight of a plaintiff injured as tragically as was Sharon Wells. On the other hand, the Court must be careful not to penalize the defendant for exercising his legitimate right of requiring the plaintiff to prove her case and presenting a full and fair defence. I am mindful of the considered comment of the foreman of the jury at the conclusion of the trial, that in the jury's view there was really two victims of this tragic accident - Sharon Wells and the defendant, Barry McBrine.

[paragraph] 20 In these circumstances and on the peculiar facts of this case, it is my conclusion that there are no reasonable grounds to depart from the usual rule as to costs. The plaintiff will recover 40 per cent of her costs and disbursements and the defendant 20 per cent of his costs and disbursements.

**21**  In his submissions Mr. Hobkirk emphasized that no formal offers of settlement were delivered by either party. At the plaintiff's request there was a brief mediation session held prior to the trial. The fact no formal offers were delivered is understandable, it is said. More than a year prior to the trial the parties agreed to sever the issues of liability and quantum damages. Thus, at the time of the trial to deal with the issue of liability neither party had developed a position or evidence regarding quantum in order to have meaningful settlement discussions.

**22**  The trial on the issue of liability was hard-fought, long and difficult. The parties took legitimate but starkly different positions on liability. The defendant did not know of the lay witnesses called by the plaintiff until they testified, and was forced to retain an expert in accident reconstruction to deal with the issue of the plaintiff's speed on entering and leaving the flood water or risk not having evidence on the matter before the Court. The defendant did not misconduct itself in the litigation, and ought not, it is submitted, to be penalized for exercising its rights to proceed to trial where there is an arguable issue. This is not a case where the defendant forced the plaintiff to go through a costly trial without a sound reason for doing so.

**23**  Mr. Hobkirk further submits that judicial sympathy for the plaintiff has no place in determining the question of costs. Nor should the relative ability of the defendant to pay costs compared with the plaintiff be a factor to be considered by the Court in exercising its discretion. No injustice to the plaintiff will result from making the "usual order as to costs (following s. 3 of the ***Negligence Act***), it is said.

**24**  The question which must be addressed by the Court in the case at bar is whether, having regard to the nature and conduct of the litigation, the imposition of the general rule as to costs set out in s. 3(1) of the ***Negligence Act*** would be unjust.

**25**  From my perspective as the trial judge it was apparent that the trial was hard-fought but fairly-fought on both sides. Discrete issues which were critical to the determination of liability, such as the defendant's knowledge of flooding at the accident site in years prior to the accident and the speed of the plaintiff's vehicle as it entered and left the flood area, were made more complicated because of the differing recollections of credible witnesses and the fact there was no witness to the accident save the driver Mr. Rimmer who, I was told, "has no memory of the accident". Notwithstanding the defendant's "vigorous denial of all liability" and assertion the plaintiff "was solely responsible for his injuries", this is not a situation in which the defendant forced the plaintiff to go through a long and costly trial without there being a sound basis for doing so. Plainly both sides had arguable positions. The defendant's persistence throughout the trial that it was not liable is in essence offset by the plaintiff's late concession he was driving too fast. The question of liability, in my judgment, was appropriately left for the Court to decide in the circumstances of this case.

**26**  So too with the notion no offer of settlement had been made prior to trial by the defendant. The question of liability required resolution before quantum could be intelligently addressed by the parties.

**27**  Applying the general rule set out in s. 3 of the ***Negligence Act*** would be commensurate with the result achieved by the plaintiff at the trial. The plaintiff will recover 60 percent of his taxable costs to include disbursements and pay nothing to the defendant. I am mindful of the fact that although the circumstances of this tragic accident touched the hearts of all those who are involved with the trial, the Court must "not penalize the defendant for exercising [its] legitimate right of requiring the plaintiff to prove [his] case and presenting a full and fair defence": ***Wells (Guardian ad litem) v. McBrine***, *supra*, at [paragraph] 19.

**28**  I conclude that it would not be unjust to apply the usual rule as to costs. The plaintiffs will recover 60 percent of their taxable costs and disbursements. The defendant will not recover any of its costs.

SCARTH J.

**End of Document**

[***Roe v. Dabbs, [2004] B.C.J. No. 1485***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X07C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

Parrett J.

Heard: July 7 - 11, 2003 (Prince George).

July 31, 2003 (Kelowna).

Judgment: July 15, 2004.

Prince George Registry No. 05919

**[2004] B.C.J. No. 1485** | [*2004 BCSC 957*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61K8-00000-00&context=) | [*[2004] 10 W.W.R. 478*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61K8-00000-00&context=) | [*31 B.C.L.R. (4th) 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61K8-00000-00&context=) | [*26 C.C.L.T. (3d) 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61K8-00000-00&context=) | [*132 A.C.W.S. (3d) 1186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61K8-00000-00&context=) | [*[2004] B.C.T.C. 957*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-61K8-00000-00&context=)

Between Rachel Roe, plaintiff, and Dr. R.H. Dabbs, Dr. P. McNicholas, Dr. D. Lesack and Prince George Regional Hospital, defendants

(233 paras.)

**Counsel**

Counsel for the plaintiff: D.J. Daley

Counsel for the defendant Dr. Dabbs: K.J. Jakeman and S.K. Raab

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| **PARRETT J.** |

INTRODUCTION

**1**  The plaintiff is a 37 year old woman, who on January 3, 1997, underwent an abortion procedure performed by the defendant Dr. Dabbs. The procedure failed. In August 1997, a child was born as a result of the failed procedure.

**2**  The action has been brought using pseudonyms as a result of a court order made on March 17, 1999.

**3**  The actions against Dr. McNicholas and Dr. Lesack were dismissed on December 11, 2001 and that against the Prince George Regional Hospital on May 9, 2003. Dr. Dabbs is the only remaining defendant.

BACKGROUND

**4**  In late 1996 the plaintiff became concerned that she might be pregnant. At the time, the plaintiff was a single mother supporting two children aged 11 and 4, and was supporting them on seasonal employment through a local manufacturer, some support payments and social assistance. In 1996 her total income was $19,232. At the time she had had a casual relationship with an individual for some months but they were not living together. The plaintiff has a grade 10 education having left school part way through her grade 11 year, and has, since that time, worked, in addition to her present job, as a store clerk and a waitress.

**5**  The family was, at the time, residing in a three bedroom trailer and struggling financially to make ends meet.

**6**  On December 18, 1996, the plaintiff saw Dr. Mittermaier who examined her and confirmed that she was in fact pregnant. An ultrasound examination was carried out on December 23, 1996, confirming the presence of a fetus estimated at 6 1/2 weeks and an intrauterine contraceptive device (IUD) located in the lower region and apparently embedded in the uterine wall.

**7**  Dr. Mittermaier arranged a referral to the defendant Dr. Dabbs, a general practitioner who was admitted to the B.C. College of Physicians and Surgeons in 1975. Dr. Dabbs has a general family practice in Prince George and, for at least the last 11 years, has performed therapeutic abortions in this region. He began performing this service in 1985 and, as at the date of trial, was performing 200 to 300 therapeutic abortions a year.

**8**  Dr. Mittermaier transmitted the ultrasound report to Dr. Dabbs' office by facsimile transmission on January 2, 1997, and the plaintiff met with Dr. Dabbs the same day. The next day, January 3, 1997, Dr. Dabbs performed a procedure to terminate the pregnancy at the Prince George Regional Hospital. The procedure utilized suction curettage and was followed by the removal of the IUD.

**9**  On April 1, 1997, an examination by Dr. Mittermaier confirmed that the plaintiff was approximately 24 weeks pregnant and that the procedure carried out on January 3, 1997, had apparently failed.

THE PLAINTIFF'S CONTACT WITH DR. DABBS

**10**  Upon appearing at Dr. Dabbs' office on January 3, 1997, the plaintiff was interviewed initially by Geraldine Speed, Dr. Dabbs' medical office assistant, who took the initial history recorded in Dr. Dabbs' patient chart. She then met with Dr. Dabbs.

**11**  Either prior to this appointment or during it, Dr. Dabbs received and reviewed a copy of the ultrasound report of December 23, 1996.

**12**  The next day the plaintiff attended at the Prince George Regional Hospital where Dr. Dabbs performed the procedure.

**13**  The hospital records indicate that the procedure, from start to finish, occupied nine minutes; and a total of 16 minutes from the time she entered the operating theatre to the time she was taken from it.

**14**  A pathology report dated January 6, 1997, and printed at 16:16, gives the results with respect to the tissue sample submitted by Dr. Dabbs following the procedure on January 3, 1997. The body of the report reads:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | SUBMITTED: | 03Jan/97 | 1206 |  |

CLINICAL NOTES:

Termination of pregnancy and IUD removal.

SPECIMEN:

PRODUCTS OF CONCEPTION.

GROSS DESCRIPTION:

Specimen labelled "products of conception", consist of fragments of tan/brown tissue and an intrauterine device. Fetal tissues and placental tissues are not identified grossly. Tan/brown tissues is submitted in toto in cassettes A and B.

KT:mb

MICROSCOPIC DESCRIPTION:

The specimen is mainly deciduas, gestational endometrium and blood clot. Scant chorionic villi are also seen. No fetal parts are identified. A fragment of unremarkable squamous epithelium and some myometrium are also present.

DL:Als

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DIAGNOSIS:

PRODUCTS OF CONCEPTION

- DECIDUA, GESTATIONAL ENDOMETRIUM AND BLOOD CLOT WITH A SMALL AMOUNT OF PLACENTAL TISSUE.

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| --- | --- |
| [Emphasis added] |  |

**15**  On its face this report was copied both to Dr. Dabbs and Dr. Mittermaier. Dr. Mittermaier testified that although he usually gets copies of both the operative report and the pathology report, in this case he got neither.

**16**  Dr. Dabbs, in his evidence, testified that it was his practice not to send a consult report to the family doctor as ". . . these issues are sensitive and patients often do not want their family doctor to know . . .". This practice seems, quite frankly, contrary to the entire concept of a structure where primary care of the patient rests with a family doctor who is assisted by a series of specialists to whom the patient can be referred. It also seems completely unwarranted in a case where the patient had been assessed by the family doctor and referred for the procedure.

**17**  On January 7, 1997, as previously arranged, the plaintiff returned to see Dr. Dabbs who administered an injection of Depo-Provera as a means of birth control. This had been discussed during her first appointment with Dr. Dabbs and the appointment had been arranged at that time.

**18**  Dr. Dabbs' chart records the purpose of the visit, in Geraldine Speed's handwriting, as Depo-Provera injection. Below that entry, in his handwriting, Dr. Dabbs has written "no post op problems".

**19**  On April 1, 1997, Dr. Mittermaier confirmed that she was approximately 21 weeks pregnant and after calming her down and trying to ". . . salvage her state of distress . . .", he called Dr. Dabbs' office and requested an urgent appointment. Later that same day she met with Dr. Dabbs and, during the course of this appointment, there was a prolonged discussion of options and Dr. Dabbs offered to assist with the financial cost of having an abortion performed at a clinic which performed therapeutic abortions beyond the time limits carried out in British Columbia. This clinic is in Seattle, Washington.

ISSUES

**20**  In this action the plaintiff seeks damages from the defendant for ***negligence*** in his performance of a therapeutic abortion which failed and for failure to provide proper instructions for follow-up after the procedure was carried out.

**21**  The plaintiff's pleadings also allege a lack of informed consent with respect to the risk of failure of the procedure.

**22**  The defendant submits that he met the standard of care expected of him both with respect to the procedure and with respect to the follow-up he provided.

**23**  In the event the court finds that standard of care has been breached then, the defendant submits, the plaintiff should be found to have contributed to the problem; and further submits that the plaintiff should, in these circumstances, be found 90% responsible.

**24**  The defendant also submits that the plaintiff has failed to meet the burden on her of establishing that a specific breach by the defendant caused the damages the plaintiff seeks.

**25**  In terms of damages, the plaintiff seeks the following:

1. General damages for injuries, pain and suffering and loss of enjoyment of life;
2. Loss of income while on maternity leave at reduced income;
3. General or special damages for the additional expenditures made for the child, or the diversion of spending from the family members to the child; and
4. Damages for the loss of opportunity to earn income.

LIABILITY

**26**  In order to succeed in this action the plaintiff must establish, on a balance of probabilities that -

1. the defendant owed to the plaintiff a legal duty of care;
2. the defendant breached that duty of care;
3. the plaintiff suffered injury or loss; and,
4. the defendant's conduct and breach was the actual and legal cause of the plaintiff's injury or loss.

**27**  In advancing her case the plaintiff must establish, on a balance of probabilities, that Dr. Dabbs failed to meet the standard of care of the ordinary competent physician in the same circumstances. The applicable standard was described by Schroeder J.A., in Crits v. Sylvester [*(1956), 1 D.L.R. (2d) 502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3M8-00000-00&context=) at 508, where he outlined the law's expectation of a doctor in this way:

. . . The legal principles involved are plain enough but it is not always easy to apply them to particular circumstances. Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.

**28**  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=), the Supreme Court of Canada considered the standard of care in medical malpractice cases. At p. 811, Rand J. concluded that:

In the presence of such a delicate balance of factors, the surgeon is placed in a situation of extreme difficulty; whatever is done runs many hazards from causes which may only be guessed at; what standard does the law require of him in meeting it? What the surgeon by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them. In a given situation some may differ from others in that exercise, depending on the significance they attribute to the different factors in the light of their own experience. The dynamics of the human body of each individual are themselves individual and there are lines of doubt and uncertainty at which a clear course of action may be precluded.

There is here only the question of judgment; what of that? The test can be no more than this: was the decision the result of the exercise of the surgical intelligence professed? Or was what was done such that, disregarding it may be the exceptional case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there is no breach or failure.

**29**  This delicate balance of factors was the subject of comment by the English Court of Appeal in Roe v. Ministry of Health, [1954] 2 All E.R. 131, where Lord Denning, in his speech, made the following observations at pp. 137 and 139:

. . . It is so easy to be wise after the event and to condemn as ***negligence*** that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way . . . . . . .

. . . But we should [sic] be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as ***negligence*** that which is only a misadventure.

**30**  The defendants, in this case, cite and rely on a passage from the judgment of Sopinka J. in ter Neuzen v. Korn, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) at 695:

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent. As L'Heureux-Dubé J. stated in Lapointe, *[1992] 1 S.C.R. 351*, in the context of the Quebec Civil Code (at pp. 363-64):

Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories. As expressed more eloquently by André Nadeau in "La responsabilité médicale" (1946), 6 R. du B. 153, at p. 155:

[TRANSLATION] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference. [Emphasis added.]

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| --- | --- |
| [Emphasis in Original] |  |

**31**  In considering this passage one must be careful to place it within its proper context, both within the judgment in ter Neuzen, supra, and within the principles applicable to medical malpractice actions generally.

**32**  Later in his reasons, at p. 698, Sopinka J. goes on to say:

As was observed in Lapointe, courts should not involve themselves in resolving scientific disputes which require the expertise of the profession. Courts and juries do not have the necessary expertise to assess technical matters relating to the diagnosis or treatment of patients. Where a common and accepted course of conduct is adopted based on the specialized and technical expertise of professionals, it is unsatisfactory for a finder of fact to conclude that such a standard was inherently negligent. On the other hand, matters falling within the ordinary common sense of juries can be judged to be negligent. For example, where there are obvious existing alternatives which any reasonable person would utilize in order to avoid a risk, one could conclude that the failure to adopt such measures is negligent notwithstanding that it is the prevailing practice among practitioners in that area.

before stating at p. 701:

I conclude from the foregoing that, as a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it would not be open to find a standard 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 facts, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.

**33**  The context of these passages was indeed a consideration of the standard of care and evidence of standard practice. The consideration of that issue begins on p. 693. In the second paragraph under that heading, Sopinka J. notes that:

It is also particularly important to emphasize, in the context of this case, that the conduct of physicians must be judged in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of ***negligence***. As Denning L.J. eloquently stated in Roe v. Ministry of Health, [1954] 2 All E.R. 131 (C.A.), at p. 137, "[w]e must not look at the 1947 accident with 1954 spectacles". That is, courts must not, with the benefit of hindsight, judge too harshly doctors who act in accordance with prevailing standards of professional knowledge. This point was also emphasized by this Court in Lapointe, supra, at p. 362-63: . . .

**34**  These passages, in my view, are primarily related to a consideration of complex and controversial medical knowledge where there are divergent opinions but standard practices that have been established. Inherent in the consideration of the issue is the state of knowledge at the time the decisions were made. The state of knowledge of an expert (or a specialist) has, in turn, two components - his scientific (or medical) knowledge and his specific knowledge of the situation he was dealing with.

**35**  In Bellknap v. Meakes [*(1989), 1 C.C.L.T. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=), at p. 220, Seaton J.A., in giving the court's decision, writes that:

In Maynard v. West Midlands Regional Health Authority (1983), [1984] 1 S.L.R. 634, [1985] 1 All E.R. 635, the House of Lords dealt with a case in which the evidence of the medical experts disagreed as to the wisdom of the steps taken by the defendants. Lord Scarman, with whom all of the Lordships agreed, said (at p. 638 [W.L.R.]):

"I do not think that the words of Lord President Clyde in Hunter v. Hanley, 1955 S.L.T. 213, 217 can be bettered:

'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men . . . The true test for establishing ***negligence*** in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care . . ."

I would only add that a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality";

and (at p. 639):

"My Lords, even before considering the reasons given by the majority of the Court of Appeal for reversing the findings of ***negligence***, I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish ***negligence*** in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment ***negligence*** is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary."

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| [Emphasis added] |  |

**36**  It is this test which must be applied in the present case, keeping in mind the requisite caution concerning errors in judgment. In Wilson v. Swanson, supra, Rand J. put it this way, at p. 812:

An error in judgment has long been distinguished from an act of unskilfulness or carelessness or due to lack of knowledge. Although universally-accepted procedures must be observed, they furnish little or no assistance in resolving such a predicament as faced the surgeon here. In such a situation a decision must be made without delay based on limited known and unknown factors; and the honest and intelligent exercise of judgment has long been recognized as satisfying the professional obligation.

In Rann v. Twitchell (1), (1909) 82 Vt. 79, the following language is used:-

He is not to be judged by the result, nor is he to be held liable for an error of judgment. His ***negligence*** is to be determined by reference to the pertinent facts existing at the time of his examination and treatment, of which he knew, or in the exercise of due care, should have known. It may consist in a failure to apply the proper remedy upon a correct determination of existing physical conditions, or it may precede that and result from a failure properly to inform himself of these conditions. If the latter, then it must appear that he had a reasonable opportunity for examination and that the true physical conditions were so apparent that they could have been ascertained by the exercise of the required degree of care and skill. For, if a determination of these physical facts resolves itself into a question of judgment merely, he cannot be held liable for his error.

**37**  Before turning to the pertinent facts Dr. Dabbs knew, "or in the exercise of due care, should have known", I will summarize the evidence of the expert witnesses called during the trial.

THE EXPERT EVIDENCE

Dr. B.A. Hagen

**38**  Dr. Hagen is a very experienced general practitioner in Prince George where he has practiced since 1970. He has been providing therapeutic abortion service at the Prince George Regional Hospital for over 20 years, and performs roughly 200 abortions per year.

**39**  Dr. Hagen testified that the ultrasound report is prepared and provided specifically to assist the physician in carrying out the procedure. In the present case, he went on to testify that if he was in this situation, and he had been, he would be concerned about the presence of the IUD and the fact it was apparently embedded in the wall of the uterus. When the IUD is embedded in the wall, he said, it is less mobile and it has the potential to interfere with the curette and the removal of part or all of the products of conception.

**40**  He went on to testify that it would, in this case, require great care to get past the IUD.

**41**  After completing the dilation and inserting the curette, suction is applied to empty the contents of the endometrium. Once this is completed, the IUD is located and removed. Dr. Hagen went on to testify that once the IUD is removed, one option is to reinsert the curette 'with very great care' and re-apply the vacuum. He went on to say that this is a blind procedure carried out 'exercising clinical judgment'. He also testified that the pathology report is 'absolutely consistent with a successful abortion'.

**42**  On re-direct he conceded that he cannot recall ever having seen a pathology report that referred to "scant chorionic villi" and that, in his mind, this was a term that would raise questions.

**43**  In his written report of March 26, 2003, the following extracts are found:

Performing the procedure:

According to the operative report, Dr. Dabbs removed the IUD after carrying out dilation of the cervix and suction curettage of the uterine cavity. It is certainly understandable that, when his suction curette struck the embedded IUD, Dr. Dabbs could have interpreted the resistance to further curette advancement to indicate that the device had reached the intra-uterine apex. Knowing that uterine perforation is a well-recognized and relatively common complication of surgical pregnancy termination, Dr. Dabbs may have believed he had successfully removed the six-week pregnancy at this point. Since the pregnancy was at a relatively early gestational age, Dr. Dabbs quite possibly could have misinterpreted what blood clot and tissue he sent to the lab as having comprised a successful removal of the pregnancy.

Except in that Dr. Dabbs, following dilation of the cervix, did not remove the IUD before starting suction curettage of the uterine cavity, he appears to have carried out what I would have thought was a routine, uncomplicated therapeutic abortion.

Reviewing and interpreting the lab results:

Like most family physicians in rural and northern B.C., Dr. Dabbs has a large, busy primary care practice. As one of his associates, I am well aware of how busy he is, and I know that up to fifty lab reports cross his desk daily. Thus, I can readily imagine that, on seeing the words "gestational endometrium" and "placental tissue" in the Rachel Roe post-operative pathology report, Dr. Dabbs concluded that he had successfully terminated Ms. Roe's six-or-seven-week pregnancy.

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| [Emphasis added] |  |

**44**  Dr. Hagen concludes his written report with the following summary:

Summary:

Ms. Rachel Roe's unwanted first-trimester pregnancy was not successfully terminated, probably because the lower-positioned IUD blocked adequate advancement of the suction curette. Following removal of the IUD, repeat vacuum curettage should have been done. Interpreting the pathology report to conclude that a successful abortion had been carried out was unfortunate but understandable.

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| [Emphasis added] |  |

Dr. B.W. Galliford

**45**  Dr. Galliford received his medical degree from the University of British Columbia in 1964. He completed an internship at Vancouver General Hospital and a residency in obstetrics and gynaecology. He is a member of the College of Physicians and Surgeons of British Columbia and has been since 1965. He has been a Fellow of the Royal College of Physicians and Surgeons of Canada since 1975. He has held various professional positions including various department head positions at the Prince George Regional Hospital. He was also Chief of Staff for a two year term.

**46**  Dr. Galliford conceded that he had done relatively few first trimester abortions over the last 20 years and deferred to Dr. Hagen on the standard of interpreting or reviewing pathology reports.

**47**  In his written report of March 25, 2002, the following extracts are found:

Performing the procedure:

. . .

In Ms. Roe's case, an IUD was in place, and, in fact, was felt on ultrasound to be embedded in the wall of the uterus. The ultrasound examination also revealed that the IUD was below the site of the pregnancy. I would suspect that IUD was hit by the suction curette on its introduction into the uterus, giving Dr. Dabbs the impression that he had hit the top of the uterus. A competent operator would not try to force the curette any further. The IUD was removed after the suction procedure was completed.

Dr. Dabbs felt that the amount of tissue obtained was consistent with "a 4 to 6 week gestation."

. . .

However, I do not feel that, given the presence of the IUD below the pregnancy site, Dr. Dabbs could be found culpable of mismanagement of his performance of the termination of this pregnancy.

. . .

Reviewing and Interpreting the Laboratory Results:

I have not dwelt on the interpretation of the ultrasound report on 23rd December, 1996. The picture described is that shown in Figure I: an IUD partially embedded in the uterine wall with a viable pregnancy above. Whether this picture was in Dr. Dabbs' head during the performance of this procedure, I do not know.

However, the surgical pathology report of 6th January, 1997, should have sounded many alarm bells!

The Gross Description suggests that, "Fetal tissues and placental tissues are not identified grossly." This would be unusual in a 7-8 week pregnancy. Explanations might include that the patient had miscarried prior to the termination (no history of bleeding or cramps), that the patient had a tubal pregnancy (the ultrasound reports a viable intrauterine pregnancy), that the patient had a double uterus, or, that the termination was unsuccessful.

The Microscopic Description follows: "The specimen is mainly deciduas, gestational endometrium and blood clot. Scant chorionic villi are also seen. No fetal parts are identified. A fragment of unremarkable squamous epithelium and some myometrium are also present."

For clarification: Gestational endometrium is the lining of the womb as it appears during a pregnancy state. Decidua is a part of the gestational endometrium and refers to changes in the microscopic appearance of that portion of the endometrium between the glands. It can be seen in the uterus even when the pregnancy is for example, in the tube. Chorionic villi are the extrusions of the placenta that serve to anchor the placenta to the wall of the uterus, and also to allow passage of nutrition and waste between the mother and the fetus. As can be seen from Figure I, at an early state of pregnancy villi are surrounding the pregnancy. Squamous epithelium is the lining of the outer portion of the cervix and is often picked up in the suction curette as a contaminant. Myometrium, refers to the muscle of the uterus, underneath the endometrium.

I would suggest that on receiving the pathology report on Ms. Roe's termination, the bottom line was looked at, i.e., "a small amount of placental tissue." This indicates to the surgeon that Ms. Roe did not have an ectopic, or tubal, pregnancy. Many surgeons are guilty of this, just looking at the diagnosis!

Had the gross description been read, "fetal tissues and placental tissue are not identified grossly," would perhaps have raised a little concern for a 6 week gestation. However, it may be occasionally that gross fetal parts are not seen grossly due to the maceration that might occur. The microscopic description, however, that "scant chorionic villi are also seen - no fetal parts are identified," should have raised a lot of concern, especially since the preoperative ultrasound revealed a viable pregnancy.

I would suspect that Dr. Dabbs did not read the whole report. If he did, then he did not exhibit the subsequent course of action that would have been applicable had the report been read and understood.

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| [Emphasis in original] |  |

Dr. A.P. Human

**48**  Dr. Human is a licensed medical practitioner in the Province of British Columbia and began a general practice in 1985 before returning to complete qualifications in obstetrics and gynaecology. He qualified in that field of specialization and obtained certification from the Royal College of Physicians and Surgeons of Canada in 1995. Since that time he has practiced in that field in Kamloops, B.C..

**49**  When Dr. Human was called on behalf of the defendant the plaintiff objected to the admissibility of the report. The primary objection centered on what counsel described as his "editorializing, summarizing and his conclusory comments".

**50**  After hearing the initial submissions, I admitted the report and had it marked as an exhibit with counsel given leave to argue the issue further in their final submissions.

**51**  During the course of the submissions, and in their written submissions on this issue, counsel for the defendant conceded that they had written the factual assumptions contained in pages 2 to 4 of Dr. Human's report and provided them to him. In his evidence, Dr. Human confirmed that he had taken those "assumptions" and reproduced them within the body of his report without indicating that he had done so or listing them as such beyond the heading "Factual Assumptions".

**52**  The defendant advances their argument on the admissibility of this report by submitting that:

The Factual Assumptions at pages 2 through 4 of Dr. Human's report are nothing more than that, assumptions or hypothetical facts, and it is then the role of counsel to attempt to prove those facts at trial.

**53**  Counsel for the defendant go on, in their written submissions, to state, at para. 5, that:

Rule 40A(5) of the Supreme Court Rules requires that the facts upon which an expert opinion is based be clearly set out in the expert report. The case law provides support for the approach taken in this case with Dr. Human's report.

**54**  The first of these propositions is accurate and sound. The second is not. There is no question, in my view, that experts are entitled to, and indeed must, prepare opinions based on factual assumptions which must be subsequently proven at trial[**1**](#Forward_fnref_fnr-1). It is equally well established that counsel may, and likely should, provide the factual assumptions on which the expert is asked to rely and not simply supply documents and materials for their review and allow them to make their own factual findings[**2**](#Forward_fnref_fnr-2).

**55**  It is not these principles which cause difficulty in the present case but rather the practice adopted here which counsel seek to defend. Some representative examples of the factual assumptions drafted by counsel, which Dr. Human was prepared to and did adopt as the foundation for his opinions in this case, are in order:

. . . Dr. Dabbs then opened up the conversation to allow Ms. Roe to ask questions and address emotional issues she may have had with respect to the abortion. Once he was satisfied that Ms. Roe had an opportunity to ask questions and address with him any issues she had about the abortion, Dr. Dabbs took over the conversation and gave her an overview of how he would be proceeding during the Procedure. This overview included a brief description of actual details of the surgery, such as dilation of the cervix and the use of a suction or vacuum apparatus to empty the uterus.

**56**  With respect, this is a remarkable first hand account written, apparently, by someone sitting over the interviewing doctor's shoulder during the interview. What is even more remarkable about it is that Dr. Dabbs, in his evidence, testified that this case blurs with so many others that he, in his evidence, relies on his "usual procedure" and his office chart and records. He went on to testify that he had no independent recollection of the interview in question.

**57**  The next extract:

Dr. Dabbs then explained to Ms. Roe the nature and the risks associated with the abortion. He explained to Ms. Rose that it is a day care surgical procedure, that she would be having a general anaesthetic and that she could expect to be in and out of the hospital in approximately four hours. He reviewed with Ms. Roe the most common risks of the abortion, which are post-operative infection, perforation of the uterus and retained products of conception requiring a subsequent procedure. He probably would not have discussed the possibility of a failed procedure given that the risk is remote. Dr. Dabbs may have told Ms. Roe about one of his patients who had had a failed abortion performed by him but he does not recall whether he did or not.

**58**  After setting out the procedure and quoting from the operative report, the narrative then picks up with the following:

Dr. Dabbs next turned his attention to the IUD. It was not immediately apparent where this device was, but because her ultrasound examination had shown an IUD present in the uterus, Dr. Dabbs spent some time attempting to locate the IUD and to remove it. In order to locate the IUD, Dr. Dabbs had to do a blind search for it, using a forcep to probe around the cavity of the uterus, because one cannot see into the cavity of the uterus.

**59**  The factual assumptions continue with the following:

To ensure that the Procedure was successful, Dr. Dabbs examined the tissue that had been removed by the vaccum [sic] aspirator. Based on his examination of the tissue, he had determined that there was enough removed tissue present to indicate that the pregnancy successfully terminated. He examined the tissue both at the time it was being extracted through the suction tubing and also when he removed it from the suction apparatus, to estimate whether or not the total volume of the tissue removed appeared to represent what he would have expected in the circumstances. Also, he took the material from the container of the aspirator and put it in a specimen container that has formalin in it to affix the specimen. The container with the formalin and specimen was labelled by the operating room nurse with the patient's identification. Dr. Dabbs then wrote "termination of pregnancy" and affixed his signature on the pathology requisition which was then attached to the specimen container. The pathology requisition was also labelled with complete patient's identification. The specimen was then sent to the lab for examination, along with the requisition that Dr. Dabbs signed indicating that it was "uterine contents". A pathology report was then generated by the laboratory.

As part of his follow up to ensure that the abortion was successful, Dr. Dabbs reviewed the pathology report dated January 6, 1997. The pathology report indicates:

under the heading entitled "Gross Description" that the "specimen labelled "products of conception" consist of fragments of tan/brown tissues and an intrauterine device. Fetal tissues and placental tissues are not identified grossly".

under the heading "Microscopic Description" that the "specimen is mainly deciduas, gestational endometrium and blood clot. Scant chorionic villi are also seen. No fetal parts are identified. A fragment of unremarkable squamous epithelium and some myometrium are also present."

under the heading "Diagnosis" that the "[p]roducts of conception - deciduas, gestational endometrium and blood clot with a small amount of placental tissue."

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| [Emphasis in original] |  |
| [Emphasis added] |  |

**60**  In 1987, McEachern C.J.S.C., as he then was, expressed concern about emerging trends in relation to expert reports in Sengebusch v. Priest [*(1987), 14 B.C.L.R. (2d) 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-6314-00000-00&context=). At p. 40 of that decision he concluded:

Lastly, in R. v. Abbey, [*[1982] 2 S.C.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*39 B.C.L.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*[1983] 1 W.W.R. 251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*29 C.R. (3d) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*68 C.C.C. (2d) 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*138 D.L.R. (3d) 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*43 N.R. 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), Dickson J. (as he then was), speaking for the court, said at p. 42:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.).

In this class of case it is usually unnecessary and inappropriate to adduce opinion evidence about ordinary matters of disability and employment opportunities additional to the evidence of medical practitioners. As was stated in R. v. Turner, supra, at p. 841:

Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.

In my view it is appropriate for the court to enforce reasonable limits upon the admissibility of opinion evidence. Too often, as in this case, persons with special training or experience are retained to construct scenarios or advance arguments in the form of an opinion when, with proper assistance from counsel, the court is able to analyze the evidence and reach a proper conclusion on commonplace problems such as suitability for employment or calculations in personal injury, family matters or other areas of litigation. The same applies in matters such as the care of children where opinion evidence is frequently tendered unnecessarily although it is sometimes necessary to arrange for investigations which the court cannot conveniently undertake. That is a different matter.

It is unnecessary, however, for experts to perform the court's function or for counsel to adduce arguments in the guise of evidence.

**61**  The practice in the present case is, in my view, unacceptable and I know of no authority which sanctions such a procedure. Counsel produced no such authority. There are three fundamental difficulties inherent in the process adopted by counsel in the present case. Firstly, it purports to provide and thus clothe their expert opinion with an apparent detailed account of actual events which is not present in the evidence itself. Secondly, it provides purported reasons and motivations for various steps in the defendant's conduct and actions which portrays the defendant in a particular way with respect to the plaintiff when he himself testifies almost exclusively about his usual procedure and without specific recollection of the events themselves. Thirdly, in the guise of providing Factual Assumptions it fills out and expands upon the actual records and materials provided for the expert's review and potentially influences and colours that review.

**62**  Counsel, in this case, have adopted a procedure far removed from the simple stating of issues that need to be addressed and a statement of facts they are confident they can prove at trial. Instead, they have adopted a procedure that seeks to present argument in the guise of factual assumptions. This is a practice which should not be condoned and, although I will not, in this case, exclude the report, that may well be necessary in future cases.

**63**  Counsel for the defendant, in their submissions, suggest that:

1. If counsel for the plaintiff wished to challenge the Factual Assumptions upon which Dr. Human based his opinion, he could have put those facts to Dr. Human in cross-examination and if he accepted a different set of assumptions, his opinion might have changed or proved to be less valuable to the Court. In this case, counsel did not, to any great extent, challenge the facts Dr. Human was asked to assume.

**64**  With respect, the party tendering an expert report bears the onus of proving the factual assumptions on which it is based. In addition, in the present case the party tendering the report was acting for the defendant and presumably knew what his evidence would be. Where the defendant has no specific recollection of events and relies almost exclusively on evidence of his usual practice and his chart, counsel adopt a dangerous course when they choose to flesh out bare assumptions.

**65**  The specific danger of such a course of action is evident from a consideration of the judgment of Dickson J. (as he then was) in R. v. Abbey, [*[1982] 2 S.C.R. 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=), [*68 C.C.C. (2d) 394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M251-00000-00&context=):

. . . While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

**66**  The decision in Abbey attracted some level of controversy with academics and other commentators. At the heart of the controversy was an apparent requirement that all information relied upon by the expert be proven or the evidence was valueless.

**67**  In R. v. Lavallée, [*[1990] 1 S.C.R. 852*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6548-00000-00&context=), the Supreme Court of Canada again considered the issue and the controversy which had emerged. Wilson J., writing for herself and five other members of the court, held that:

. . . as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony.

**68**  In his separate concurring reasons, Sopinka J. expanded on the interpretation of R. v. Abbey. At p. 898 he sets out the nature of the controversy:

. . . Upon reflection, it seems to me that the very special facts in Abbey, and the decision required on those facts, have contributed to the development of a principle concerning the admissibility and weight of expert opinion evidence that is self-contradictory. The contradiction is apparent in the four principles set out by Wilson J. in the present case, at p. 893, which I reproduce here for the sake of convenience:

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

The combined effect of numbers 1, 3 and 4 is that an expert opinion relevant in the abstract to a material issue in a trial but based entirely on unproven hearsay (e.g., from the mouth of the accused, as in Abbey) is admissible but entitled to no weight whatsoever. The question that arises is how any evidence can be admissible and yet entitled to no weight. As one commentator has pointed out, an expert opinion based entirely on unproven hearsay must, if anything, be inadmissible by reason of irrelevance, since the facts underlying the expert opinion are the only connection between the opinion and the case: see Wardle, "R. v. Abbey and Psychiatric Opinion Evidence: Requiring the Accused to Testify" (1984), 17 Ottawa L. Rev. 116, at pp. 122-23.

The resolution of the contradiction inherent in Abbey, and the answer to the criticism Abbey has drawn, is to be found in the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in City of St. John, [*[1966] S.C.R. 581*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22K3-00000-00&context=)), and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in Abbey).

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| [Emphasis in original] |  |

**69**  After drawing the distinction he expands upon it based on the existence in some cases of "strong circumstantial guarantees of trustworthiness" in the case of the types of information under consideration in Ares v. Venner, [*[1970] S.C.R. 608*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-2329-00000-00&context=).

**70**  In the end, Sopinka J. specifically agrees with the conclusion of Wilson J. quoted earlier. In expressing that agreement however, he draws a further distinction material to the practice adopted by counsel in the present case. At p. 900 he notes:

Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with Abbey, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case: . . .

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| [Emphasis added] |  |

**71**  If the concern continues where the information comes from the mouth of a party to the litigation, then it must exist where the evidence (or factual assumptions) relied upon are not founded on the parties' evidence or recollection but assumptions drawn from his "usual practice". While such evidence is admissible on the basis of Belknap v. Meakes [*(1989), 1 C.C.L.T. (2d) 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JPP5-2188-00000-00&context=) at 210, it is evidence flowing from the mouth of the party and, in addition, is an attempt to prove conduct in circumstances where no actual recollection exists. If anything, concerns about the reliability of this evidence must be heightened where the issue is what happened in a specific case.

**72**  Three aspects of Dr. Human's written opinion are important in this case. The relevant extracts are:

Point C: The procedure. I have reviewed the operative report from the procedure performed by Dr. Dabbs. I would make the following comments.

The size of the largest dilator used was not quoted in the operative report. However I was able to determine that Pratt dilators were used and she was dilated to 32 Pratt. This was thus large enough to allow insertion of the size 10 suction curette. One would generally dilate to 1 mm larger that [sic] the curette itself. The common practice is to dilate to approximately 1 mm more than the anticipated gestational age in weeks. In this case the added complication of the presence of a [sic] IUD which may require further exploration of the cavity, particularly if it was embedded in the wall, was in my opinion the appropriate management. You will note that the IUD was not seen on inspection of the cervix. The suction curettage was performed initially quite appropriately to ensure that the pregnancy was terminated and then followed by the exploration of the uterine cavity for the IUD. Had the IUD been noted at the entrance of the canal then it would have been removed initially prior to completing the procedure. However the concern was that this was embedded in the wall of the uterus. If this had been removed initially by exploration excessive bleeding could have occurred which would have then made termination of the pregnancy more difficult. In these circumstances in my opinion Dr Dabbs completed the procedure in an appropriate and reasonable manner.

Point D: The pathology report was reviewed by myself. At 8 weeks gestation, in my experience, it is not common to be able to identify any fetal parts. The tissue which is obtained is noted in the suction device and the collection device or bottle. Quite often the amount and nature of the tissue is often difficult to assess due to the presence of blood clot. The physician did report that the amount of tissue seen was consistent with a 4 to 6 week pregnancy.

The wording of the pathology report I feel is critical. The presence of chorionic villi is indicative of

1. An intrauterine gestation.
2. Successful termination of the pregnancy particularly in an early pregnancy.

When the final pathology report indicates products of conception I feel that this is generally regarded as being adequate. I do not feel that this is a suboptimal level of practice having reviewed this report.

Point E: Follow-up. The biggest concern under these circumstances would be the possibility of a further unwanted pregnancy. This was this lady's third termination. I see no contraindication to administering Depo Provera. It is not usual practice to do any further pregnancy related evaluation on a patient following a therapeutic termination. The biggest single risk that one is concerned about is the possibility of ectopic pregnancy. There is a very slight risk of 1 in 15,000 of there being a pregnancy both in the uterus and tube. However with no further symptoms and having obtained a pathology report showing that chorionic villi were present Under these circumstances reasonable standards of practice in my opinion would not have included follow up with an ultrasound or any serial beta HCG evaluation.

**73**  Dr. Human summarizes his opinion at the end of his report:

CONCLUSION

Whilst failure of termination of pregnancy is an uncommon event it does occur. The earlier the pregnancy the more likely this event is to occur. This pregnancy was complicated by the presence of an IUD in the uterus which made the procedure possibly more difficult technically. The pathology report, which was obtained, showed the presence of chorionic villi although no fetal parts were identified. In my opinion this does not warrant further follow up. The administration of contraception in the form of Depo Provera was a decision made in the light of failed contraception and also the repeated trauma inflicted on this patient with 3 terminations of pregnancy. It is my opinion that this unfortunate turn of events occurred despite Dr Dabbs having practiced acceptable standards of practice.

**74**  In the course of his viva voce evidence, Dr. Human confirmed that he had never spoken to Dr. Dabbs; that he was never provided with Dr. Hagen's report; and that he had not reviewed that report.

**75**  Dr. Human acknowledged the importance of being completely accurate yet, in the opinion portion of his report, he does not accurately set out the wording of the pathology report. The language he chose in his written report to describe the pathology report is curious:

When the final pathology report indicates products of conception I feel this is generally regarded as being adequate. I do not feel this is a suboptimal level of practice having reviewed this report.

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| [Emphasis added] |  |

**76**  Dr. Human, during the course of his cross-examination, maintained his position that it is the presence of chorionic villi that is important, not their number. He agreed that if he received a pathology report which reported no chorionic villi he would investigate and likely do a repeat of the ultrasound. He went on to testify that he has seen over a thousand pathology reports and cannot ever recall seeing the word "scant", although he has seen, on occasion, the word "few". He testified that it was his practice to scan the pathology report and, in effect, look for the bottom line.

**77**  He conceded that, if the procedure had been performed with the suction curette at the apex of the cavity or near it, the procedure would not have failed.

Dr. R.H. Dabbs

**78**  As previously mentioned, Dr. Dabbs acknowledged that the present case blurs with so many others that he relies upon how he normally does things, his office chart and the records. He conceded that he had no independent recollection of his initial interview with the plaintiff.

**79**  Dr. Dabbs testified that he had the ultrasound report when he met with the plaintiff and he knew of the presence of the IUD. He went on to say that its presence did not worry him; 'it simply added another element to the procedure'.

**80**  He went on to say that early on in his practice he had had one failed procedure and, although it had not altered his approach to the procedure itself, it had emphasized in his mind the need for follow-up.

**81**  Dr. Dabbs testified that if the suction curette had hit the IUD he would have noted it both at the time and in his operative report. The note in the operative report is that "No difficulty was encountered". He went on to testify that it was his 'overwhelming conviction' that the procedure had gone normally and been completed.

**82**  In terms of the pathology report, he testified that he focuses on the diagnosis as one piece of information confirming the successful completion of the procedure; but doesn't pay as much attention to the other sections of the report. In this case, Dr. Dabbs acknowledged reading the whole of the pathology report and went on to testify that he interpreted the report as being normal and confirmatory.

**83**  On April 1, 1997, Dr. Dabbs saw the plaintiff, again on referral from Dr. Mittermaier who had discovered that she was still pregnant. On April 4, 1997, Dr. Dabbs wrote to the plaintiff's family doctor saying, in part:

As you know, this patient had an abortion procedure on January 3, 1997, which failed. It is difficult to know with certainty how this complication of the procedure occurred. She may have a bicornuate uterus, or the IUD may have prevented the suction extraction from happening normally. The pathology report diagnosis was products of conception, which delayed our appreciation of the fact that the pregnancy had not been successfully removed.

In any event, she presented on April 1, 1997 with evidence of a continuing pregnancy. I believe that you did an ultrasound which showed her to be twenty-two weeks gestational age, and her previous ultrasound of December 23, 1996 is in keeping with her being twenty-one weeks gestation on April 1, 1997.

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| [Emphasis in original] |  |

**84**  The letter went on to confirm his advice given to the plaintiff during their meeting that she could undergo a late-term abortion at a clinic in Seattle and that he would make the necessary arrangements and provide financial assistance for her attendance.

**85**  Dr. Dabbs, in his evidence, disagreed with Dr. Galliford's opinions suggesting that the curette hitting the IUD was only one of several possible causes for the failure of the procedure. He went on to disagree with Dr. Galliford's opinion that the pathology report should have sounded many alarm bells.

**86**  During his direct evidence, Dr. Dabbs testified that he told the plaintiff, during their meeting on April 1, 1997, that there was a definite but small risk of injury to the fetus from the failed procedure.

DISCUSSION

**87**  In this case the plaintiff submits that the defendant failed to meet the requisite standards in three ways-

1. he performed the procedure itself negligently;
2. he failed to properly read and appreciate the pathology report when he received it; and
3. he failed to properly follow up after the procedure had been performed.

**88**  It is important to recognize in this case the sequence of events and the state of knowledge at each stage.

**89**  When Dr. Dabbs first saw the plaintiff on January 2, 1997, the day before the procedure was performed, he had been provided with a copy of the ultrasound report of December 23, 1996. A copy of that report was sent by facsimile transmission by Dr. Mittermaier to Dr. Dabbs before he saw the plaintiff. Dr. Dabbs' evidence was that he reviewed it.

**90**  The report by Dr. P. McNicholas is headed IUD LOCALIZATION. The body of the report reads:

The uterine cavity contains a single gestational sac containing a single fetal pole with fetal heart beat identified.

Gestational sac appears well positioned high in endometrial cavity. There is a tiny cresentric rim of sonolucency adjacent to gestational sac, consistent with a small implantation bleed.

Mean sac diameter of approximately 20 mm suggests fetal age of approximately 6.5 weeks, +/- 1 week.

Noted is IUD, this lying in lower uterine segment region, it's most superior portion being 1.4 cm inferior to gestational sac, additionally while the inferior portion of IUD appears to lie in endometrial canal, more superiorly, it is felt to extend into uterine wall, however does not cause a perforation, it extending only half way through myometrium.

Both ovaries demonstrate a normal appearance with no adnexal masses or fluid collections identified.

**91**  The following day the plaintiff was admitted to the Prince George Regional Hospital as an in-patient. The plaintiff was one of a series of patients admitted for the purpose of having this procedure performed by Dr. Dabbs on that day. The operative record shows that the plaintiff entered the holding area at 9:35 and the operating theatre at 9:55. The anaesthetic was started at 9:56 and the surgery itself started at 10:01 and was complete at 10:10 with her leaving the operating theatre one minute later at 10:11. The duration of the procedure itself from start to finish was 9 minutes.

**92**  In his operation report Dr. Dabbs describes the procedure in these words:

DESCRIPTION, OPERATIVE PROCEDURE & FINDINGS:

The patient was prepped and draped in the normal fashion. Dilatation of the cervix was carried out and a suction curettage performed using a curved #10 suction curet. No difficulty was encountered and the amount of tissue obtained was consistent with a 4 to 6 week gestation. This patient conceived with an intrauterine device in situ. It was not immediately apparent where this device had gotten to, but because her ultrasound examination had shown a continual presence of the IUD in the intrauterine space, we spent a few more minutes and located the IUD and removed it. It was not in retrospect just exactly where the IUD was positioned, but clearly in this instance it had failed in that she had conceived. This patient is an ideal candidate for Depo-Provera postoperatively in the face of this failed intrauterine contraceptive device.

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| R.H. Dabbs, M.D. |  |

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|  | cc: | Dr. Dabbs |  |

**93**  Dr. Dabbs had already recommended that the plaintiff, after the procedure, use Depo-Provera as a means of contraception, given her a prescription for it and scheduled an appointment for January 7, 1997, for the first injection to be given.

**94**  On January 6, 1997, at 16:16 the surgical pathology report was printed after the tissue sample was examined. The body of this report contained the following entries:

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| --- | --- | --- | --- | --- |
|  | SUBMITTED: | 03Jan/97 | 1206 |  |

CLINICAL NOTES:

Termination of pregnancy and IUD removal.

SPECIMEN:

PRODUCTS OF CONCEPTION.

GROSS DESCRIPTION:

Specimen labelled "products of conception", consist of fragments of tan/brown tissue and an intrauterine device. Fetal tissues and placental tissues are not identified grossly. Tan/brown tissues is submitted in toto in cassettes A and B.

KT:mb

MICROSCOPIC DESCRIPTION:

The specimen is mainly deciduas, gestational endometrium and blood clot. Scant chorionic villi are also seen. No fetal parts are identified. A fragment of unremarkable squamous epithelium and some myometrium are also present.

DL:Als

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DIAGNOSIS:

PRODUCTS OF CONCEPTION

- DECIDUA, GESTATIONAL ENDOMETRIUM AND BLOOD CLOT WITH A SMALL AMOUNT OF PLACENTAL TISSUE.

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| [Emphasis added] |  |

**95**  What emerges from this sequence of events and the documents is the fact that Dr. Dabbs, prior to beginning the procedure, knew that the IUD was still in place and that it was located below the gestational sac and extended into the uterine wall. The report goes on to note that the IUD "appears to lie in endometrial canal".

**96**  There is, evident within the medical evidence in this case, a level of reluctance of the medical practitioners to criticize one of their own number. Despite that apparent reluctance, there is a consistency about the evidence which is at odds with that of Dr. Dabbs.

**97**  The defendant submits that the standard of care does not require the removal of the IUD first or a repeat suction after it was removed. He submits that in carrying out this procedure he met the requisite standard of care.

**98**  With respect, although that is indeed the evidence before the court at this trial, that does not end the matter. It is for the court to determine, on the basis of the evidence, if the standard of care has been met.

**99**  Dr. Hagen, a very experienced practitioner with a great deal of experience in this procedure, noted in his evidence that he had been in this specific situation before and that the situation that existed here was a concern. The concern was that with the IUD embedded in the wall, particularly at a location below that of the gestational sac, it could interfere with the curette and the removal of part or all of the products of conception.

**100**  Dr. Human, the other expert with significant experience in this procedure, was not given Dr. Hagen's report and did not review it in forming his opinion and delivery of his report. He was not asked to comment on Dr. Hagen's evidence specifically and did not do so. The size of the confined area in which this procedure was carried out was described at this trial as being roughly the size of a small grapefruit. Dr. Human agreed, at the end of his evidence, that if the curette had been advanced to the top of the fundus as Dr. Dabbs intended, the procedure would almost certainly have been successful.

**101**  The application of the standard of care is not an academic exercise carried out in a manner designed to limit or eliminate liability; but rather, a practical recognition of the difficulty of applying medical care to specific "real life" situations that are both highly variable and, at times, governed by severe time pressures.

**102**  I accept and prefer Dr. Hagen's evidence as to the nature of the concern that arose in the circumstances of this case. This was not an emergent problem but one that was evident from the ultrasound report in advance of the procedure, and was one that Dr. Dabbs was fully aware of. As Dr. Hagen described it, this situation was one where 'it would require great care to get past it [the IUD]'.

**103**  The risk created by the situation was precisely the one that came to pass, namely, that there was an increased risk that part or all of the products of conception would not be removed.

**104**  Although in his oral evidence at trial Dr. Hagen acknowledged that he did not know for sure that the IUD was the reason for the failure of the procedure in this case, his written report is more direct in its assessment:

. . . It is certainly understandable that, when his suction curette struck the embedded IUD, Dr. Dabbs could have interpreted the resistance to further curette advancement to indicate that the device had reached the intra-uterine apex. Knowing that uterine perforation is a well-recognized and relatively common complication of surgical pregnancy termination, Dr. Dabbs may have believed he had successfully removed the six-week pregnancy at this point.

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| [Emphasis added] |  |

**105**  Dr. Hagen's written summary is even more direct:

Ms. Rachel Roe's unwanted first-trimester pregnancy was not successfully terminated, probably because the lower-positioned IUD blocked adequate advancement of the suction curette. Following removal of the IUD, repeat vacuum curettage should have been done. Interpreting the pathology report to conclude that a successful abortion had been carried out was unfortunate but understandable.

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| [Emphasis added] |  |

**106**  Dr. Galliford is a very experienced specialist in the field of obstetrics and gynaecology, but has himself done relatively few first trimester therapeutic abortions. In his written report, Dr. Galliford addressed this issue in these words:

. . . The ultrasound examination also revealed that the IUD was below the site of the pregnancy. I would suspect that IUD was hit by the suction curette on its introduction into the uterus, giving Dr. Dabbs the impression that he had hit the top of the uterus. A competent operator would not try to force the curette any further. The IUD was removed after the suction procedure was completed.

**107**  Dr. Dabbs' letter to Dr. Mittermaier, on April 4, 1997, echoes these views:

. . . It is difficult to know with certainty how this complication of the procedure occurred. She may have a bicornuate uterus, or the IUD may have prevented the suction extraction from happening normally.

**108**  It is clear on the evidence that the plaintiff does not have a bicornuate uterus and although the evidence led by the defence suggested there could be several other causes, none were identified.

**109**  On the whole of the evidence, I am satisfied that this procedure failed when the suction curette struck the embedded IUD and that it was not advanced to the location necessary for the procedure to take place.

**110**  A significant amount of the conflict in the evidence in this case is in relation to the contents of the surgical pathology report. The tissue removed from the uterus by suction curette during the procedure was forwarded to the pathology department. The report, in this case, was printed on January 6, 1997 at 16:16.

**111**  As Taylor J. found in Fredette v. Wiebe [*(1986), 4 B.C.L.R. (2d) 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3CP-00000-00&context=) at 187:

The post-operative check-up following such procedures is one of two safeguards relied on to identify cases in which complications may develop or in which the procedure may have failed. The second safeguard is the routine laboratory examination of tissue removed by the operation.

The first safeguard failed in Beverley's case because she never returned for her check-up. The second safeguard failed because Dr. Wiebe never examined the laboratory report on the tissue she had removed.

**112**  In Fredette, the court found that there was no evidence of ***negligence*** in the manner in which the procedure was performed but went on to consider the failure after the procedure to discover promptly that it had failed. The pathology report in that case reported that only a very small amount of tissue was received and that there was no fetal tissue at all.

**113**  Taylor J., after considering this evidence, concluded at p. 188:

I find the doctor was negligent in failing to ensure that she examined the pathology report, and particularly in signing off the operative report without seeing it. I find that a careful general practitioner would have seen the report not later than four weeks after the operation - the date by which the operative report has to be completed according to the Shaughnessy Hospital practice - and probably well before that, and would immediately have warned the patient and have examined her or, at least, have had her take a pregnancy test.

Had that been done in this case it would have resulted in Beverley finding out she was still pregnant before the ninth week of her pregnancy, while the original operation could have been repeated. At that stage I believe the plaintiff would probably have consented to a second operation.

**114**  The conflict in the evidence of the case at bar is found at a number of levels. Dr. Galliford says emphatically that the pathology report ". . . should have sounded many alarm bells!". He goes on to opine that a finding in the gross description that "fetal and placental tissues are not identified grossly" was unusual in a 7 to 8 week pregnancy.

**115**  Dr. Hagen, in his written report, offers, in explanation, the fact that Dr. Dabbs has a "large, busy primary care practice" and went on to add that:

Thus, I can readily imagine that, on seeing the words "gestational endometrium" and "placental tissue" in the Rachel Roe post-operative pathology report, Dr. Dabbs concluded that he had successfully terminated Ms. Roe's six-or-seven-week pregnancy.

**116**  Dr. Human, in his oral evidence, disagreed with Dr. Galliford and said it was often difficult to distinguish and the failure to identify grossly was not unusual a proposition with which Dr. Dabbs agreed.

**117**  Dr. Human also disagreed with Dr. Galliford's evidence that the microscopic description in the pathology report was significant. He went on to testify that what was important, in his view, was the presence of chorionic villi and not the number of them.

**118**  When pressed during cross-examination, Dr. Human conceded that in the opinion portion of his written report he did not include the word "scant" which was found within the pathology report; that he couldn't ever recall seeing that word in a pathology report before; and, that he couldn't say if that word was present he would have investigated.

**119**  This highlights the danger inherent in the approach put to Dr. Human when counsel drafted the factual assumptions in the form they did and he accepted them. Although those factual assumptions accurately quote the pathology report, they highlight the potentially supportive material and ignore the rest. Dr. Human follows suit - going so far as to write the following:

The wording of the pathology report I feel is critical.

**120**  In this "feeling", he and Dr. Galliford agreed. The difference between the two of them is that Dr. Galliford actually considers the wording of the report and its use of the word "scant" in his opinion; while Dr. Human does not.

**121**  The word "scant" is defined in the Oxford Advanced Learner's Dictionary, put to various witnesses during the trial, as:

SCANT hardly any; not very much and not as much as there should be.

**122**  The Shorter Oxford English Dictionary defines it similarly, and more fully, as:

Scant . . . To become scant or scarce . . . To furnish (a person, etc.) with an inadequate supply; to stint; . . . To limit or restrict in (a supply, etc.) . . . To make scant or small; to reduce in size or amount, cut down. To stint the supply of; to refrain from giving, withhold; . . . To confine within narrow bounds; to limit, restrict, hedge in. To treat slightingly or inadequately; . . .

**123**  Dr. Hagen, when asked about the description of "scant chorionic villi", testified that it was a term he couldn't say he had ever seen in a pathology report before but that it was one that would raise questions in his mind.

**124**  The final portion of the pathology report and the one Dr. Dabbs said he relied on most, although he reviewed the whole report, was the following:

DIAGNOSIS:

PRODUCTS OF CONCEPTION

- DECIDUA, GESTATIONAL ENDOMETRIUM AND BLOOD CLOT WITH A SMALL AMOUNT OF PLACENTAL TISSUE.

**125**  In relation to the words used in the pathology report, Dr. Galliford provided, in his report, the following helpful explanation:

For clarification: Gestational endometrium is the lining of the womb as it appears during a pregnancy state. Decidua is a part of the gestational endometrium and refers to changes in the microscopic appearance of that portion of the endometrium between the glands. It can be seen in the uterus even when the pregnancy is for example, in the tube. Chorionic villi are the extrusions of the placenta that serve to anchor the placenta to the wall of the uterus, and also to allow passage of nutrition and waste between the mother and the fetus. As can be seen from Figure I, at an early state of pregnancy villi are surrounding the pregnancy. Squamous epithelium is the lining of the outer portion of the cervix and is often picked up in the suction curette as a contaminant. Myometrium, refers to the muscle of the uterus, underneath the endometrium.

**126**  In my view, it is not helpful nor proper to look at portions of documents and solely examine the evidence that relates to that portion. It is always necessary to step back and examine the whole of the evidence.

**127**  Dr. Dabbs received the surgical pathology report as a laboratory report on the procedure he had performed on the plaintiff. As Taylor J. found in Fredette, this report was one of the two safeguards relied upon to identify cases in which complications may develop or in which the procedure may have failed.

**128**  I accept Dr. Galliford's view of that report taken as a whole. It is a report which, as a whole, raises concerns. It is not simply a report in which there is one indicator of concern but rather one in which each material section in turn does so. It may well be accurate to say that it is not uncommon at 7 to 8 weeks to find that fetal and placental tissues are not identified in the gross description. But this failure continues into the microscopic description where the unusual term "scant chorionic villi" is used, and into the diagnosis where only "a small amount of placental tissue" is identified.

**129**  Dr. Galliford's opinion, however, does not stand alone; for Dr. Hagen, despite his expressed view about the report, acknowledged that the term "scant chorionic villi" would raise questions in his mind and even Dr. Human was uncertain whether, if he had seen such a term, he would have investigated further.

**130**  In addition, Dr. Dabbs himself, in his letter of April 4, 1997, noted that:

. . . The pathology report diagnosis was products of conception, which delayed our appreciation of the fact that the pregnancy had not been successfully removed.

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| [Emphasis in original] |  |

**131**  This comment on its face seems to indicate a process in which he, indeed, looked at the bottom line instead of examining the report as a whole.

**132**  On August 23, 1997, the plaintiff gave birth to her child at 10:40. Although the child was delivered, the placenta remained inside the cervical os and, as a result, an obstetrician was called in. Dr. Garber, in his consultation report, notes that:

The prenatal history of this pregnancy is extremely interesting. This pregnancy has survived despite a termination being performed in January and two doses of Depo-Provera being given in support at the early stages.

**133**  He goes on to describe his procedure and findings:

Using manual manipulation of the placenta in the lower segment and traction on the cord, the placenta delivered shortly thereafter. Time of delivery was 1145 hr. The uterus contracted down well and intramuscular Oxytocin [sic] as well as Ergometrine was administered. The placenta was examined and found to be intact. No further complications are anticipated.

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| [Emphasis added] |  |

**134**  The end result in this case was that after this procedure was performed, it not only failed with the resulting birth of an intact and apparently undamaged child but also left the placenta intact. Given the finding in the original ultrasound report of December 23, 1996, that prior to the procedure being performed "the uterine cavity contains a single gestational sac containing a single fetal pole with fetal heart beat identified", the failure of the procedure would appear to have been virtually complete.

**135**  This pathology report, however, did not stand alone. This was a report concerning a patient who had undergone the procedure with an IUD in place and embedded in the wall below the gestational sac. It was one of those cases where the surgeon was required to proceed with great care or risk failure of the procedure.

**136**  I find that in this case, given the circumstances, a careful general practitioner would, at the least, have examined the pathology report with some care; particularly when, in addition, he was about to administer an injection of Depo-Provera, a medication which specifically warns against its use during pregnancy.

**137**  A careful examination of the pathology report, indeed any considered examination of it, would have raised in the mind of a reasonable general practitioner concerns requiring further investigation. Dr. Dabbs failed to meet the standard in his examination of the report and, as a result, the opportunity to warn the plaintiff in a timely way and examine her further was lost.

**138**  The procedure itself, as it was carried out, may well have met the standard for the routine therapeutic abortion procedure. This, however, was not such a case. This was a patient with a specific and known complication, in the circumstances, particularly where there was no apparent bleeding following removal of the IUD. As Dr. Hagen suggests, "repeat vacuum curettage should have been done". Dr. Dabbs' failure to take this step during the procedure and to subsequently consider adequately the pathology report he received resulted in the failure of the procedure and the failure to recognize that fact at an early stage.

**139**  I find that the defendant owed to the plaintiff a legal duty of care and that he breached that duty in the manner I have described.

FOLLOW-UP

**140**  The plaintiff alleged that the defendant failed to adequately arrange follow-up and that no adequate instructions with respect to follow-up were given. In support of this Mr. Daley submits that the plaintiff's appointment with Dr. Dabbs on January 7, 1997, was for the specific purpose of administering the Depo-Provera injection. While this had certainly been arranged, Dr. Dabbs first note in his chart on that date is "no post op problems". This notation indicates that an inquiry was done with respect to the procedure and I find that it was.

**141**  The plaintiff was also somewhat knowledgeable with respect to this process. She had gone to term and given birth to two children previously and, in addition, had undergone two previous abortions.

**142**  The evidence fails to establish any failure by Dr. Dabbs in the follow-up process beyond my findings with respect to the surgical pathology report.

CONTRIBUTORY ***NEGLIGENCE***

**143**  The defendant alleges that if there was ***negligence*** on his part then there was also contributory ***negligence*** on the part of the plaintiff. In advancing this position the defendant does not suggest that the plaintiff should have undergone a further abortion procedure or put the child up for adoption, but rather, that her failure to follow-up after the procedure was a major part of the difficulty and of the failure to realize the procedure had failed.

**144**  The authorities recognize that the duty of care owed by a medical practitioner is not restricted to the exercise of reasonable care during the course of an operation but extends, as well, to the post-operative period[**3**](#Forward_fnref_fnr-3).

**145**  There are limits, however, in the duty imposed on medical practitioners. In Blakeborough et al v. Weatherston et al, [*[1999] B.C.J. No. 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-227H-00000-00&context=), B.C.S.C., Vancouver Registry No. C962598, March 22, 1999, MacDonald J., in a case related to prenatal care, found:

However, I reject the proposition that, having so informed a prenatal patient, the doctor is obliged to 'chase' or 'hunt down' a patient who fails to return at the appropriate interval where there is nothing unusual about her condition. That would place an intolerable burden on the medical profession. There are many innocent explanations for a 'no-show', including a decision to change doctors or a move from the area of the doctor's practice.

**146**  This reasoning in turn applied that found in the decision of Wei Estate v. Dales, [*[1998] O.J. No. 1411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-62XP-00000-00&context=), where Chadwick J., at para. 108, writes:

108 The patient himself had a responsibility not only to take the medication as prescribed but to monitor his own signs and symptoms and to comply with the request for follow-up appointments.

109 The treating physician cannot be expected to follow-up every instruction given to a patient. The treating physician has the right to expect the patient will follow his or her instructions. If the patient disagrees with the doctor's instructions, then he has a duty to advise the doctor.

**147**  While these principles are well established they must still be applied in the matrix of facts found in a particular case.

**148**  In the present case, the plaintiff was given, by Dr. Dabbs, an injection of Depo-Provera three days after the procedure. At the same time he assured her that the abortion had been successful.

**149**  The pamphlet provided to the plaintiff discusses various symptoms and side-effects which may accompany the use of Depo-Provera. These side-effects include change in menstrual pattern and weight gain, and may include headaches, nausea, vomiting and stomach cramps, among a host of others.

**150**  The pamphlet also plainly indicates it is not to be used if you are pregnant.

**151**  It seems somewhat disingenuous for the defendant, who had assured the plaintiff that the abortion had been successful and administered the injection of Depo-Provera, to then suggest that her failure to return to him and report continuing symptoms (symptoms that were listed as potential side-effects of the medication he recommended, prescribed and injected) amounts to and should be held to be contributory ***negligence***.

**152**  In fact, the plaintiff returned to see her family doctor on January 31, 1997, and February 7, 1997, before the appointment on April 1, 1997, when it was confirmed she was still pregnant.

**153**  Dr. Mittermaier testified that he had no inkling that she might still be pregnant until the appointment in April.

**154**  This is not a case where a patient ignores advice and does not fulfill her responsibility with respect to follow-up. The plaintiff had been assured by the defendant that the procedure had been successful and the medication he injected served to explain and mask any concerns she might have had.

**155**  She continued to see her family doctor who, despite those visits, had no inking that she might still be pregnant. If he did not know, I fail to see how the plaintiff should have known.

**156**  I do not accept that in these circumstances the plaintiff should have analyzed the booklet she had been provided with the skill of a pharmacist or her overall condition with the skill of a doctor.

**157**  I find that there is no basis for a finding of contributory ***negligence*** on the part of the plaintiff.

DAMAGES

**158**  The types of claims advanced in this action are difficult; for this is not a simple tort claim where the court is called upon to assess a loss which is often a physical loss or a loss of capacity.

**159**  The loss advanced in this case arises from the birth of a healthy child. The measurable losses in terms of lost income, and extra costs, are offset by intangible benefits readily evident from the plaintiff's evidence of the joy she derives from the presence of this child in her life.

**160**  In addition, although there is undoubtedly an extra mouth to feed and the other costs involved in having an extra member in the family unit, there is also an extra person from whom the plaintiff may, ultimately, obtain some financial benefit.

**161**  If these issues are not complex enough, there is also the child support obligation of the child's natural father.

**162**  In this case, the plaintiff invites the court to assess the plaintiff's pain and suffering, the costs of raising a child, and the financial losses she has suffered as a result of her maternity leave, delayed educational upgrading and losses of opportunity which arise from that.

**163**  The defendant, on the other hand, submits that although there may be an award for non-pecuniary losses, the award for income loss is modest and there should be no award for the cost of raising a healthy child. In addition, the defendant submits that the loss of opportunity claim advanced in this case is entirely too speculative.

THE AUTHORITIES

**164**  This difficult damage concept has been considered in a number of authorities in different jurisdictions.

British Columbia

**165**  Three British Columbia decisions deal with the assessment of damages for the unexpected birth of a child: Fredette v. Wiebe [*(1986), 29 D.L.R. (4th) 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3CP-00000-00&context=), [*4 B.C.L.R. (2d) 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3CP-00000-00&context=) (S.C.); Cherry v. Borsman [*(1990), 75 D.L.R. (4th) 668*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2VJ-00000-00&context=) (S.C.) varied [*(1992) 94 D.L.R. (4th) 487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S120-00000-00&context=) (C.A.); and, Joshi (Guardian ad litem of) v. Wooley [*(1995), 4 B.C.L.R. (3d) 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0WF-00000-00&context=) (S.C.).

**166**  In Fredette v. Wiebe, the plaintiff, a single 17 year old high school student underwent an abortion which failed. She eventually gave birth to twin girls.

**167**  The defendant was found, in this case, to have been negligent in failing to examine a post-operative laboratory report which would have resulted in earlier discovery of the failure.

**168**  Some 18 months later, she met a man whom she eventually married. In assessing the situation, M.R. Taylor J., found that:

In no sense is the plaintiff unhappy she has the twins - she is as pleased with them as any mother would be.

She says it was a harrowing experience to bear them at 17 years of age, with no financial resources, when she was trying to complete high school and with no spouse to help her. This is not, like most of the reported "wrongful birth" cases, a case of a married woman who has had to bear one child too many. It is the case of an unmarried teenager who had to bear two children too soon.

. . .

The evidence in this case suggests that if the abortion had been successful the plaintiff would have decided to have more than the one child she now has had by her husband. Thus she would in any event have been faced with the cost of raising one or two other children - including time off work and child rearing expenses - as well as the difficulties and anxieties of motherhood. She would in any event have received all the benefits of motherhood.

The only thing she would not have experienced is the harrowing experience of being a 17-year-old, impecunious single parent.

The fact that the plaintiff is glad she has these twins, and that they could not, of course, have been born under any other circumstances or at any other time, does not, in my view, mean she has no claim for the extra burden of bearing and caring for them under those unfortunate circumstances.

**169**  In these circumstances, the court found that the plaintiff was entitled to a recovery of non-pecuniary damages for additional anxiety, inconvenience, physical suffering, loss of amenities and loss of enjoyment of life, resulting from her pregnancy. The non-pecuniary damages were assessed at $20,000.

**170**  Cherry v. Borsman was also a failed abortion case. In this case, however, the plaintiff's child was born with severe and permanent disabilities caused by the negligently performed abortion.

**171**  Skipp J., at trial, found that there was no public policy prohibiting compensation for a parent for the birth of a child following an unwanted pregnancy. He awarded not only non-pecuniary damages but also damage for the costs of caring for the child. This included loss of future income and the cost of future care.

**172**  The Court of Appeal upheld the approach and dismissed the appeal.

**173**  A careful examination of these two decisions, however, reveals that the awards related directly to the costs of caring for a child with severe disabilities arising directly from the defendant's ***negligence***. Neither court included within their awards damages for the ordinary costs of raising a child.

**174**  In Joshi (Guardian ad litem of) v. Wooley, the plaintiff, a 45 year old married mother of three, underwent tubal ligation. Some five years later she became pregnant, eventually giving birth to a child who suffered from some disabilities.

**175**  In this case, Boyle J. found that the defendant was negligent in failing to advise the plaintiff of the risks of failure and in the management of the pregnancy. He went on to find that the first of these failures resulted in the pregnancy and the second caused physical harm to the mother. Critically, there was no finding that the defendant's ***negligence*** caused the child's disabilities.

**176**  Damages were awarded in this case both for non-pecuniary damages and damages for past and future income loss, as well as for past and future cost of raising the child.

The Evolution of Canadian Authority

**177**  While initially Canadian courts rejected claims for the award of damages for the birth of a healthy child on the basis that such an award was contrary to public policy, this reticence gave way in the late 1970s to modest awards which did not include the costs of raising a healthy child.

**178**  In the mid 1990s, two decisions signalled a change in direction, perhaps arising from the legal developments in the United Kingdom.

**179**  In Suite v. Cook, [*[1993] R.J.Q. No. 514*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JG51-JK4W-M2PP-00000-00&context=), [*15 C.C.L.T. (2d) 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JG51-JK4W-M2PP-00000-00&context=) (S.C.) aff'd [*[1995] R.J.Q. No. 2765*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JG51-JK4W-M2F5-00000-00&context=) (C.A.), the Quebec Superior Court found that parents of a child born following an unwanted pregnancy were entitled to damages including the cost of raising the child. The court went on to reject the submission that the non-pecuniary benefits associated with raising the child should be offset.

**180**  The Court of Appeal, in affirming the judgment, rejected the latter reasoning finding that the emotional benefits and burdens of raising a child should be assessed and offset.

**181**  The second decision, Kealey v. Berezowski [*(1996), 136 D.L.R. (4th) 708*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JX3N-B1NF-00000-00&context=) (Ont. Gen. Div.) was a case of a failed sterilization procedure. In this decision, Lax J. draws a distinction between (1) wrongful birth cases, (2) wrongful life cases, and (3) wrongful pregnancy cases, and then proceeds to canvass various approaches to the calculation of damages for wrongful pregnancy. The reasons contain a thorough review of the authorities and a helpful analysis of the differing approaches to damages in these types of cases that emerges from the various authorities.

**182**  After reviewing the authorities, Lax J. began her analysis by addressing the overall difficulty of advancing such a claim and the historical changes in attitude and philosophy which are reflected in the evolution of the various authorities:

The authorities which I have reviewed amply illustrate that there is no approach which is free from difficulty. A claim for child-rearing costs juxtaposes the private world of tort law with a world that is imbued with personal and public views of morality. It asks whether tort law is bold enough or foolish enough to embrace as a harm that which we so clearly regard as a good. It demands that we examine whether tort theory is compromised or validated depending on the approach which is chosen. The claim raises questions about the nature of injury, the limits of the doctrine of foreseeability and the congruence of this doctrine with the assessment of damages. Courts have struggled with the novel question at issue in this case because, in the absence of legislative guidelines for assessing damages of this kind, they are driven back on standard principles of ***negligence*** law or on public policy. Both may be inadequate for the task.

In the case of public policy, arguments can be advanced to both support and to deny recovery for child-rearing costs. It is clear that there is no rule of public policy in Ontario requiring people to have children or preventing them from deciding not to have children or determining the number of children they choose to have. A woman's right to reproductive choice is lawful and increasingly recognized: R. v. Morgentaler, [*[1988] 1 S.C.R. 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23H0-00000-00&context=), [*44 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23H0-00000-00&context=); Tremblay v. Daigle, [*[1989] 2 S.C.R. 530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6515-00000-00&context=), [*62 D.L.R. (4th) 634*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6515-00000-00&context=). Parents' rights to plan and limit, if they so choose, the size of their families are the accepted community norms of today.

The time has long passed when a court is free (if indeed, there ever was such a time) to dismiss a claim such as this as "grotesque" or "ridiculous". We have reliable birth control and sterilization procedures and family planning is both accepted and encouraged. The norms and standards of community which informed the values of an agrarian and religious society have been replaced with the economic pressures to produce an educated and skilled labour force. Families are smaller and expensive to maintain. Children are no longer an economic unit of production. On the contrary, they are an economic drain for some considerable number of years. All of this is true.

However, it is also true that the notion of family however configured, whether nuclear or extended, whether partnered or single, whether heterosexual or same-sex, whether conventional or unconventional, remains the central and cherished structure in our lives. And, for the most part, children figure very prominently at its core without regard to their economic and sometimes emotional costs. In our hierarchy of societal values, the benefits which a child brings are regarded as so essentially worthwhile that we tend to regard those who are childless by choice as unusual and we extend our comfort to those who long for a child but are unable to have one. In short, the love, companionship, affection and joy which a child brings is thought to so outweigh the burdens that we bridle at the thought that the law could be so foolish as to regard this as a compensable loss.

In Ontario, public policy recognizes the inherent value of children. The loss of a child's "guidance, care and companionship" is compensable by virtue of s. 61(2)(e) of the Family Law Act, [*R.S.O. 1990, c. F.3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G31-JFKM-62K1-00000-00&context=), and pecuniary and non-pecuniary losses are recoverable upon the wrongful death of a child: Mason v. Peters [*(1982), 39 O.R. (2d) 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DXWW-231K-00000-00&context=), [*139 D.L.R. (3d) 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-DXWW-231K-00000-00&context=) (C.A.). How can it then be that the wrongful birth of a child is a compensable loss? The answer to this, in my view, does not lie in public policy. On the one hand, public policy favours sensible family planning and does not impose children on people contrary to their choice. On the other hand, children are regarded undeniably by the state as beneficial and it is the loss of a child, not the birth of a child, which, in law, is a compensable wrong. Both views, contrary though they may be, are supported not only by public policy but also by public sentiment. Accordingly, it falls to tort law to attempt to determine whether this is a compensable loss. This requires a fuller understanding of the nature of the loss and the legal principles which favour or militate against compensation.

**183**  In the end, she concludes that the claim for the cost of raising a healthy child should be treated as a claim for pure economic loss and be recoverable only where financial concerns were the motivating factor for the parent's decision not the have more children. She goes on to conclude that in the case before her that was not the primary motivating factor and, as a result, those particular damages were not recoverable.

**184**  In Mummery v. Olsson, [*[2001] O.J. No. 226*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDC1-K0BB-S4VC-00000-00&context=), Forestell J., in a similar case, considered both Kealey and McFarlane v. Tayside Health Board, [2000] 2 A.C. 59 (H.L.), concluding that the costs of raising a child should not be generally recoverable in a wrongful birth action.

**185**  In Alberta, the issue appears perhaps even more unsettled. In M.S. v. Baker, [*[2002] 4 W.W.R. 487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-FK0M-S2XJ-00000-00&context=), Moreau J. agreed with and applied the reasoning of Lax J. in Kealey finding that the cost of raising a child ought to be recoverable where the plaintiff's rationale for sterilization was financial. In M.Y. v. Boutros [*(1992), 11 C.C.L.T. (3d) 271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63CT-00000-00&context=), however, Rawlins J. disagreed with this approach finding that damages for the cost of child rearing should not be recoverable in any case.

Other Jurisdictions

**186**  A wide range of international authorities may be found in Kealey v. Berezowski, the House of Lords decision in McFarlane v. Tayside Health Board and in the decision of the High Court of Australia in Cattanach v. Melchior, [2003] H.C.A. 38, 77 A.L.J.R. 1312. What these decisions serve to highlight is that the conceptual difficulties associated with these types of claims are not confined to the borders of Canada.

**187**  In 1999 the House of Lords, in McFarlane v. Tayside Health Board, found that the costs of raising a healthy child were not recoverable. In contrast, the High Court of Australia, in July 2003, in Cattanach v. Melicor, 77 A.L.J.R. 1312, found that the costs of raising a child to 18 were generally recoverable in wrongful birth cases.

**188**  More recently, the House of Lords, in October of 2003, in Rees v. Darlington Memorial Hospital NHS Trust, [2003] U.K.H.L. 52, [2004] 1 A.C. 309 (H.L.), seems to have retreated from the strict principle found in McFarlane v. Tayside Health Board. In re-affirming that the costs of raising a healthy child are not recoverable in a wrongful birth case, the majority held that a "conventional award" of [pounds]15,000 should be added to the damages awarded in wrongful birth cases in order to provide more adequate compensation for plaintiffs.

The Different Approaches

**189**  The authorities consider four basic approaches to the assessment of damages in wrongful birth cases.

1. No Recovery

**190**  The reasoning in this approach seems to be founded on the assumption that a birth is a blessing for the parents and should not properly result in the assessment of damages.

1. Total Recovery

**191**  Under this approach, the recovery of damages includes the full cost of raising the child and no deduction is made for benefits accruing as a result of the child's birth.

1. Offset/Benefits

**192**  This approach allows the recovery of damages for the cost of raising a child, but attempts to assess and set-off against that cost the net benefits that the parents are found to receive as a result of the child's birth.

1. Limited Damages

**193**  Under this approach, the court allows an award of damages for the pregnancy, the childbirth and the costs of initially accommodating the newborn child but no recovery is allowed for the costs of raising the child.

**194**  In my view, neither the "No Recovery" nor the "Total Recovery" models are the proper approach. I say this with the greatest of deference to those who have, in the authorities, expressed differing views. I do not intend to set out in these reasons the detailed reasoning for and against each of these approaches which can be readily found in the authorities cited in these reasons, and efforts to summarize those views would simply not do justice to the eloquent efforts of those authors.

**195**  Suffice it to say that in my view, at least, it is not rational to refuse compensation to a person who has made positive efforts to avoid the burden of another child and had those efforts frustrated by professional ***negligence***. There is no rational basis for the law presuming that no harm results.

**196**  It is equally irrational, in my view, to award the full costs associated with the birth and raising of a healthy child for such an approach overcompensates the parents by allowing them to keep the intangible benefits while awarding the costs associated with the child against the defendant.

**197**  On a different level, the calculation of those costs as reflected in the reports and evidence of the economists whose evidence and reports have been tendered in this case, are artificial, of necessity, in their attempts to quantify this type of loss.

**198**  The problem is that this is not an "ordinary" category of loss in which a measurable stream of income or damages can be ascertained but effectively a redistribution of resources. This is not a case where the principle restitutio in integrum can or should be applied. Neither is it a class of damages where the wealth or poverty of a family (in terms of income) should lead to different results. It is a situation where the theoretical "loss" suffered by the family as a whole is compensated by an award with respect to the child which results in a "gain" or "benefit" to that child.

**199**  The offset/benefits approach, while superficially the more appealing conceptually, leads inexorably to the heart of what I view as the public policy issue. Is it the proper role of a court to encourage parents to deny the joy or the gratitude they feel in the birth and growth of a child in hopes of greater financial reward; or to attempt to quantify negative contingencies arising from the life of a particular child in a particular family environment?

**200**  As Lax J. concluded in Kealey v. Berezowski at D.L.R. 738:

Who can say whether the time, toil and trouble or the love, guidance and money which parents devote to a child's care and upbringing, will bring rewards, tangible or intangible, today, tomorrow or ever. No court can possibly determine this in any sensible way. Nor should it attempt to do so.

**201**  Such a process is not simply unworkable in practical terms, it has the potential to damage both the family dynamics and the relationship between family members by seeking to value the emotional or monetary value of participation in a family unit. The court must not, in my view, embrace or be drawn into such a process.

**202**  Many, if not the majority, of the decisions to which I have referred have, in the end, grappled with the assessment of damages within the broad confines of the "Limited Damages" approach. This approach is found particularly in the decisions in McFarlane v. Tayside Health Board, Mummery v. Olsson and by many, if not most of the American authorities.

**203**  The approach has generally broken down over the difficulties associated with the balancing of the benefits and burdens of parenthood.

**204**  These difficulties have led some, such as Lord Millet in McFarlane, to conclude that the law, as a matter of policy, should assume no loss. At A.C. 113, he writes:

In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forego the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.

**205**  In my view, if this logic is correct, it logically precludes the award of damages for pregnancy and childbirth yet these are almost universally separated and included within damage awards for wrongful birth.

**206**  This specific difficulty was at the heart of Lord Millet's dissent in McFarlane (at A.C. 114).

**207**  The English courts, after the decision in McFarlane, varied the approach in that case in two significant ways. Firstly, by awarding compensation for extra expenses in raising a disabled child; and Secondly, by adopting the award of what they class as "conventional damages".

**208**  The first of these departures is seen in Parkinson v. St. James and Seacroft University Hospital NHS Trust, [2001] E.W.C.A. Civ. 530, [2002] Q.B. 266, where the English Court of Appeal held that notwithstanding McFarlane, parents were entitled to recover extra costs associated with the raising of a child with disabilities even when those disabilities were unrelated to negligent treatment.

**209**  This distinction has been seriously criticised, most notably in Cattanach where McHugh and Gummon JJ., at para. 78, note that:

The reliance upon values respecting the importance of life is made implausible by the reference to the postulated child as "healthy". The differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire. To prevent recovery in respect of one class of child but not the other, by reference to a criterion of health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents.

while at para. 166, Kirby J. expresses a similar view noting that:

Apart from the arbitrariness of this exception it has a further flaw. It reinforces views about disability and attitudes towards parents and children with physical or mental impairments that are contrary to contemporary Australian values reinforced by the law. English judges have been forced into this unhappy differentiation because of the authority of McFarlane. Some of them show obvious discomfort with it and some even rebellion. I am unconvinced that Australian law should go down the same path for it leads away from established legal principle.

**210**  Lord Millet, in his dissent in McFarlane (at A.C. 114) was alone in proposing the award of "conventional damages". Four years later, in Rees, the House of Lords recognized such an award.

**211**  I do not view these two developments as exceptions or mere glosses on a particular approach to damages but rather as a recognition that the approach established in McFarlane, if it is still good law, does not adequately compensate parents in these types of actions.

DAMAGES IN THE PRESENT CASE

**212**  In my view, the four basic approaches outlined in the authorities fail to adequately compensate plaintiffs for the real costs, economic and personal, that arise from raising a child. In undergoing a sterilization in the form of a tubal ligation or a vasectomy or an abortion, a person has, it must be assumed, made an informed decision with the benefit of professional medical advice.

**213**  The court, in my view, ought not to negate that decision by assuming that no harm, but a positive benefit, flows from negligently frustrating that considered decision.

**214**  The difficulty, however, continues; for arithmetic calculations of the type which evolved in family compensation cases are ill suited to assessing this type of loss. The focus of the court should not be on faulty assumptions that an expenditure on a child represents a loss to the parents or on a process that forces the court to examine family relationships too closely as a form of benefit/detriment analysis.

**215**  In this jurisdiction, damages are meant to be compensatory. The principle underlying that is the concept that the court must consider the individual plaintiff and tailor the award to that plaintiff's circumstances.

**216**  In my view, the English approach of "conventional damages" seeks to do this by a different means. In this jurisdiction, in my view, the proper approach is to treat damages in these cases as non-pecuniary in nature. The effect of redistribution within a family unit is a factor but such a redistribution should not be treated as a pecuniary loss but simply as one aspect of this non-pecuniary loss.

**217**  Such an approach may be viewed as arbitrary but it is no less arbitrary to try and force this type of claim into a pecuniary or economic loss model. Instead, the overall circumstances must be considered in arriving at an appropriate award.

**218**  I do not consider this approach as being contrary to the principles underlying the decisions in Fredette v. Wiebe, Cherry v. Borsman or Joshi v. Wooley. In looking to the underlying principles which emerge from these three decisions, I am also mindful of the considerable evolution that has occurred, even since Joshi was decided in 1995.

**219**  In approaching the present case, the court must consider the plaintiff's decision to undergo the procedure in this case. The plaintiff, in this case, had limited education and limited means of earning income. Her existing family and commitments strained her resources without the addition of another child. At that time she had no permanent relationship and no emerging prospects of one.

**220**  A decision to abort a fetus or to give a child up for adoption are intensely personal decisions which are the parents' to make. They may well scar the parents emotionally or affect the family unit as a whole. It is difficult to imagine a situation in which such a decision could or should be considered unreasonable and leading to a finding that the plaintiff failed to mitigate her damages.

**221**  In the present case, where the plaintiff had made that decision only to find out much later that the procedure had failed, it is difficult to imagine the emotional turmoil that followed; where she was faced with the suggestion that perhaps one of two twins had been aborted, or that the fetus may have been damaged; that situation only worsened.

**222**  Her decision to reject the offered late term abortion cannot, in the circumstances, be questioned and, in my view, cannot be considered unreasonable.

**223**  The plaintiff's primary concerns at the time she underwent the initial procedure were financial. She had limited income, tentative plans to upgrade her education and limited prospects.

**224**  I have carefully considered the evidence as a whole. I am not satisfied, on the evidence, that the plaintiff would have actually pursued the education she described. It is clear that opportunities to do so existed and that she did not do so.

**225**  In Fredette v. Wiebe, decided 18 years ago, the general damages were assessed at $20,000.

**226**  In Cherry v. Borsman the general damages were $75,000 but a significant component of this was related to the trauma of learning of and coping with the child's severe physical and mental injuries.

**227**  In Joshi v. Wooley, general damages were assessed at $30,000 for the pre-natal period including the birth, and $37,500 for the post-natal period (related to childbirth).

**228**  In this case, the plaintiff has suffered the normal pain and discomfort associated with pregnancy and childbirth. She has also suffered limitations on her lifestyle and activities. In addition, she underwent the considerable trauma of discovering the procedure had failed and the emotional upheaval of assessing the possibility that a twin had been aborted, or the fetus damaged, as well as making a further decision concerning a late term abortion. She was lucky to have the sensitive and caring support of her family doctor, Dr. Mittermaier, but even with that support she was severely traumatized.

**229**  Taking all of this into account, I award to the plaintiff the sum of $55,000 for non-pecuniary damages.

**230**  In addition, Dr. Dabbs does not dispute the plaintiff's income loss with respect to the pregnancy and maternity. I assess that loss at $5,000.

**231**  As previously noted, I find that the plaintiff has failed to establish a loss of opportunity claim.

**232**  If counsel are unable to agree on costs, they may be spoken to.

**233**  In addition, counsel may, if they wish, make further submissions, in writing or orally, as to whether there should be continued restrictions on access to this court file.

PARRETT J.

[**1**](#Backward_fnref_fnr-1) Emil Anderson Construction Co. v. British Columbia Railway Co., [*[1987] B.C.J. No. 1783*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FCCX-60FJ-00000-00&context=)

[**2**](#Backward_fnref_fnr-2) Henessy v. Rothman [*[1988] B.C.J. No. 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F06F-22WG-00000-00&context=)

[**3**](#Backward_fnref_fnr-3) Robb v. Sutton, [*[1996] B.C.J. No. 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2HF-00000-00&context=) at para. 41.

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[***Sahyoun (Committee of) v. Ho, [2015] B.C.J. No. 469***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G53-RJN1-FBFS-S4V5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.G. Voith J.

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Registry: Vancouver

**[2015] B.C.J. No. 469** | 2015 BCSC 392

Between Antonios Nabil Riad Sahyoun, by his committee and father, Dr. Nabil Riad Sahyoun, Mariam Nabil Riad Sahyoun, Bishoy Nabil Riad Sahyoun, Mrs. Sanaa Riad Sahyoun and Dr. Nabil Riad Sahyoun, Plaintiffs, and Dr. Helena Ho, Dr. Anton Miller, Elizabeth Payne, Provincial Health Services Authority (doing business as Sunny Hill Health Centre for Children formerly Sunny Hill Hospital for Children, and doing business as B.C. Children's Hospital), The University of British Columbia, Martha Hilliard, Vancouver Coastal Health Authority formerly Vancouver Health Department, Her Majesty the Queen in Right of the Province of British Columbia as represented by the B.C. Ministry of Health, Margaret Hardwick, Dr. Kevin Farrell, Dr. Jean Hlady, Dr. Fred Kozak, Dr. Keith Riding, Dr. Neil Longridge, Vancouver Coastal Health Authority (doing business as Vancouver General Hospital), Laura Wang, Dr. Brian Westerberg, Providence Health Care (doing business as St. Paul's Hospital), Dr. Jason Chew, Dr. Douglas Graeb, Beverly Underhill, Dr. Jean Moore, Karen Till, Robert Pearmain, Allan McLeod, Donald Goodridge, Carol McRae, Deceased, Kenneth Ronald Bradley McRae as Representative and Administrator of the Estate of the Deceased Carol McRae, Vancouver Board of Education formerly Vancouver School Board, Her Majesty the Queen in Right of the Province of British Columbia as represented by the B.C. Ministry of Education, David Duncan, B.C. Legal Services Society, Harinder Mahil, Judith Williamson, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of B.C. for the former B.C. Council of Human Rights, Ross Dawson, Cheryl Carteri, Haris Zakouras, Her Majesty the Queen in Right of the Province of British Columbia as represented by the B.C. Ministry of Children and Family Development formerly B.C. Ministry for Children and Families, Lorill Johl, Gateway Society: Services for Persons with Autism, Detective Constable Ennis, Constable Schaaf, Acting Sergeant Schilling, Constable Lemcke, Sergeant Pyke, Constable Green, Vancouver Police Department, City of Vancouver, and Her Majesty the Queen in Right of the Province of British Columbia, Defendants

(168 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Disposition without trial — Delay or failure to prosecute — Applications by defendants to strike claim for want of prosecution and other relief allowed — Plaintiffs commenced action in 2008 regarding incidents that took place in 1990s, but little had been done to bring action to trial — Action of disabled plaintiff stayed in 2011 pending retention of counsel, but counsel not retained — Delay was inordinate and inexcusable — Defendants prejudiced by delay as allegations were serious — Pleading was incomprehensible, contained evidence and failed to advance recognized causes of action.**

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| Applications by the defendants to dismiss the action for want of prosecution, to strike the claims of the adult defendants and application by the defendant University to strike the claim. The plaintiff AS had serious limitations and was unable to manage his affairs. His father was appointed committee of the person. Subsequently, in 2008, the father commenced this action. The claim was made against 49 different defendants, including 10 physicians, various individuals from health care and education facilities, the University of British Columbia, various individuals employed by the Province, six police officers and the City of Vancouver, and a lawyer and the Legal Services Society. The claim contained serious allegations of professional ***negligence***, perjury, malicious behaviour, breaches of duty, fabrication of evidence, defamation and dishonest behaviour. In 2011, the claim of the plaintiff AS, who was disabled and unable to act for himself, was stayed until counsel could be retained to act on his behalf. The Public Guardian and Trustee refused to act on AS's behalf because it considered the action to be without merit and was not satisfied it was in AS's best interests.  HELD: Application allowed.  The delays in this action had been inordinate. The allegations against most defendants dated back 20 to 25 years. Furthermore, the action was commenced more than seven years ago and very little had been done to bring the matter to trial. The delay was inexcusable. Part of the delay was caused by the stay of AS's claim. However, there was no prospect of change as AS's the public guardian and trustee was not prepared to act on AS's behalf, his parents had been unable to find counsel to act for him and an application for state-funded counsel had been dismissed. The defendants were prejudiced by the delay as the allegations were serious. The pleadings of AS's father and mother were deficient. The amended pleading was incomprehensible and it was impossible to identify which plaintiff advanced what cause of action against which defendant. In addition, the amended pleading contained evidence. Furthermore, the amended pleading failed to advance recognized causes of action against many of the defendants. The parents advanced causes of action against the health care defendants for the alleged misdiagnosis of AS, but the law was clear that hospitals were not responsible for the ***negligence*** of non-employed medical staff. They also alleged causes of action against various social workers for their conduct while the parents' children were in their care, but there was no legal duty of care on service providers to the family members of apprehended children. Furthermore, they alleged criminal wrongdoing on the part of many defendants, but no criminal wrongdoing had been established. The claims against various statutory decision-makers and others exercising statutory powers were a collateral attack on those decisions. Furthermore, some of the claims were made against persons who had statutory immunity. The claim in defamation was not properly advanced. In many cases, the pleadings did not adequately identify the material facts required to ground the claims. Furthermore, as a result of the striking of the claims of AS, the claims of the parents became statute-barred. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 15, s. 24(1)

Child, Family and Community Services Act, R.S.B.C. 1989, c. 61, s. 101

Criminal Code, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=),

Crown Proceeding Act, R.S.B.C. 1979, c. 86, s. 3(2)

Family and Child Services Act, S.B.C. 1980, c. 11, s. 23

Limitation Act, RSBC 1996, CHAPTER 266, s. 4, s. 4(1), s. 4(1) (d), ss. 7(1)-(2)

Limitation Act, [*S.B.C. 2012, c. 13, s. 30*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TR-00000-00&context=)(3)

Police Act, [*RSBC 1996, CHAPTER 367, s. 21*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S0S6-00000-00&context=), ss. 21(2)-(3)

Rules of Court, *B.C. Reg. 221/90*, Appendix C, Schedule 1, s. 1

School Act, R.S.B.C. 1989, c. 61, ss. 112(1)-(2)

School Act, [*RSBC 1996, CHAPTER 412, s. 94*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5JKN-R7M1-F5T5-M031-00000-00&context=)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 1-3*(1), Rule 3-7(1), Rule 6-2(7)(c), Rule 9-5, Rule 9-5(1), Rule 9-5(1) (a), Rule 9-5(1)(b), Rule 9-5(1)(c), Rule 9-5(1)(d), Rule 20-2, Rule 20-2(2), Rule 20-2(4), Rule 20-2(6), Rule 20-5, Rule 22-7, Rule 22-7(2), Rule 22-7(7)

Vancouver Charter, [*S.B.C. 1953, c. 55, s. 294*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5JKN-R7N1-FBN1-20DP-00000-00&context=)(2)

**Counsel**

Appearing on behalf of the Plaintiffs, Antonios Nabil Riad Sahyoun, by his committee and father, Dr. Nabil Riad Sahyoun, and on his own behalf: Dr. Nabil Riad Sahyoun.

Appearing on her own behalf: Mrs. Sanaa Riad Sahyoun.

Dr. Helena Ho, Dr. Anton Miller, Dr. Kevin Farrell, Dr. Jean Hlady, Dr. Fred Kozak, Dr. Keith Riding, Dr. Neil Longridge, Dr. Brian Westerberg, Dr. Jason Chew, and Dr. Douglas Graeb: Kim Yee, Counsel for the Defendants.

Elizabeth Payne, Provincial Health Services Authority doing business as Sunny Hill Health Centre for Children and doing business as B.C. Children's Hospital, Martha Hilliard, Vancouver Coastal Health Authority, Margaret Hardwick, Vancouver Coastal Health Authority doing business as Vancouver General Hospital, Laura Wang, Providence Health Care doing business as St. Paul's Hospital, Beverly Underhill, Dr. Jean Moore, Karen Till, Robert Pearmain, Allan McLeod, Donald Goodridge, Carol McRae, Deceased, Kenneth Ronald Bradley McRae, as Representative and Administrator of the Estate of the Deceased, Carol McRae, Vancouver Board of Education, B.C. Ministry of Education, Lorill Johl, Gateway Society: Services for Persons with Autism: Timothy C. Hinkson, Counsel for the Defendants.

Detective Constable Ennis, Constable Schaaf, Acting Sergeant Schilling, Constable Lemcke, Sergeant Pyke, Constable Green and City of Vancouver: Iain K. Dixon, Counsel for the Defendants.

University of British Columbia: Robert B. Kennedy, Erica Miller, Counsel for the Defendants.

British Columbia Ministry of Attorney General, British Columbia Ministry of Children and Family Development, British Columbia Human Rights Tribunal, Ross Dawson, Cheryl Carteri, Haris Zakouras, Harinder Mahil, Judith Williamson: Bryant Mackey.

Counsel for the Defendants, David Duncan and the B.C. Legal Services Society, Christopher Darnay, Counsel for the Defendants.

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| **P.G. VOITH J.** |

**1**   The various defendants advance several applications to which the plaintiffs, Dr. Sayhoun and Mrs. Sayhoun, have filed specific cross-applications. The defendants' applications fall into two broad categories:

1. applications to have the claim of the plaintiff, Antonius Nabil Riad Sayhoun, dismissed for want of prosecution, pursuant to R. 22-7(7) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*;
2. applications to have the third amended notice of civil claim, which was filed and served on August 26, 2013, (the "Amended Pleading"), struck out under R. 9-5(1) on the basis that different portions of the Amended Pleading disclose no reasonable claim and/or are unnecessary, frivolous or vexatious and/or are otherwise an abuse of the process of the court.

**I. OVERVIEW AND BACKGROUND**

**2**  I have case managed this action since December 2009. The Amended Pleading identifies five plaintiffs. Dr. and Mrs. Sahyoun are the parents of Antonios, Bishoy and Mariam.

**3**  Bishoy and Mariam have reached the age of majority. During the course of the present application, each of them obtained independent legal advice and provided consent dismissals to those defendants that they had made claims against. Accordingly, Bishoy and Mariam no longer have any involvement in this action.

**4**  Antonios was born on February 9, 1987 and is presently 28 years old. In December 2007, Bracken J. declared that Antonios was, as a result of various serious limitations, incapable of managing his affairs. In that same order, Dr. Sahyoun was appointed committee of the person and estate of Antonios. Dr. Sahyoun commenced this action in the name of Antonios on January 31, 2008. On January 31, 2008, Master Tokarek declared that the plaintiffs in this action were indigent. At all times, Dr. and Mrs. Sahyoun have been self-represented.

**5**  On May 2, 2011, I stayed Antonios' claim until counsel could be retained to act on his behalf. Those reasons are indexed at *Sahyoun v. Ho*, [*2011 BCSC 567*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1RM-00000-00&context=) (the "Stay Reasons"). Until that time, Antonios had been represented by his litigation guardian, Dr. Sahyoun. However, R. 20-2(4) of the *Supreme Court Civil Rules* requires that "[a] litigation guardian must act by a lawyer unless the litigation guardian is the Public Guardian and Trustee" (the "PGT").

**6**  The plaintiffs' first statement of claim was filed on January 2, 2009. An amended statement of claim was filed on April 14, 2009. A second amended notice of civil claim was filed on April 2, 2012. The plaintiffs were advised, by counsel for the defendants, that that pleading was deficient in various respects, and were invited to file a further claim which rectified those deficiencies, and which provided the defendants with further particulars.

**7**  On April 25-26, 2013, I heard an application brought by various defendants, which sought to compel the plaintiffs, other than Antonios, to file an amended pleading that complied with the *Rules*. The plaintiffs sought to file a further amended pleading. The defendants who participated in the application, in turn, opposed the filing of this further draft pleading on the basis it continued to suffer from various deficiencies, and that it did not address or rectify the concerns that the defendants had identified.

**8**  In reasons dated June 26, 2013, and indexed at *Sahyoun v. Ho*, [*2013 BCSC 1143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M134-00000-00&context=) (the "Pleadings Reasons"), I declined to allow the plaintiffs to file their proposed pleading. I identified a number of significant difficulties with that proposed pleading, and I allowed the plaintiffs a further 60 days to file a pleading that complied with the *Rules*. On August 26, 2013, the plaintiffs filed the Amended Pleading.

**9**  The Amended Pleading identifies 49 different defendants. Each defendant, through their counsel, took part in this application, and though their respective submissions overlapped, they also advanced various issues that were unique to them.

**10**  The defendants fall into the following categories: a) ten different physicians (the "Defendant Physicians"); b) a collection of individuals, health-care facilities and authorities, the Vancouver Board of Education (formerly the Vancouver School Board) and the Gateway Society: Services for Persons with Autism (the "Health and School Defendants"); c) the University of British Columbia ("UBC"); d) various individuals employed by the Province of British Columbia and the Province of British Columbia (the "Provincial Defendants"); e) six police officers and the City of Vancouver (the "City and Police Defendants"); f) David Duncan and the B.C. Legal Services Society (the "LSS Defendants").

**II. ISSUE 1: THE WANT OF PROSECUTION APPLICATION**

**11**  The Defendant Physicians, the Health and School Defendants and UBC seek an order that Antonios' claim be dismissed under R. 22-7(7) for want of prosecution. The remaining defendants either support the application or take no position.

**12**  Rule 22-7(7) provides:

1. If, on application of a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

**13**  Rule 20-2 deals with persons under disability. The following subsections of R. 20-2 are relevant:

1. A proceeding brought by or against a person under legal disability must be started or defended by his or her litigation guardian.

...

1. A litigation guardian must act by a lawyer unless the litigation guardian is the Public Guardian and Trustee.

...

1. If a person is appointed committee, that person must be the litigation guardian of the patient in any proceeding unless the court otherwise orders.

**A. The Usual Framework**

**14**  The case law relevant to the usual application to dismiss for want of prosecution is straightforward. The court will address the following three criteria:

1. Has there been inordinate delay?
2. If so, is the inordinate delay inexcusable?
3. If so, has the plaintiff established, on a balance of probabilities, that the defendant has not suffered prejudice, or that other circumstances would make it unjust to terminate the action?

See e.g. *Irving v. Irving* [*(1982), 38 B.C.L.R. 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-61CW-00000-00&context=) at 324 (C.A.); *Busse v. Chertkow*, [*1999 BCCA 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1XS-00000-00&context=) at para. 12 [*Busse*].

**15**  A court should then engage in a final and broader consideration of whether, on balance, justice requires dismissal of the action; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, [*2009 BCCA 535*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2H4-00000-00&context=) at paras. 27-28.

**16**  Each of these legal considerations is also relatively straightforward.

**1. Inordinate Delay**

**17**  An inordinate delay is a delay that is "immoderate, uncontrolled and excessive and out of proportion to the matters in question 'so as to create a real risk that a fair trial will not be possible'"; *Veritas Geophysical (Nigeria) Limited v. Energulf Resources Inc*., [*2013 BCSC 630*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-202C-00000-00&context=) at para. 34.

**18**  At this stage, a court will not generally consider delay which predates the commencement of the action since the application to dismiss relates to the proceeding itself; *Pacific Hunter Resources Inc. v. Moss Management Inc.*, [*2004 BCCA 40*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S386-00000-00&context=) at para. 36.; *Ed. Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, [*2014 BCCA 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GX-00000-00&context=) at para. 38.

**19**  What constitutes an inordinate delay depends on the facts and circumstances of each case. Further, delay need not be lengthy in order to be inordinate: a relatively short but unexplained delay may, in all the circumstances, be inordinate and inexcusable; *Irving* at 323; *Bekos v. Koutlas*, [*[1983] B.C.J. No. 2068*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-224S-00000-00&context=) at para. 10 (C.A.).

**20**  The delays in the action before me have been inordinate. The allegations against most defendants date back some 20-25 years. More importantly, for the purpose of this analysis, it has been more than seven years since the action was commenced. To date, very little has been done to bring this matter to trial. Further, the claim of Antonios has been completely dormant since May 2011.

**21**  In *Louie v. Webber*, [*2013 BCSC 1763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23D9-00000-00&context=), the plaintiff's personal injury claim had been stayed in order to allow the plaintiff time to retain legal representation. After the passage of seven months, with no action from the plaintiff, the defendant applied to dismiss the claim for want of prosecution. The court held that the plaintiff's delay had been inordinate, noting that 14 years had passed since the event (the proceeding was commenced less than a year after the event), and that "[i]f the plaintiff is left on her own, there is no reason to think that 6 or 12 months from now the case will be in any differen[t] state than it is now"; *Louie* at paras. 20, 25.

**2. Inexcusable Delay**

**22**  After determining that there has been an inordinate delay, the court must consider the reasons for the delay. In *Irving* at 324, the court said, "the question here is not whether the reason is good or bad, or wise or unwise; it is whether the delay was excusable or inexcusable." The court also said, "that which would make a short delay excusable might not be sufficient to make a long delay excusable. Some delays may be so long and the prejudice to the defendant so great that no reason would excuse the delay".

**23**  Tactical delays, in the sense that the delay is being used as a calculated means of gaining an advantage in the litigation, are most often inexcusable; *Tundra Helicopters v. Allison Gas Turbine*, [*2002 BCCA 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1JG-00000-00&context=) at paras. 22-23. Delays caused by "negligent solicitors, impecuniosity, or illness" are not normally considered inexcusable; *Tundra* at para. 23. However, the analysis always rests on the circumstances of a particular case: "[i]n some cases, for example, ***negligence*** of the plaintiff's lawyer might amount to an excuse, in others it might not"; *0690860 Manitoba* at para. 29. Although impecuniosity may be an excuse for delay, "[ijmpecuniosity should not always be accepted as an excuse irrelevant of the length of the delay because, otherwise, an action could be delayed indefinitely"; *Busse v. Robinson Morelli Chertkow*, [*[1998] B.C.J. No. 660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S27M-00000-00&context=) at para. 25 (S.C.), rev'd on other grounds, *Busse* at para. 6.

**3. Prejudice**

**24**  Once the court has determined that the delay is both inordinate and inexcusable, a presumption of prejudice arises; *Busse* at para. 8. The presumption is, however, one of fact and not law, and the central question is whether, on a balance of probabilities, an absence of prejudice has been established; *Tundra* at paras. 35-36.

**B. The circumstances of this application**

**25**  Two unusual and interrelated issues arise in this particular application. First, Antonios' claim has been stayed pending counsel being retained to act for him. Most applications for want of prosecution are based on the inactivity or a lack of diligence on the part of a plaintiff. The notion of "inexcusable delay" or inactivity does not align easily with either a court-ordered stay or with a disabled plaintiff who is incapable of acting on his own behalf.

**26**  Second, and in a related vein, this application indirectly raises the question of whether Antonios' claim should be dismissed as a result of what is, in real terms, the conduct of Dr. Sahyoun. Striking the claim of a disabled individual as a consequence of the activity or inactivity of that individual's litigation guardian or committee or parent is inherently unsatisfactory.

**27**  This latter issue has been judicially considered, albeit not by the courts of this jurisdiction and not in circumstances where a stay, pending the involvement of counsel, has been imposed by a court.

**28**  In *Jespersen v. Small* [*(1988), 84 A.R. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9301-JW5H-X3P2-00000-00&context=) (Q.B.), McFadyen J. considered an application to dismiss the action of an infant plaintiff for want of prosecution. The infant was injured in 1982, the action was commenced in 1984, and no steps had been taken in the action for three years. McFadyen J. noted that she had been unable to find any authority dealing with the dismissal of an action, commenced by an infant's next friend, for want of prosecution; at para. 4. She determined that the action would have been dismissed if it had been brought by an adult plaintiff; at para. 12. She went on, however, to consider whether the court had additional obligations in the case of an infant plaintiff whose litigation guardian had failed to pursue the action diligently and said:

[16] In *Millard v. Millard and Calgary* [*(1983), 65 A.R. 355*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92X1-FBN1-239F-00000-00&context=) (C.A.), the Alberta Court of Appeal refused to accept an argument that an infant is not bound by the failure of his next friend to diligently pursue the action. In the *Millard* case the next friend failed to respond to a notice to admit facts, which notice later formed the basis of an application to dismiss the action as an action barred by the *Limitation of Actions Act*.

[17] Laycraft, J.A. giving the judgment as the court stated at p. 356:

"That notice was not responded to as required by Rule 230 with the result that the facts specified are deemed to be admitted. It is urged on the authority of *Lucas v. Coupal* [*(1930), 66 O.L.R. 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-JXNB-638F-00000-00&context=), that a next friend is not able to bind an infant by the compromise of an action. It is argued by analogy that therefore he cannot hurt him either by failure to observe Rules such as Rule 230. Thus it is urged Rules such as Rule 230 do not bind infants who sue by their next friend. That position is not in our opinion arguable. It would destroy the whole system of litigation. Infants are bound by the Rules of Court as are other litigants."

[18] In the matter of *Howe v. City of Vancouver* [*(1957), 9 D.L.R. (2d) 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S37K-00000-00&context=), the next friend who was the father of the infant wished to settle an action by agreeing to discontinue the action without costs. Sullivan, J., refused to permit the discontinuance of the action but rather stayed the proceedings pending the appointment of a new next friend or pending the infant attaining the age of majority and deciding whether he wished to pursue the action.

[19] In this matter the defendants are faced with an action for damages in an amount exceeding $4,000,000.00. The delay has already been substantial affecting the ability of the Defendants to defend against the action. It is my view that it would be prejudicial to the Defendants to adopt the course of action followed in the *Howe* case. The father of the infant, the next friend, has given me no explanation whatsoever why he does not wish to further pursue the claim. He has merely declined to appear in response to the Notice of Motion. The infant will not reach the age of majority for another three years. At that time, based on information in the Statement of Claim it may well be that the infant may continue to be under a disability. The issue of the age of majority may not solve the question in this case.

**29**  The *Howe v. City of Vancouver* [*(1957), 9 D.L.R. (2d) 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S37K-00000-00&context=) (B.C.S.C.), decision, referred to in *Jespersen*, arose in circumstances that do not assist the present analysis. That action was stayed until the infant plaintiff reached the age of majority and could decide whether or not to pursue the action that had been commenced on his behalf; *Howe* at 82. Similar considerations arose in *Oliver v. Branch*, [*1999 BCCA 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G49F-00000-00&context=), where the court, at para. 10, stayed an action for a period of a further two years, or until the plaintiff turned 19. Here Antonios is 28 years old, and his incapacity to act on his own behalf will not change or abate.

**1. There Is No Prospect of Change**

**30**  During the application that gave rise to the Stay Reasons, Dr. and Mrs. Sahyoun were adamant that the PGT could not act on Antonios' behalf; Stay Reasons at para. 20. They argued that the PGT was in a conflict of interest with a number of the defendants. They were also insistent that they be given the time to find counsel who would act for Antonios.

**31**  In this application, Dr. Sahyoun accepts that he has been unable, despite his efforts, to find counsel who would act for Antonios, and he does not suggest that there is any reason to believe that this will change.

**32**  When this application commenced, Dr. Sahyoun first took the position that the PGT should now be required to act for Antonios. The PGT, in advance of the application, had communicated to Dr. and Mrs. Sayhoun that it was unwilling to act for Antonios. Counsel for the PGT appeared before me to confirm that the PGT was not prepared to act, and to explain why this was so. Those reasons, which are confirmed in writing, include, *inter alia*, the PGT's view that the action is without merit and that there is no realistic prospect of recovering damages or costs. The PGT was also not satisfied that the action was in the best interests of Antonios, and it was concerned about its ability to conduct the action without interference from Dr. Sahyoun.

**33**  It appears clear, from the relevant authorities, that this court is unable to compel the PGT to act for a disabled adult in circumstances where it is unwilling to do so; see e.g. *Blue v. The Corporation of the Township of Esquimalt*, [*2004 BCSC 1241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2XS-00000-00&context=) at paras. 12-13. This same result, albeit in different contexts, has been confirmed in *M.(L.) v. F.(D.)* [*(1999), 68 B.C.L.R. (3d) 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4B7-00000-00&context=) at para. 33 (S.C.), in *Wu v. Lin*, [*2004 BCSC 1042*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X0F6-00000-00&context=) at paras. 25-26, and in *Clermont v. Fraser Health Authority and Surrey Memorial Hospital*, [*2008 BCSC 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1HW-00000-00&context=) at para. 32.

**34**  The foregoing issue, however, became academic as a result of Dr. Sahyoun's change of position during this application. Because Dr. Sahyoun was not well when the application was first commenced, it was adjourned for period of time. When the parties returned, Dr. Sahyoun had reversed his position and, he again, argued that the PGT could not act because it was in a conflict of interest with a number of the defendants who were government bodies or employees. He relied on *L.C. v. Alberta (Métis Settlements Child & Family Services, Region 10)*, [*2011 ABQB 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-JFSV-G0K8-00000-00&context=), which I note has since been reconsidered at [*2011 ABQB 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-JCRC-B1XN-00000-00&context=), and which Dr. Sahyoun did not bring to my attention, in support of that proposition. His revised position was that a lawyer should be appointed to act as Antonios' litigation guardian, that he be permitted to remain as Antonios' committee, and that I should order that Antonios be provided with state-funded counsel. This last term was obviously a necessary precondition of the first - that a lawyer be appointed to act as Antonios' litigation guardian.

**35**  Dr. Sahyoun had earlier brought an application for state-funded counsel that I dismissed in the Stay Reasons at paras. 29-37. In that decision, I noted at para. 30 that LeBel J., in *British Columbia (Ministry of Forests) v. Okanagan Indian Band*, [*2003 SCC 71*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B100-00000-00&context=) at para. 32, had identified that such orders were to be "limited to very exceptional cases". One of the criteria that has to be met before such an order is made is that the issues raised in the case "transcended the individual interests of the particular litigant"; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [*2007 SCC 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B188-00000-00&context=) at para. 37.

**36**  In the Stay Reasons, I concluded, at para. 35:

The present action advances various causes of action against the defendants and seeks, as relief, an award of damages. While the issues raised are of great importance to the plaintiffs, they are not issues which transcend the interests of the parties. Furthermore, they are legal issues where the principles involved are well established. The public interest is not engaged in any meaningful way, if at all.

**37**  In the result, the application for state-funded counsel was dismissed. The Stay Reasons were not appealed, and I do not consider that there is any principled basis or reason to revisit the order that I made. Nothing Dr. Sahyoun said on this application would give rise to a different result.

**38**  Dr. Sahyoun, in an effort to establish that some issue of broad public importance was raised by Antonios' claim, also raised the question, *inter alia*, of whether ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* was engaged, and whether s. 7 required that Antonios be provided with state-funded counsel.

**39**  Again, these issues had been raised earlier by Dr. Sahyoun and were addressed by me in the Stay Reasons at paras. 38-49. I concluded that "[s]ection 7 is not engaged and provides no support for the plaintiffs' application for state-funded counsel"; para. 50. I also concluded that there was "no legal basis for the s. 15 submission that Dr. Sahyoun seeks to advance"; at para. 57. Neither of these determinations was appealed. They neither can, nor should be, revisited. Furthermore, I do not consider that the various submissions made by Dr. Sahyoun, directed to the proposition that the present action engages issues of broad public importance, has merit.

**40**  What these facts and conclusions yield is a situation where:

1. The central claim of Antonios arises out of events that occurred in the period of 1990-1994. The action, on his behalf, was commenced in January 2008, and the stay of this action has been in place for almost four years. The action remains in its infancy. Pleadings are not yet closed and no trial date has been secured, nor could it be. Several of the personal defendants are now retired. At least one defendant has passed away, and this claim is now being brought against her estate. Finally, several defendants have, since I assumed case management of this matter, indicated that they wish to bring a summary trial to strike out aspects of the claim, including aspects of Antonios' claim. Those efforts have been held in abeyance.
2. There is no prospect that the circumstances I have described will change. Dr. and Mrs. Sahyoun have been declared to be indigent and cannot retain counsel. No counsel is prepared to assume conduct of Antonios' claim, and Dr. Sahyoun does not suggest that more time to continue with this endeavour might achieve a different result. The PGT has considered the action and its merits and is, for various reasons, unprepared to act as Antonios' litigation guardian. Still further, Dr. Sahyoun does not consider that the PGT is in a position to, or should be permitted to, act as litigation guardian for Antonios. Finally, I, in turn, have determined that there is no basis to provide Antonios with state-funded counsel.

**C. Application of the Want of Prosecution Factors to this Case**

**41**  Based on the chronology I have provided, particularly since the action was commenced, I am satisfied that the delay in prosecuting Antonios' claim has been inordinate.

**42**  I am mindful that it is "no light matter to dismiss an action for want of prosecution"; *Tundra* at para. 37, and that such orders are "draconian"; *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 at 259 (C.A.). I have considered that these admonitions are even more pressing or acute when the plaintiff at issue is a disabled adult. Finally, I am aware, as I have said, that applications for want of prosecution are normally based on "inexcusable" delay, or on delays that are deliberate or tactical. I have said that Dr. Sahyoun's inability to secure counsel who would act for Antonios would not normally be viewed in these terms.

**43**  Nevertheless, I consider that, in some senses, it should. First, Dr. Sahyoun was initially adamant that he would find counsel for Antonios. He undertook that obligation, and nearly four years later, has determined that he cannot meet that same obligation. Second, I am satisfied that Dr. Sahyoun's ongoing intransigence or obdurance has contributed to the present circumstances. I will develop this matter at some length later in these reasons. For present purposes, it is sufficient to say that Dr. Sahyoun is completely unyielding, often when it is patent that he is wrong on his views of this action, or on how it should be conducted. Thus, one aspect of the PGT's reluctance about being appointed Antonios' litigation guardian arises from its concern, which I accept as valid, about being able to work with or take direction from Dr. Sahyoun. A third, and related issue, pertains to the merits of Antonios' action. The PGT has concluded that the action is without merit. The fact that no counsel is prepared to assume conduct of Antonios' claim is at least suggestive of the same conclusion.

**44**  The case law indicates that a disabled plaintiff is bound, to some extent, by the actions and failings of his/her litigation guardian. It cannot be otherwise. The rights of that disabled plaintiff have to be balanced with the interests of the defendants in an action.

**45**  I have also considered whether I ought to extend the stay that is presently in place for further finite period of time -- say for another two years. But to what end? Such an order would, in real terms, be cosmetic. There is nothing in the record before me which raises any prospect of any change in the circumstances that I have described in the next two years or, in fact, thereafter.

**46**  Several further legal considerations pertain. Significant prejudice can arise from a stay. In *Rasekhi-Nejad v. General Accident Assurance Co. of Canada*, [*[2004] O.J. No. 4225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-JNCK-21F8-00000-00&context=) (S.C.J.), an impecunious plaintiff had failed to pay three cost orders and the defendant applied to dismiss the action. The court said:

20 Dismissal of an action is a decision of last resort, a final remedy. A stay of proceedings, depending on the applicable facts, generally is more appropriate. There however is a real consequence, which arises with a stay, that is, for how long should it be in place before the action is dismissed. Underlying any action, which does not move to trial promptly, is the concern that if a sufficient time goes by the trial will be surreal with a verdict based on fiction rather than fact as the evidence will come from witnesses who must recollect events which have long gone by. This is a real concern, as justice is not served by trying actions based on dimmed or faulty recollection.

...

22 This action is now over five years old. It was scheduled for trial well over a year ago. Over a year has gone by since Pitt J.'s order with the only steps being interlocutory proceedings arising and flowing from that order. The evidence is quite clear and demonstrates that the plaintiff is impecunious and that there appears to be no prospect of the plaintiff obtaining the funds necessary to pay the outstanding cost orders. A stay of the action will likely prolong the inevitable. In addition it will further delay the trial and increase the prospect of a trial based on evidence from witnesses with dimmed memories and potentially faulty recollection of events long gone by.

23 In the circumstances before me I find that a stay is an inappropriate and unjust remedy for the plaintiff's failure to pay the costs as ordered and I refuse to exercise my discretion in that way.

**47**  In *Heu v. Forder Estate*, [*[2004] O.J. No. 705*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-JJSF-21HJ-00000-00&context=) (S.C.J.), a medical malpractice case, an impecunious plaintiff was provided with a deadline to pay outstanding costs. Three years after the events in question, the court considered whether the action should be dismissed based on a failure to pay an interlocutory cost order. The court made the following comments about an indefinite stay:

26 If the costs are not paid and the stay lifted within six months the defendants may again move to dismiss the action, since these doctors cannot have these allegations hanging over their heads indefinitely. I concur with Eberhard J. who stated, "a stay until such time as the ... Plaintiff chooses to comply with the cost order is too open-ended. The issues should be brought to adjudication in the time frame fixed or be terminated."

**48**  Though I recognize the unusual circumstances that underlie this application, I consider that the delay has not only been inordinate, but it has also been inexcusable. With these two consequences in hand, a presumption of prejudice arises. The burden shifts to the plaintiff, who is required to establish, on a balance of probabilities, that the applicants have not suffered prejudice, or that other circumstances make it unjust to terminate the action; *Busse* at para. 8. The question is not, however, whether the plaintiff has "rebutted" the presumption of prejudice. Once again, the issue is whether on the whole of the evidence, and on the balance of probabilities, the absence of prejudice has been established; *Tundra* at paras. 35-36.

**49**  The prejudice suffered by the various groups of defendants, flows first from the considerable passage of time that has elapsed. In *Stewart v. Canada (Attorney General)*, [*2012 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24PK-00000-00&context=) at para. 15, Chiasson J.A. accepted that a presumption of prejudice arises from the passage of time.

**50**  There are also numerous authorities which address the particular prejudice faced by medical professionals in malpractice actions whose prosecution is delayed. In *Kovic v. Waechter* [*(1982), 36 B.C.L.R. 396*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3DF-00000-00&context=) at 400 (S.C.), Proudfoot J., as she then was, stated:

In the circumstances of this case, there most certainly has been a prejudice to the defendants and, in addition, they will continue to be prejudiced. There is a hospital involved, several nurses and members of the medical profession. They have a right to have this matter finalized.

**51**  In *Cleugh v. Jones*, [*2001 BCSC 1880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2SD-00000-00&context=) at para. 6, Master Donaldson stated:

This is a medical malpractice case, and there are a number of authorities which have made reference to the difficulty and stress that professionals must cope with when facing a ***negligence*** action, and one can only be guided by decisions in the past which conclude that the pressure on a professional who is alleged to have been negligent is more stressful or difficult to deal with than that of a normal defendant or a non professional defendant in, for example, a debt action.

**52**  Furthermore, and more broadly, in cases where the allegations advanced are serious, and pertain to such matters as a breach of fiduciary duty, fraudulent misrepresentation and professional ***negligence***, there is a particular onus on a plaintiff to pursue his or her claim diligently; *Kern v. Watson* [*(1977), 32 B.C.L.R. (3d) 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21VJ-00000-00&context=) at para. 13 (S.C.); *Gill v. Hepburn*, [*2012 BCSC 439*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62F5-00000-00&context=) at para. 88; *Daum v. City of Surrey*, [*2004 BCSC 1584*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S0TN-00000-00&context=) at para. 41.

**53**  In this case, this consideration has particular significance. Antonios' claim is filled with allegations of professional ***negligence***, perjury, malicious behaviour, breaches of duty, fabricating evidence, defamation, and dishonest behaviour.

**54**  Based on the whole of the evidence before me, I find as a fact that the "absence of prejudice" has not been established. There are some authorities which suggest that, having made this determination, I "must" dismiss the plaintiffs' claim; see e.g. *Busse* at para. 27. More often, the relevant question is described as "whether or not, on balance, justice demands, that the action be dismissed"; *0690860 Manitoba* at paras. 27-28; *Irving* at 328.

**55**  The foregoing assessment engages the numerous considerations that I have identified. It recognizes that one imperative of R. 1-3(1) is that claims be advanced, if not always with despatch, at least in some reasonable way. The progress of an action cannot be frozen indefinitely when there is no prospect for any change in that status. Furthermore, all such assessments require that the interests of all parties be fairly addressed and weighed. I am satisfied, having regard to the assessment that I have described that, on balance, justice does require that Antonios' action be dismissed.

**III. ISSUE 2: SHOULD THE CLAIMS OF DR. AND MRS. SAHYOUN BE STRUCK UNDER RULE 22-7(2) AND/OR RULE 9-5(1)?**

**A. The General Framework**

**56**  This aspect of the defendants' application is based on the difficulties with and inadequacy of the Amended Pleading. Such matters are best addressed through R. 9-5(1). The defendants' R. 22-7(2) application, which allows a court to dismiss a proceeding for non-compliance with the *Rules*, is in a sense, derivative of and rests on their R. 9-5(1) application. Both applications are focused on the ongoing failure of Dr. and Mrs. Sahyoun to file a pleading that complies with the *Rules*. Accordingly, I have focused on the R. 9-5(1) application. That rule provides:

1. At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
2. it discloses no reasonable claim or defence, as the case may be,
3. it is unnecessary, scandalous, frivolous or vexatious,
4. it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
5. it is otherwise an abuse of the process of the court, and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**57**  The test on an application to strike an action under R. 9-5(1)(a), on the basis the pleadings do not disclose a cause of action, is whether it is plain and obvious the claim cannot succeed. It requires a conclusion that, assuming that the facts as stated are true, those facts disclose no cause of action and the pleadings disclose no arguable issue. If there is a chance that the action may succeed, then the action should be allowed to proceed; *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* at 980; *Thompson v. Webber*, [*2010 BCCA 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22BK-00000-00&context=) at para. 11; *Canadian Bar Assn. v. British Columbia*, [*2008 BCCA 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1R8-00000-00&context=) at para. 37.

**58**  The test for striking a pleading under R. 9-5(1)(b), on the basis that it is unnecessary, scandalous, frivolous or vexatious, was recently summarized in *Willow v. Chong*, [*2013 BCSC 1083*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0YW-00000-00&context=), where Fisher J. said:

[20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [*[1999] B.C.J No. 2160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=) (SC); *Skender v Farley*, [*2007 BCCA 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-222K-00000-00&context=). If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

**59**  An "embarrassing" pleading, as contemplated by R. 9-5(1)(c), is one that is so irrelevant that to allow it to stand would involve useless expense and would also prejudice the trial of the action by involving the parties in a dispute apart from the issues; *Keddie v. Dumas Hotels Ltd.* [*(1985), 62 B.C.L.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61X7-00000-00&context=) at 147 (C.A.).

**60**  The abuse of process standard under R. 9-5(1)(d) derives from a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice; *Toronto (City) v. C.U.P.E., Local 79*, [*2003 SCC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YP-00000-00&context=) at paras. 35-37.

**61**  Though subsections (a)-(d) of R. 9-5(1) address different concerns and different wrongs, there is also some overlap between these subsections. Thus, for example, a pleading that discloses no cause of action, contrary to R. 9-5(1)(a), can also be unnecessary, frivolous or vexatious within the meaning of R. 9-5(1)(b); see e.g. *Virk v. Brar*, [*2012 BCSC 1004*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24PV-00000-00&context=) at paras. 69-70.

**62**  A pleading can be embarrassing if it does not state the real issue in an intelligible form. It can also be embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It can be prejudicial if it is designed to or has the effect of confusing the defendant, making it difficult, if not impossible, to answer; *Virk* at para. 75.

**63**  These same concerns can constitute an abuse of the court if a litigant has been expressly told that there are aspects of its pleadings that are deficient or defective, and if that litigant persists, in its amended claim, to advance the same claims or issues in the same way.

**64**  In this case, the Amended Pleading is so overwhelmed with difficulty that it is simply not possible to fully identify all of the specific inadequacies that exist, or to categorize those difficulties into the specific subparagraphs of R. 9-5(1). It is also not possible to deal with the deficiencies in the Amended Pleading that relate to individual defendants, as often multiple causes of action are advanced against a single defendant. I am, however, satisfied that most of the Amended Pleading does not comply with R. 9-5(1), and that very significant portions of the Amended Pleading offend one or more of the subparagraphs in the rule.

**B. The Pleading Reasons**

**65**  In the Pleading Reasons, at paras. 15-54, I identified the purpose of proper pleadings and the deficiencies in the draft amended claim that was then before the court. I also permitted the plaintiffs a further opportunity to amend those pleadings and to rectify the various deficiencies I identified. The Amended Pleading does not begin to address such deficiencies. Indeed, in some respects those deficiencies are exacerbated. Before turning to these deficiencies by grouping or category, I wish to address what I perceive to be a fundamental difficulty. That difficulty arises from Dr. Sahyoun's intransigence, and absolute unwillingness to yield on any issue, regardless of its importance or merit.

**66**  In *Sahyoun v. British Columbia (Director of Child, Family and Community Service)* (6 October 1999), Vancouver CA026038 (B.C.C.A.), Southin J.A. addressed an appeal from Pitfield J.'s decision to uphold a Provincial Court decision to commit the Sahyoun children to the care of the Director. Southin J.A. said:

[8] In saying that, I am, however conscious, that it might not be easy at all for counsel to represent Dr. Sahyoun who persists in refusing to understand what it is that is being said to him about how the legal system works, and I fear is unwilling to keep his eye firmly fixed on the questions that the Provincial Court judge has to decide. He is more interested in trying to play lawyer than he is in addressing himself as a father to the needs of his children and that is not in their interest.

[9] I have probably said more than is useful because Mr. Justice Pitfield attempted to explain all of this without success. I attempted to explain it once before I think, and I have attempted to explain it again. Whether it does any good or not, I do not know.

**67**  In *Director of Family and Child Services v. Dr. Sahyoun and Mrs. Sahyoun* (17 April 2000), Vancouver 98-11360 at 3 (B.C.P.C.), Judge Gillis observed:

The whole sense of Dr. [Riad Sahyoun]'s application was that he and his wife believe that Dr. Ho's diagnosis that Antonios is autistic was wrong. The parents believe Antonios had a prelingual hearing disorder and was definitely not autistic.

Dr. [Riad Sahyoun] could not understand that, at best, if his application had been granted, the Court could deem Dr. Ho's diagnosis wrong but he would still be faced with the allegations that his children were in need of protection and that the Court would have to hear testimony on this issue and make a decision.

**68**  Before me, when describing the foregoing proceedings, Dr. Sahyoun told me that Judge Gillis had given him permission to leave that hearing. What Judge Gillis said, at p. 4, was:

The parents were strongly advised not to 'withdraw' at this stage as it appeared from the aforementioned affidavit that the parents would have many more objections and any applications, if denied, would probably be appealed. The parents were further informed that the hearing would have to proceed in their absence if only because of the sake of their children who had been in care since November 1998 and any adjournment would extend their stay in care for many months, as this hearing was set for 5 days. After talking to deaf ears the first witness was called: Dr. De Andrede was qualified as a clinical psychologist and a child psychologist. Notwithstanding, the announcement that they were withdrawing, the parents, who had not physically withdrawn from the Court room, objected to the calling of Dr. De Andrede "as there had been an initial misdiagnosis report and Dr. De Andrede and Dr. Miller, (the proposed next witness) had made a deceitful medical history report which had been 'prohibited' by Dr. Grymoloski". The parents then 'withdrew' and left the courtroom and did not return during the rest of the proceedings.

**69**  Recently in Sahyoun v. British Columbia (Employment and Assistance Appeal Tribunal), [*2014 BCCA 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61KT-00000-00&context=), Low J.A., for the court, observed:

[2] The written and oral submissions of the appellant to this court are unfocused and difficult to discern in either a factual or a legal context. ...

...

[4] The appellant presented argument as though he were making the applications for benefits anew before this court, rather than identifying arguable errors of law made by the chambers judge... .

[5] The appellant, in effect, wants the court to rewrite his ministry file so that he can be backdated with a certain designation in order to qualify for additional income benefits retroactively from April 2007 to September 2010 and for certain medical benefits after age 65, which also require the designation the appellant seeks. In the alternative, he wants the court to set aside both tribunal decisions and send the matter back to the tribunal with directions to reconsider his application for the designation and the benefits he says would flow from the designation.

**70**  Low J.A. concluded:

[35] There is no merit in either appeal. The appellant attempted to persuade the ministry to backdate a designation never previously given to him, even by inference. He failed in the past and currently to provide necessary medical information. He read into past rulings designations that simply were not made. He did not meet statutory and regulatory criteria. He made his applications very late in the day when he could no longer qualify even if you provided the necessary supporting medical information. The ministry's determinations of the issues raised by the appellant were reasonable and it is not arguable that either tribunal was patently unreasonable. The chambers judge did not err.

**71**  This range of observations and conclusions, though arising in different factual contexts, are apposite to the present applications. Dr. Sahyoun is unreasonably preoccupied with details, dates and procedure, but he seems either unable or unwilling to address the substance of the particular issues before the court. To the extent he does, it is often with reference to authorities that have no relevance, or in a manner that simply ignores those authorities that do not support his position. It will become apparent that Dr. Sahyoun has been told by me, and by other judges of this court in other proceedings, that certain types of pleadings have no basis. Such advice or admonitions appear to simply fall "on deaf ears".

**72**  The foregoing conclusions are supported by comparing the comments and guidance I sought to give Dr. and Mrs. Sahyoun in the Pleading Reasons with the Amended Pleading. In the Pleading Reasons, I said:

[16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:

If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiffs right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such...

[17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

[18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.

[19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

**73**  In addition, I emphasized:

1. the need to be clear and concise (para. 23);
2. the need to identify material facts (paras. 24-26);
3. the prohibition on pleading evidence (para. 29);
4. the need to set out, in some reasonable way, the relief claimed against each named defendant (paras. 30-31, 48);
5. the need to set out a concise summary of the legal basis for the relief sought (paras. 32-33); and
6. that several claims were misconceived and did not give rise to a cause of action (see e.g. paras. 45-47).

**74**  I observed that the pleading before me was "severely deficient," and that it offended "virtually all of the ... requirements of the a proper pleading" that I had identified; at para. 34. That remains true for the Amended Pleading.

**C. The Amended Pleading Remains Deficient**

**75**  I have considered how best to present my reasons in light of the number of defendants and the various difficulties and inadequacies that exist in the Amended Pleading. For reasons that will become apparent, it is simply not possible to address every potential claim as it relates to each defendant. I have, therefore, grouped defendants and claims where appropriate and have addressed representative groupings in order to canvas the substance of the deficiencies in the Amended Pleading. In my view, this is the best and most efficient approach in the exceptional circumstances of this case.

**1. The Amended Pleading is Not Clear and Concise**

**76**  The pleading I addressed in the Pleading Reasons, and that I described as "extremely prolix" was 49 pages and 191 paragraphs long. The Amended Pleading is now 86 pages long, and consists of more than 300 paragraphs. Some of those paragraphs have a dozen or more subparagraphs.

**77**  The Amended Pleading is divided into two "sections". The first section is a portion of the claim of the five initial plaintiffs that was filed on April 2, 2012 ("Section 1"). Because of the stay I issued, Dr. Sahyoun said that he felt he was constrained in his ability to amend aspects of that pleading. The second section of the Amended Pleading purports to be advanced on behalf of the plaintiffs, other than Antonios, and would now only include the claims of Dr. and Mrs. Sahyoun ("Section 2").

**78**  I raise this, because in response to a question I asked Dr. Sahyoun about the claims he and his wife advanced against the defendants, I was told that such claims were "mostly" in Section 2 of the Amended Pleading, but that it was "possible" that there were such claims in Section 1.

**79**  The Amended Pleading is impenetrable and often incomprehensible. In order to understand what claims were raised against which defendants, I asked counsel for each group of defendants to prepare a list of all of the paragraphs where the defendants they acted on behalf of appeared in the Amended Pleading. This was necessary because the references to several defendants are interspersed throughout the pleading. Without such a list, there is simply no means to identify what parts of the Amended Pleading apply to a particular defendant in any organized or efficient way.

**80**  It is also clear that even Dr. and Mrs. Sahyoun have not mastered the Amended Pleading. On more than one occasion when I asked Dr. Sahyoun about a particular claim, or set of claims against a particular defendant or group of defendants, he said that he required overnight to review the Amended Pleading before he could properly respond. It seems self-evident that a pleading is neither clear nor concise if its author requires some extended interlude before he or she is able to respond to straightforward inquiries.

**2. It is not Possible to Identify which Plaintiff Advances what Cause of Action Against which Defendant.**

**81**  This concern overlaps with the comments I have made about the lack of clarity in the Amended Pleading. However, it also goes beyond this. In addressing the inability to properly identify which defendants Dr. and Mrs. Sahyoun have advanced claims against, I have focused on one group of defendants, the Defendant Physicians, as illustrative of the issue.

**82**  On the last day of the application, in response to questions I put to Dr. Sahyoun, Dr. and Mrs. Sahyoun said that they, in their personal capacities, only advanced claims against two of the Defendant Physicians - Drs. Ho and Miller. Section 2 of the Amended Pleading also refers, however, to each of Drs. Farrell, Hlady and Riding. If no claim is advanced against these physicians, it is not clear why they are referred to in that portion of the claim, which Dr. Sahyoun says pertains to the claims brought by himself and his wife.

**83**  Furthermore, the application response filed by Dr. Sahyoun to the application of the Defendant Physicians, at para. 3, asserts "[t]he claim of Dr. Nabil Riad Sahyoun against the ten Defendant Physicians, regarding their disclosure of and reliance on an alleged email dated November 17, 1999 by a Social Worker named Shaju Mathew addressed to his Supervisor, is that this email constitutes a 'defamation of character' of Dr. Riad Sahyoun."

**84**  At the same time, I am unable to locate, within "Part 3: Legal Basis" of the Amended Pleading, any claim that has been brought by Dr. Sahyoun for defamation against each of the ten-named Defendant Physicians. Rather, the allegation that the November 17, 1999, email amounts to defamation of character and fabricating evidence contrary to the *Criminal Code,* [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=), is addressed in a portion of the Amended Pleading that appears to be making a claim as against the defendant Province of British Columbia; Section 2, Part 3, paras. 56-61. Beyond a mention that the letter was disclosed by their counsel, there appears to be no mention of the Defendant Physicians in reference to this allegation until the Amended Pleading generally concludes:

[62] The Plaintiffs put Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Children and Family Development, and the Defendant Physicians collectively to the strict proof of the alleged November 17, 1999 email by Mr. Matthew.

**85**  In the Pleading Reasons, I also said:

[48] Part 2 of the Proposed Pleading, under the heading "Relief Sought", advances a single, generic prayer for relief by all plaintiffs against all defendants. It includes claims for special as well as punitive, aggravated and general damages. It does not begin to set out the relief that is claimed "against each named defendant". While I do not suggest that such relief must be repeated in rote form against each of 49 defendants, this portion of the pleading must surely signal to a defendant, as well as to the trier of fact, what relief is being claimed against a particular defendant or particular group of defendants.

**86**  No part of the foregoing concern is addressed in the Amended Pleading.

**3. The Amended Pleading Contains Evidence**

**87**  In the Pleading Reasons I noted, at para. 29, that R. 3-7(1) states "[a] pleading must not contain evidence by which the facts alleged in it are to be proved." At para. 35, I referred to the pleading that was then before me as a "running narrative" and said that that pleading contained "a great deal of evidence".

**88**  The Amended Pleading continues to offend R. 3-7(1). Indeed, virtually every page in Section 2 of the Amended Pleading does so.

**4. The Amended Pleading Fails to Advance Recognized Causes of Action Against Many of the Defendants.**

1. **No Duty Owed**

**89**  There are numerous examples of the foregoing concern. Dr. and Mrs. Sahyoun allege, *inter alia*, that Dr. Ho misdiagnosed Antonios. They appear to allege that they suffered damages as a result of Dr. Ho's "breach of duty to diagnose, and breach of duty of care"; Section 2, Part 3, para. 4. In the Pleading Reasons, I said:

[45] In *B.D. (Litigation Guardian of) v. Halton Region Children's Aid Society,* [*[2004] O.J. No. 6196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF01-JTGH-B3RX-00000-00&context=) at paras. 18-21 (S.J.C.), Justice Hoilet referred to various decisions which confirm, for example, that a physician who provides care to a child owes a duty of care to the child and not to the child's parents. Similar principles and limitations would govern claims apparently being made by Dr. and Mrs. Sahyoun against various defendants who are not physicians.

**90**  Similar concerns relate to various claims of vicarious liability that appear to be advanced against several of the Health Defendants for the actions of the Defendant Physicians. This includes claims against the B.C. Children's Hospital, Vancouver General Hospital and St. Paul's Hospital.

**91**  It has long been established that hospitals are not responsible for the ***negligence*** of non-employed medical staff such as independent contractor physicians; *Yepremian v. Scarborough General Hospital* [*(1980), 28 O.R. (2d) 494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JG59-22SW-00000-00&context=) at 527 (C.A.). *Yepremian* has been followed by British Columbia courts in a number of decisions; see e.g. *Stewart v. Noone*, [*[1992] B.C.J. No. 1017*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0TD-00000-00&context=) (S.C.); *Smith v. Dodds*, [*[1998] B.C.J. No. 1638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3YR-00000-00&context=) at para. 7 (S.C.); C*rnkovic v. Stockdill,* [*[1998] B.C.J. No. 3187*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1PG-00000-00&context=) at para. 79 (S.C.); *Shannahan v. Fraser Health Authority*, [*2010 BCSC 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0S8-00000-00&context=) at paras. 11-13; *Basil v. Interior Health Authority*, [*2012 BCSC 1158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S282-00000-00&context=) at para. 43.

**92**  To the extent Dr. and Mrs. Sahyoun's claim of ***negligence*** against the Health Defendants is based on issues of medical diagnosis, it again cannot succeed. The law is clear that diagnosis is not the responsibility of a hospital or its servants; *Tekano (Guardian ad litem of) v. Lions Gate Hospital*, [*[1999] B.C.J. No. 1763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G0WP-00000-00&context=) at para. 110 (S.C.).

**93**  Still further, Dr. and Mrs. Sahyoun advance various causes of action against various social workers for their conduct during the period of time that the Sahyoun children were taken into care. There is, however, no legal duty of care on service providers towards the family members of apprehended children; *Syl Apps Secure Treatment Center 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 paras. 63-65; *D.L.H. v. M.J.M.*, [*2011 BCSC 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-625J-00000-00&context=) at paras. 59-60.

1. **No Recognized Cause of Action Exists**

**94**  It is alleged, on behalf of each of Antonios, as well as by Dr. and Mrs. Sahyoun, that various defendants committed various *Charter* breaches. Dr. Sahyoun's written submissions to me, dated November 28, 2014, assert that the various defendants infringed Antonios' s. 7 *Charter* rights, and that other defendants infringed both Antonios' and Dr. and Mrs. Sahyoun's s. 15 *Charter* rights. Dr. Sahyoun's materials appear to contemplate *Charter* claims against the following individuals: Martha Hilliard, Margret Hardwick, Dr. Helena Ho, Dr. Fred Kozak, Dr. Keith Riding, Laura Wang, Dr. Neil Longridge, Dr. Jean Moore, Ms. Beverly Underhill, the late Carol McRae, Ms. Cheryl Carteri, Dr. Jean Hlady, Ms. Lorill Johl, Dr. Brian Westerberg, Dr. Jason Chew, Dr. Douglas Graeb, Ms. Karen Till, Robert Pearmain, Mr. David Duncan, Mr. Harinder Mahil, Ms. Judith Williams, Mr. Allan McLeod, Mr. Donald Goodridge, Mr. Haris Zakouras, Mr. Ross Dawson, and Dr. Kevin Farrell.

**95**  In *Vancouver (City) v. Ward*, [*2010 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1HX-00000-00&context=) at para. 22, the Court confirmed that *Charter* damages under s. 24(1) are to be claimed against the state and not against private individuals. There is, then, no basis to advance any *Charter* claim directly against the individual defendants that I have identified.

**96**  Dr. and Mrs. Sahyoun purport to advance a cause of action against Dr. Miller based on the assertion that he "committed perjury" before a provincial court judge; Section 2, Part 3, para. 53. It is alleged that Ms. Carteri gave false evidence; Section 1, Part 1, para. 66. It is similarly alleged that Dr. Ho "fabricated evidence" contrary to the provisions of the *Criminal Code*; Section 2, Part 3, para. 4(e).

**97**  In the Pleading Reasons, I said:

[46] The plaintiffs also advanced claims against various defendants because they had "perjured" themselves. In *D.L.H. v. M.J.M.*, [*2011 BCSC 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-625J-00000-00&context=) at para. 63, Justice Verhoeven confirmed that the criminal offenses of perjury and of fabricating evidence do not give rise to a civil claim; see also *Workum v. Olnick*, [*2005 BCSC 1262*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1F7-00000-00&context=) at paras. 6-11; and *Sayhoun v. Broadfoot* (4 February 2011), Vancouver S084539 (B.C.S.C.) oral reasons at para. 8... This last decision is particularly relevant, for reasons I will come to, because it involved Dr. Sahyoun and Mrs. Sahyoun.

**98**  The foregoing admonition does not appear to have assisted or deterred Dr. and Mrs. Sahyoun.

**99**  Numerous defendants are alleged to have "breached a statute", the *Criminal Code* in particular. A statutory breach does not, in and of itself, confer a civil right of action on a harmed party; *Canada v. Saskatchewan Wheat Pool*, [*[1983] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M278-00000-00&context=) at 227. In *Saskatchewan Wheat Pool*, the Court considered whether a statutory breach conferred a civil right of action on a harmed party and concluded at 227-228:

1. Civil consequences of a breach of statute should be subsumed in the law of ***negligence***.
2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes ***negligence*** *per se* giving rise to absolute liability.
3. Proof of statutory breach, causative of damages, may be evidence of ***negligence***.
4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

**100**  More particularly, in *Ausiku v. Hennigar*, [*2011 YKCA 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XR8-3VW1-JBDT-B2P3-00000-00&context=) at para. 22, the court considered a claim where "[i]n essence, [the plaintiff] pleads a violation of the *Criminal Code*." Relying on *Saskatchewan Wheat Pool*, the court succinctly said that "a breach of the *Criminal Code* cannot, standing alone, constitute a civil tort in Canada"; at para. 24.

**101**  Where criminal liability has been established in other proceedings and the plaintiff advances an appropriate cause of action, such as assault or the negligent breach of a duty of care, the suit may be considered in light of that established statutory breach; *M. (M.) v. K. (K.)* [*(1989), 38 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B03T-00000-00&context=) at 288-290 (C.A.).

**102**  I observe that, in this case, no criminal wrong has been established against any of the numerous defendants Dr. and Mrs. Sahyoun have accused of criminal wrongdoing.

1. **Collateral Attack**

**103**  Dr. and Mrs. Sahyoun have advanced claims against various statutory decision-makers and against other persons who exercised statutory powers. Thus, for example, a claim is made against Mr. Duncan, for "obstruction of justice, breach of duty and breach of statute" as a result of the decision he made on April 18, 1994, to deny the plaintiff's legal aid; Section 2, Part 3, para. 23. The B.C. Legal Services Society is said to be vicariously liable for the acts of Mr. Duncan; Section 2, Part 3, para. 27.

**104**  A claim is brought against Mr. Mahil, the Chairperson of the B.C. Council of Human Rights, as a result of a decision he made on December 13, 1994; Section 2, Part 3, para. 28. A claim is also advanced against Ms. Williamson, a delegate of the Chair of the B.C. Council of Human Rights, for a decision that she made on May 23, 1995; Section 2, Part 3, para. 34. The defendant Province of British Columbia is said to be vicariously liable for the acts of Mr. Mahil and Ms. Williamson; Section 2, Part 3, paras. 33, 39.

**105**  A claim appears to be advanced against Ms. McRae, a former Chair of the Board of School Trustees, for a decision that was made in January 1994; Section 1, Part 1, para. 57.

**106**  Each of these claims appears to be a collateral attack on the decisions that were made by these defendants. In the Pleading Reasons, I said:

[47] The Proposed Pleading also purports to advance various claims as a result of the adverse administrative decisions that were made by various tribunals and tribunal members. Such claims appear to be ill-conceived and to constitute impermissible collateral attacks on the decisions that were made; see for example, *Budgell* at paras. 23-27; *Shaw Cablesystems Limited v. Concorde Pacific Group Inc*., [*2009 BCSC 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3NK-00000-00&context=) at para. 24, [*80 R.P.R. (4th) 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3NK-00000-00&context=); and *Sahyoun v. Broadfoot*, [*2008 BCSC 1836*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3R7-00000-00&context=) at paras. 54-55..., var'd on other grounds [*2009 BCCA 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24SD-00000-00&context=). Once again this latter decision is of some import because it involves Dr. and Mrs. Sahyoun.

**107**  The following comments of Williams J., in *Sahyoun v. Broadfoot*, [*2008 BCSC 1836*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3R7-00000-00&context=), var'd on other grounds, [*2009 BCCA 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24SD-00000-00&context=) [*Broadfoot* BCSC], are relevant and apply with equal force in this case:

[68] In my view, the action that the plaintiffs have initiated against these defendants is plainly an attack on the decision that was made by the tribunal. By virtue of the statute, it is clear that there is no jurisdiction for the court to hear a substantive appeal from that decision. The only recourse is by way of a proceeding under the *Judicial Review Procedure Act*. That is not what this is. There is, as well, the statutory immunity that protects the tribunal and its members. That is effective unless there is a claim of bad faith.

...

[72] In my view, the following passage from the decision of Mr. Justice McEwan in *Speckling v. Kearney*, [*2006 BCSC 506*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1NK-00000-00&context=) is instructive and applicable. There he said:

I am satisfied, having reviewed the statement of claim in its entirely that, in any event, the discontinued claims brought against the Labour Relations Board and the named adjudicators are simply collateral attacks on the manner in which they carried out their quasi-judicial functions. The complaint against Sharon Kearney is that she "deliberately did not use [her] knowledge", a complaint which, if true, could be addressed on judicial review. The complaint against Michael Fleming is that he "failed to address" or "deliberately failed to adjudicate" a number of matters. These could also be addressed on judicial review. There is nothing pleaded in the statement of claim that would take what the named defendants did out of the realm of their responsibilities under the *Code*. *It is not enough to simply characterize the exercise of a quasi-judicial function in terms approximating bad faith to strip an adjudicator of the immunity afforded to such decision makers...*.

...

[75] In my view, it is quite apparent that this lawsuit is, plainly and simply, an effort by the plaintiffs to challenge the administrative decisions that have been made over the history of the claim. They allege that the claims were not properly handled and decided, and they seek, first and foremost, to have the decisions rescinded and the sought-after status granted. Following that, of course, is retroactive monetary compensation for benefits denied and payment of benefits going forward.

[76] That is really the essence of the action. The basis upon which it is structured is a lengthy series of allegations of misconduct by members of the Ministry staff. In fact, the wrongs that they allege could have and should have been asserted in the course of the statutory mechanisms that are provided for challenging decisions related to benefit clams and, if appropriate, through an action in the court under the *Judicial Review Procedure Act*.

See also *C.U.P.E., Local 79* at paras. 33-34.

**108**  When I questioned Dr. and Mrs. Sahyoun about this particular issue, they said that they had been unaware, at the time, of the need to judicially review such matters or of how to go about achieving that result. This acknowledgment is actually found at Section 1, Part 1, para. 59 of the Amended Pleading. Be that as it may, this fact does not provide the Sahyouns with license to do what they cannot, and what they have repeatedly been told they cannot, do.

1. **Statutory and Other Immunities**

**109**  The Amended Pleading involves numerous claims against individuals who would normally enjoy the benefit of some form of statutory or other immunity.

**110**  Thus, for example, the Amended Pleading advances claims against six separate police officers, as a result of a single incident, on November 5, 1998. During that incident, the police attended at Dr. and Mrs. Sahyoun's home to take their children into care, and Dr. Sahyoun was then arrested. Section 21(2)-(3) of the *Police Act*, *R.S.B.C. 1996, c. 367*, which has remained unchanged since the incident in 1998, provides:

1. No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
2. Subsection (2) does not provide a defence if
3. the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross ***negligence*** or malicious or wilful misconduct, or
4. the cause of action is libel or slander.

**111**  In order to address s. 21, a plaintiff must do more than prove that a police officer committed an intentional tort. Instead, to establish "wilful misconduct" a plaintiff must establish that the officer committed a tort knowing it to be wrong or with reckless indifference as to whether it was wrong; *R. v. Boulanger*, [*2006 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B177-00000-00&context=) at para. 27.

**112**  The definition of "gross ***negligence***", in turn, is not rigid but rather depends on all the circumstances. In *Doern v. Phillips Estate* [*(1994), 2 B.C.L.R. (3d) 349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0FN-00000-00&context=) (S.C.), aff'd [*43 B.C.L.R. (3d) 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M231-00000-00&context=) (C.A.), Kirkpatrick J., as she then was, addressed the meaning of "gross ***negligence***" in s. 21 of the *Police Act* and said:

81 In the absence of any clear legislative intent to define the concept of gross ***negligence***, it should be given its plain meaning as it has developed under the common law. The classic test for gross ***negligence*** was reiterated by the Supreme Court of Canada in *Walker v. Coates*, [*[1968] S.C.R. 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22TB-00000-00&context=) [[*64 W.W.R. 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22TB-00000-00&context=)]. Ritchie J. referred, at p. 601, to the Court's earlier decision in *McCulloch v. Murray*, [*[1942] S.C.R. 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FBV7-B55N-00000-00&context=), where Duff C.J.C., at p. 145, had defined gross ***negligence*** as:

"All these phrases, gross ***negligence***, willful misconduct, imply conduct in which, if there is not conscious wrongdoing, *there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves*."

See also *Glover v. Magark*, [*[1999] B.C.J. No. 472*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2215-00000-00&context=) at paras. 9-12 (S.C.), aff'd [*2001 BCCA 390*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63F6-00000-00&context=).

**113**  There is no apparent suggestion, and certainly no material facts pled, that the Police Defendants were guilty of gross ***negligence*** or willful misconduct. Section 2, Part 3, para. 45 of the Amended Pleading does assert that the Police Defendants, other than Constable Ennis, "wrongly identified Dr. Riad Sahyoun as a person with a mental disorder on November 5, 1988, as he was in great emotional distress during his encounter with them." It is asserted that this conduct constituted "a defamation of the character of Dr. Riad Sayhoun, and by extension, a defamation of the character of Dr. Riad Sayhoun's family"; Section 2, Part 3, para. 46. The City of Vancouver is said to be vicariously liable for the acts of the Police Defendants; Section 2, Part 3, para. 47.

**114**  I also note that there are defamation claims advanced against numerous other defendants. I do not propose to address the deficiencies in each such pleading, but have addressed this claim in the context of the Police Defendants, as illustrative of the types of difficulties that are present in other such claims.

**115**  Dr. and Mrs. Sahyoun's claim, in defamation, has not been properly advanced against the Police Defendants. A claim in defamation has various constituent elements; *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. One of those elements is that the defamatory statement has been published, meaning that the words were communicated to persons other than the plaintiff; *Grant* at para. 28. That material element must be pled; *Bullen & Leake & Jacob's*, *Precedents of Pleadings*, 17th ed., vol. 1 (London, UK: Sweet & Maxwell, 2012) at paras. 37-08, 37-16 - 37-17. This element is absent in the claim made against the Police Defendants.

**116**  Furthermore, in this case, Dr. Sahyoun complains of a slander rather than a libel. Slander generally requires proof of special damages; Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Canada Inc., 2006) at p. 777. In this case no plea of such special damage is developed. There is a generic plea for special damages made against all defendants. I do not consider that this suffices. Accordingly, I do not consider that the defamation plea made against the Police Defendants is properly advanced. Without a proper pleading, there is no conduct identified in the Amended Pleading, on the part of the Police Defendants, that would cause them to fall outside of the protection afforded by s. 21 of the *Police Act*. There is, similarly, no behaviour, on the part of the Police Defendants, for which the City of Vancouver might be vicariously liable.

**117**  I have already identified that Dr. and Mrs. Sahyoun have advanced claims against various statutory decision-makers for events which primarily occurred in the early 1990s, and described some of the difficulties with those claims. In addition, members of administrative tribunals are generally provided with judicial immunity from legal proceedings when exercising their adjudicative functions; see *R. v. Budgell*, [*2012 BCSC 1302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2JT-00000-00&context=) at para. 16. Some limited exceptions arise when the decision-maker has been involved in some impropriety, for example, corruption or bribery.

**118**  Furthermore, during the period in question, s. 3(2) of the *Crown Proceeding Act,* R.S.B.C. 1979, c. 86, which still appears in similar terms (*R.S.B.C. 1996, c. 89*), stated:

1. Nothing in section 2
2. authorizes proceedings against the Crown for anything done or omitted to be done by a person acting reasonably and in good faith while discharging or purporting to discharge responsibilities
3. of a judicial nature vested in him; or
4. that he has in connection with the execution of judicial process;

**119**  Similar difficulties arise with respect to other defendants, or groups of defendants, who enjoy the protection of various immunities. For example, s. 23 of the former *Family and Child Service Act*, S.B.C. 1980, c. 11, protected actors under that act during the period in question and that protection was continued in s. 101 of the current *Child, Family and Community Services Act*, *R.S.B.C. 1996, c. 46*.

**120**  Similarly during the period in question, s. 112(1)-(2) of the former *School Act*, R.S.B.C. 1989, c. 61, which appears in almost identical terms in s. 94 of the current *School Act*, *R.S.B.C. 1996, c. 412*, provided:

112 (1) No action for damages lies or may be instituted against a trustee, an officer or an employee of a board for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of the duty or the exercise of the power.

1. Subsection (1) does not provide a defence where
2. the trustee, officer or employee has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross ***negligence*** or malicious or willful misconduct, or
3. the cause of action is libel or slander.

**121**  In order to lose the benefit of the immunities provided by statute, and/or the common law, a statutory decision-maker or other individual must engage in some form of serious wrongdoing. Dr. and Mrs. Sahyoun have alleged, for example, that each of the decision-makers, against whom they have advanced claims, were involved in such serious wrongdoing. For example, Mr. Duncan and Mr. Mahil are alleged to have "obstructed justice"; Section 2, Part 3, paras. 23, 30. The plea that Mr. Duncan also "breached his duty" (Section 2, Part 3, para. 24) would not, without more, serve to remove the immunity that he would otherwise enjoy. Nor would the unintelligible assertion that Mr. Mahil "committed miscarriage of justice ... by severely tainting the [Human Rights Complaint] proceedings"; Section 2, Part 3, para. 33. It is also alleged that Ms. Williamson "committed miscarriage of justice by intentionally and maliciously making a decision to deny Antonios' right and Dr. & Mrs. Riad Sahyoun's rights"; Section 2, Part 3, para. 35.

**122**  It is not enough, however, to assert malice. Dr. and Mrs. Sahyoun must plead the material facts they rely on to establish such malice. Often, there are no material facts advanced to support an allegation.

**123**  In *Broadfoot* BCSC, Williams J. commented on the various allegations of serious wrongdoing that Dr. Sahyoun advanced against various defendants in that proceeding and said:

[73] It is my conclusion that the pleading herein as it relates to the claim against the Commissioner and his staff and office is of this type. There are no facts pled that would legitimately take the conduct complained against into the realm of bad faith, and given the general flavour of the plaintiffs' statement of claim at large, with frequent assertions of professional malpractice and more, I find this is simply a characterization of bad faith to overcome the immunity provision of the legislation and nothing more.

**124**  As against other defendants, Williams J. said:

[79] Each of these allegations is significant; each clearly asserts serious, deliberate, bad faith misconduct. In support of each allegation is pleaded specific conduct that on the face of the matter gives each an apparent validity such that it would be improper for this court to strike them, and so I will not do so at this time.

...

[81] In arriving at this outcome, I make no assessment or judgment of the merit of the claims that the plaintiff makes against these defendants. Certainly, given the litany of allegations of wrongdoing and the liberal use of such characterizations as professional misconduct and more, one might be tempted to conclude that the statement of claim at bar has been drawn in an irresponsible and overambitious way. However, that is not an assessment that falls to this court to make in this application.

**125**  In the Pleading Reasons, I issued a similar caution and said:

[62] The Proposed Pleading contains numerous serious allegations of fraudulent misrepresentation, falsification of materials, perjury and malicious behaviour on the part of numerous unrelated defendants. It is open to a plaintiff, on a proper basis, to advance some of these matters either independently or in support of an action if a proper foundation exists for the allegation. It is thoroughly wrong to do so for strategic reasons. I have explained to Dr. and Mrs. Sayhoun that they must reflect carefully on what allegations they advance and should be mindful of the sanctions that potentially exist where a claim of this nature is not made out.

**126**  Such concerns continue to pertain. Antonios, as well as Dr. and Mrs. Sahyoun, allege various forms of serious wrongdoing against most of the personal defendants other than, interestingly, most of the Defendant Physicians, who do not enjoy the benefit of any broad statutory immunity. Dr. and Mrs. Sahyoun are well-aware that their actions, as well as Antonios' action against various personal defendants, could not proceed without some claim of fraud or malice or other serious wrongdoing.

**127**  I am mindful that I am not, on this application, to address such allegations on the merits, but am to assume that they can be made out. Nevertheless, I consider it is appropriate to require, if such claims of serious wrongdoing are advanced, that they be properly advanced. In particular, I consider it appropriate to require that Dr. and Mrs. Sahyoun plead those material facts they rely on to establish such wrongs. I expressly raised the need to plead material facts in the Pleading Reasons at paras. 24-26.

**128**  I do not, again, propose to address this issue for each of the numerous personal defendants to whom it pertains, though it is a sweeping concern. Instead, I have addressed this issue only with reference to the six-named personal defendants who were employed by the Vancouver School Board.

**129**  Dr. Moore is alleged to be guilty of, *inter alia*, "dishonesty" and "malicious or willful misconduct"; Section 2, Part 3, para. 11. Ms. Till and Mr. Pearmain are similarly alleged to be "guilty" of, *inter alia*, "dishonesty" and "malicious or willful misconduct"; Section 2, Part 3, para. 13. Mr. McLeod and Mr. Goodridge are alleged to be "guilty of gross ***negligence***" and of "an indictable offence" under the *Criminal Code*; Section 2, Part 3, paras. 16-18. Ms. McRae, who is now deceased, is again, alleged to have been "guilty" of "dishonesty and/or gross ***negligence*** and/or malicious or willful conduct", of a "cover-up" for the activities of others, and of the "offence" of "obstructing justice" under the *Criminal Code*; Section 2, Part 3, paras. 19-20.

**130**  Apart from any other difficulty with these claims, I do not consider that the Amended Pleading adequately identifies some of the material facts that would be required to properly ground such allegations. The allegations are based, in part, on various of these individuals having "exposed Antonios' life to danger", or having "abused" him, or having "covered up" the activities of others. The nature of these allegations often remains unclear. Furthermore, some material facts or allegations do not, without more, justify the inflammatory or elevated level of wrongdoing alleged. Thus, it is alleged, *inter alia,* that Mr. McLeod is guilty of "gross ***negligence***" because he breached a section of the applicable *School Act*; Section 2, Part 3, para. 16. The same allegation of "gross ***negligence***" on the same basis is made against Mr. Goodridge; Section 2, Part 3, para. 16.

**131**  Let me come full circle in relation to these six-named personal defendants. Having addressed the alleged wrongdoing of these individuals for five pages of the Amended Pleading, the nature of the "damages and losses" they are alleged to have caused is summarized over a further page in nine subparagraphs at Section 2, Part 3, para. 20. Subparagraphs (i), (j), (n), (o) and (p) are claims advanced by or for Antonios. Subparagraph (k) alleges Dr. and Mrs. Sahyoun were denied Antonios' student records. It is not clear what, if any, cause of action would support this head of loss, or how this is a proper head of damages. Subparagraphs (l) and (m) are claims brought by Dr. and Mrs. Sahyoun based on the children having been removed from their care. The decision to remove the Sahyoun children from the care of Dr. and Mrs. Sahyoun has already been litigated. Subparagraph (q) is based on Dr. and Mrs. Sahyoun having incurred expenses such as "photocopying, consuming copious amounts of time consulting lawyers, etcetera, in relation to the legal matters that Antonios has been involved in". If costs or disbursements were available in such proceedings, they should have been sought at that time. I am unaware of any means by which they could now be claimed.

**132**  A proper claim consists of both a recognized cause of action and recognized form of loss. Here the claims brought by Dr. and Mrs. Sahyoun are deficient in both respects.

**D. Limitations Issues**

**133**  Various of the defendants rely on different limitation provisions in different statutes. Thus, for example, the City of Vancouver relies on s. 294(2) of the *Vancouver Charter*, *S.B.C. 1953, c. 55*, which provides:

1. The city is in no case liable for damages unless notice in writing, setting forth the time, place, and manner in which such damage has been sustained, shall be left and filed with the City Clerk within two months from and after the date on which such damage was sustained; provided that in case of the death of a person injured the want of a notice required by this subsection is not a bar to the maintenance of the action. The want or insufficiency of the notice required by this subsection is not a bar to the maintenance of an action if the Court or Judge before whom such action is tried or, in the case of an appeal, the Court of Appeal is of the opinion that there was reasonable excuse for the want or insufficiency and that the city has not been thereby prejudiced in its defence.

**134**  Dr. and Mrs. Sahyoun's materials did not directly address this statutory provision, or the difficulties it raises for any claim they may wish to bring against the City of Vancouver.

**135**  Various of the defendants also argue that the claims of Dr. and Mrs. Sahyoun are barred by operation 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=) [*Limitation Act*, 1996]. The *Limitation Act*, 1996 has since been repealed but still governs this claim; *Limitation Act*, [*S.B.C. 2012, c. 13, s. 30*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TR-00000-00&context=)(3). Once again, the majority of the activities that Dr. and Mrs. Sahyoun complain of occurred between 1990-1994. A few extend to 1998-2000. This action was commenced on January 31, 2008.

**136**  Dr. and Mrs. Sahyoun argue, however, that the claims they advance are "related" to the claims that are brought by Antonios, whose claims were extended pursuant to ss. 7(1)-(2) of the *Limitation Act*, 1996 and that their own claims are thereby saved by s. 4(1)(d) of the *Limitation Act*, 1996. Section 4 provided:

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.

**137**  Dr. and Mrs. Sahyoun accepted, however, that if I struck the claim of Antonios, a necessary consequence of that determination would be to remove them from the potential ambit of s. 4(1)(d) of the *Limitation Act*, 1996. Accordingly, as a result of the decision I made earlier in these reasons in relation to the claim that was filed by or on behalf of Antonios, the claims of Dr. and Mrs. Sahyoun become statute barred.

**138**  I should say, however, that I would arrive at this result, in any event, in relation to the claims that are made against many of the defendants. The analysis that arises under s. 4(1)(d) and, indeed, under R. 6-2(7)(c), would require that I address and consider each of the claims made by Dr. and Mrs. Sahyoun against different defendants separately. I do not, in the circumstances, and in light of the various other problems with the Amended Pleading, propose to do so. I have done so for the Police Defendants, whose counsel took the lead on this particular issue to describe this issue and the impediments it causes for the claims brought by Dr. and Mrs. Sahyoun.

**139**  The analysis under s. 4(1) has developed over a number of cases, beginning most notably with *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=) at 300 (C.A.), where the majority held that the purpose of the provision was to permit subordinate proceedings while also preventing "truly independent" proceedings from "using bogus subordinate status to avoid a limitation period which would otherwise be applicable".

**140**  In *Cementation Co. (Can.) Ltd. v. Amer Home Assur. 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=) at 177 (C.A.), Lambert J.A., for the majority, held that adding a party pursuant to s. 4(1) requires a consideration of (a) whether there is "some degree of interrelationship" between the claims that justifies bringing them together and provides an explanation for the delay and (b) the "paramount" consideration of the interests of justice and convenience more broadly. In *Boyer v. Insurance Corp. of British Columbia* (1994), 24 C.P.C. (3d) 256 at para. 9 (B.C.S.C.), Josephson J. concluded that the effect of *Cementation* was to collapse the consideration of the "relating to and connected with" analysis with the broader "just and convenient" analysis.

**141**  The overarching "just and convenience" analysis is consistent with the "applicable law" referenced in s. 4(1), which is generally R. 6-2(7)(c). This rule permits the addition of a party to a proceeding with a "relating to or connected with" issue if it is "just and convenient". *Letvad v. Fenwick*, [*2000 BCCA 630*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2DF-00000-00&context=), at para. 29, confirms that a court has wide discretion under R. 6-2(7)(c) so long as that discretion is exercised judicially with regard to:

1. the extent of the delay;
2. the reasons for the delay;
3. any explanation put forward to account for the delay;
4. the degree of prejudice caused by delay; and

- the extent of the connection, if any, between the existing claims and the proposed new cause of action.

**142**  In summary, s. 4(1)(d) of the *Limitation Act*, 1996 requires a consideration of what is just and convenient in light of the expired limitation period and the reasons for the delay. The overall analysis focuses on the factors outlined in *Letvad*.

**143**  In this case, the only references to the Police Defendants are found in Section 1, Part 1, paras. 61-63; Section 2, Part 1, paras 205, 211-215; and Section 2, Part 3, paras. 45-46 of the Amended Pleading. Other than a derivative defamation claim, whose nature I do not understand, no cause of action appears to be advanced by Antonios in these paragraphs. Indeed, leaving aside the difficulties with such a derivative claim, it is clear that the dominant complaint that is made arises from the Police Defendants' treatment of Dr. Sahyoun. Still further, no explanation was provided to me, nor is any explanation found in the materials, for why Dr. Sahyoun did not advance a claim against the Police Defendants, in his own right, at a much earlier time. As such, it seems clear, quite apart from the fact that I have struck Antonios' claim, that Dr. and Mrs. Sahyoun would be unable to rely on s. 4(1)(d) of the *Limitation Act*, 1996 to sustain their claim against the Police Defendants.

**E. Conclusion**

**144**  Striking a pleading under R. 9-5(1) is a draconian remedy that is only granted in egregious circumstances. With that said, it plays a central role in ensuring that parties comply with the *Rules*, and it provides the court with a necessary mechanism to ensure such compliance. Absent access to R. 9-5(1), the court's ability to control the content and form of pleadings is diminished, the broader objects of the *Rules* such as efficiency, timeliness, and cost-effectiveness are undermined, and considerable unfairness may be imposed on opposing litigants.

**145**  In this case, all of these considerations are engaged. This action was commenced more than six years ago. The Amended Pleading is the fifth pleading that Dr. and Mrs. Sahyoun have drafted and delivered to the defendants. The earlier hearing that gave rise to the Pleading Reasons, together with this hearing, has occupied seven days of court time. Dr. and Mrs. Sahyoun have been provided with as much guidance, through the correspondence and submissions of counsel, and through the Pleading Reasons, as is possible. In the Pleading Reasons, I declined to strike the pleading that was then before me and decided, instead, to provide Dr. and Mrs. Sahyoun with a further opportunity to rectify the numerous deficiencies that existed in that earlier pleading.

**146**  Such efforts and such opportunities have effectively been wasted. The Amended Pleading remains a thoroughly unworkable and deficient document. It continues to offend each subparagraph of R.9-5(1). This is so in the many and varied ways that I have described.

**147**  Furthermore, I consider that the defendants have lived under a cloud of allegations, related to distant wrongs, that in many cases could scarcely be more severe in nature, for long enough.

**148**  I am satisfied that providing Dr. and Mrs. Sahyoun with a further opportunity to address the inadequacies of the Amended Pleading will not yield a different result. I am also satisfied there are no lesser measures available to me that would properly balance the various interests that I have described.

**149**  Accordingly, I consider it appropriate to strike the claim that has been advanced by Dr. and Mrs. Sahyoun against each of the defendants.

**IV. UBC's RULE 9-7 APPLICATION**

**150**  UBC advanced a separate and alternative summary trial application under R. 9-7. By virtue of the conclusions I have come to, I do not consider it necessary to address that separate application.

**V. COSTS**

**151**  Most of the defendants seek a lump-sum cost award of either $500 or $1,000 from Dr. and Mrs. Sahyoun. The LSS Defendants do not seek any cost order. UBC seeks to recover its full costs on a party and party basis.

**152**  I have said that each of Dr. and Mrs. Sahyoun were granted indigent status in this action on January 31, 2008 (the Indigent Order). At the time, their application was governed by Appendix C, Schedule 1, s. 1, of the former *Rules of Court*, *B.C. Reg. 221/90*. The Indigent Order expressly stated that Dr. and Mrs. Sahyoun were "declared indigent with respect to the fees set forth in Appendix C, Schedule 1, of the *Rules of Court*, as they apply to this application and the within proceedings generally".

**153**  Today, applications for indigent status are governed by R. 20-5 of the current *Rules*. The test for granting an order for indigent status has remained largely similar. What is important for present purposes is that under both the former and the current *Rules*, the relevant provisions provide, in substance, that no fee is payable to the Crown by an indigent person to commence, defend or continue the whole or any part of the preceding.

**154**  Thus, both provisions serve to insulate indigent parties from the need to pay those fees to the Crown that a litigant would normally be required to pay. Neither provision provides any broader immunity and, in particular, neither provision serves to insulate an indigent party from the costs that an opposing party is otherwise entitled to.

**155**  As a practical matter, parties will often not seek a cost award against an indigent party. Such practical concerns do not, however, determine whether such costs are, on a principled basis, available to opposing litigants.

**156**  There are some cases that have recognized the limited nature or scope of the "fees" that are caught by indigent status. For example, in *Pavlis v. HSBC Bank Canada*, [*2009 BCCA 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0BH-00000-00&context=) at para. 17, Kirkpatrick J.A. confirmed that indigent status would not relieve a party from having to pay the costs associated with preparing appeal materials or ordering transcripts.

**157**  There is also authority for making an order for special costs against a person with indigent status even where that order may give rise to a "hollow" or "empty" judgment; *Keremelevski v. V.W.R. Capital Corporation*, [*2013 BCSC 612*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2H8-00000-00&context=) at para. 71, aff'd [*[2013] B.C.J. No. 3055*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4PS-00000-00&context=) (C.A.); *Leger v. Metro Vancouver YMCA*, [*2013 BCSC 2021*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3YC-00000-00&context=) at para. 78.

**158**  In *Fixova v. Matous*, [*2014 BCSC 2215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4S7-00000-00&context=) at para. 64, Affleck J. summarized various authorities and concluded, "[i]mpoverished status does not permit a litigant to use it as a shield against a costs award."

**159**  The *Broadfoot* decision also touches directly on the issue of whether costs are payable by a party that has been declared indigent. In *Broadfoot,* a master made a cost order against Dr. Sahyoun following an application. On the appeal of that cost order, Williams J., in *Broadfoot* BCSC, said:

[48] The master was aware that the appellant had indigent status at the time he made his order, but he had heard submissions from counsel which satisfied him that the order was appropriate in the circumstances, namely, that Dr. Sayhoun had demonstrated a pattern of conducting the litigation with an apparent disdain for the convenience of others, almost to the point of appearing to manipulate the process for tactical benefit. On that basis, the master concluded that the usual practice of granting costs in such a situation was warranted.

[49] As for the fact of the appellant's indigency, that was within the contemplation of the master when he made his order, and he evidently recognized that there was a salutary purpose to be served. The issue of actual collection of the award of costs is another matter, one that is not before me at this time. However, I am not persuaded that the master was in error when he exercised his jurisdiction to make the cost order in the circumstances of the case. After all, being confirmed with the status of an indigent litigant surely cannot inoculate a party against any consequences for conduct in the litigation process.

**160**  Dr. Sayhoun appealed Williams J.'s decision to the Court of Appeal. That appeal is reported at *Sahyoun v. Broadfoot*, [*2009 BCCA 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24SD-00000-00&context=). Ryan J.A., for the court, dismissed the appeal from the order dismissing the Sayhouns' action, but allowed the appeal of the master's cost order on the following basis:

[5] The transcript of the proceedings before Master Taylor indicates that after he adjourned the application before him counsel for the applicant sought costs and the order was made. After the order was made, Dr. Sayhoun made submissions to the Master but was not really given a full opportunity to respond to the submissions of counsel. In my view, the order for costs ought to be set aside.

**161**  Accordingly, it seems clear that the cost order against Dr. Sayhoun was overturned on the limited basis that he had not been given an opportunity to fully respond to the opposing party's submissions on costs.

**162**  *Herbison v. Canada (Attorney General)*, [*2014 BCCA 461*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5FX0-KKR1-JCBX-S2K9-00000-00&context=) at para. 30, summarizes the court's discretion to fix the quantum of costs under R. 14-1(15) and the principles that govern those awards: the court cannot act "arbitrarily or capriciously", must be guided by the principle that "parties are only entitled to their objectively reasonable legal costs", the ultimate award "must be consistent with the award that a registrar would make in similar circumstances" and it must be guided by a consideration of "all the circumstances".

**163**  While the issue does not appear to come up frequently, possibly for the practical reasons I have described, there is some case law that supports considering a party's impecuniosity when quantifying costs; *Currie (Guardian ad litem of) v. Fitt*, [*[1996] B.C.J. No. 2882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M20M-00000-00&context=) at para. 64 (S.C.); see also *Jeremiah v. Toronto (Police Services Board)*, [*2009 ONCA 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-JTGH-B4JD-00000-00&context=) at paras. 13-14.

**164**  Cost orders serve various salutary purposes. Those purposes include:

1. indemnifying a successful litigant;
2. deterring frivolous actions or defenses;
3. encouraging conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect;
4. encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and
5. serving a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength, or lack thereof of their cases at the commencement and throughout the course of the litigation, and by discouraging the continuance of doubtful cases or defenses.

See Giles v. Westminster Savings and Credit Union, [*2010 BCCA 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-223T-00000-00&context=) at paras. 74, 94; Hartshorne v. Hartshorne, [*2011 BCCA 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2V7-00000-00&context=) at para. 25.

**165**  The positive functions that are served by cost orders pertain to all litigants, including those who are indigent. The discipline that is imposed by cost orders is similarly a discipline that is appropriate and necessary for all litigants. Removing such discipline for indigent litigants gives rise to the prospect of abuse and mischief.

**166**  At the same time, one of the purposes served by an order granting indigent status is to enable parties to access the courts in circumstances where they might not otherwise be able to; see *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [*2014 SCC 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G3M-0BS1-F528-G44Y-00000-00&context=) at paras. 45-46. In a similar vein, it is important to ensure that a cost order, which might otherwise be appropriate, is not so severe as to be punitive or to impede an indigent person's access to the courts and their ability to advance a meritorious claim.

**167**  The cost orders that most of the defendants seek aligns with these twin objectives. A lump sum cost award of $1,000, payable to each group of defendants, is appropriate. It does not begin to recognize the expenses they have incurred. It does attach some appropriate consequence to Dr. and Mrs. Sahyoun's conduct within the legal framework and considerations that I have described.

**168**  I do not consider that the usual cost order that UBC seeks would be appropriate for the reasons I have described. The LSS Defendants do not seek any cost order, and accordingly, I make no cost order in their favour.

P.G. VOITH J.

**End of Document**

[***Scheelar v. Kibblewhite, [2006] B.C.J. No. 1128***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1BH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

McEwan J.

Heard: February 20 - 24 and 27, 2006.

Judgment: May 18, 2006.

Vancouver Registry No. S035409

**[2006] B.C.J. No. 1128** | 2006 BCSC 797 | 151 A.C.W.S. (3d) 310

Between Darryl Scheelar, plaintiff, and Douglas J. Kibblewhite, defendant

(52 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Duty of care — Failure to inform — Standard of care — Particular professions — Doctors — Surgeons — Treatment, authorization for — Consent — Informed consent — Action by the patient for damages in *negligence* and breach of contract against the surgeon who repaired a perforation in the patient's nose cartilage dismissed — The patient's nose profile changed as a result of the surgery — It had not been established that the alteration in the patient's nose profile was the result of the surgeon's *negligence* — The surgeon performed the surgery in accordance with his duty and did not contractually undertake to do more — Costs awarded to the surgeon.**

**Professional responsibility — Contractual duties — Duties of care and *negligence* — Standard of care — Professions — Health care — Doctors — Action by the patient for damages in *negligence* and breach of contract against the surgeon who repaired a perforation in the patient's nose cartilage dismissed — The patient's nose profile changed as a result of the surgery — It had not been established that the alteration in the patient's nose profile was the result of the surgeon's *negligence* — The surgeon performed the surgery in accordance with his duty and did not contractually undertake to do more — Costs awarded to the surgeon.**

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| Action by the patient for damages in ***negligence*** and breach of contract against the surgeon who repaired a perforation in the patient's nose cartilage -- The patient was a stuntman and actor who feared the perforation in his nose cartilage would be visible in some lighting conditions and would negatively affect his employability -- The surgery successfully repaired the perforation in his nose cartilage but altered the patient's nose profile -- The patient subsequently had two operations to restore the look of his nose -- The surgeon did not mention any risk of a change in the external appearance of the patient's nose in relation to the initial operation -- Expert testimony indicated that the risk of such a change was highly remote -- HELD: Action dismissed -- There was no lack of informed consent as a reasonable person in the patient's circumstances, even having been told that there was a remote risk that his appearance might change, would have consented to the operation to repair the perforation in the nose cartilage -- The surgery was performed in accordance with an appropriate standard of care and was successful -- It had not been established that the alteration in the patient's nose profile was the result of any ***negligence*** on the part of the surgeon -- The surgeon performed the surgery in accordance with his duty and did not contractually undertake to do more -- Costs were awarded to the surgeon. |

**Counsel**

Counsel for the Plaintiff: G.B. Walker

Counsel for the Defendant: K.J. Jakeman J.K. Gibson

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| **McEWAN J.** |

**I**

**1**  The plaintiff's claim against the defendant doctor is for damages in ***negligence*** and for breach of contract.

**2**  Dr. Kibblewhite is a surgeon who specializes in Otolaryngology, that is, head and neck surgery, and facial plastic and reconstructive surgery. He first saw Mr. Scheelar on July 18, 2002. Mr. Scheelar was concerned about a perforation that had developed in the cartilage of his nose which appeared to be enlarging over time. He illustrated the nature of his problem by saying that he could touch the tips of his fingers through the perforation by pinching them inside of his nose.

**3**  This perforation was of particular concern to Mr. Scheelar because he is an actor and a stuntman and he feared that the perforation would, in some lighting conditions, become visible or alter his appearance such that his employability would be affected. He had a "look" that he was very happy with, and he was pleased to be called, within the film industry, one of the "Hollywood North pretty boys." While what he called his "look" was not affected by the perforation in his nose, Mr. Scheelar specifically recalled enacting a death scene in an "Outer Limits" episode and being concerned about the side lighting illuminating the opposite nostril. He sought medical advice as to what to do about it. His general practitioner sent him to one specialist who suggested a septal button, a form of artificial insert. Mr. Scheelar was not keen on that and sought another referral.

**4**  When Mr. Scheelar met with Dr. Kibblewhite, he says he explained his concerns relative to his profession. He says Dr. Kibblewhite told him that the perforation could be closed surgically by moving a piece of cartilage from further back in his septum and stitching it into place. He says that Dr. Kibblewhite told him that there was a chance the perforation would not seal completely, but that, in that case, the opening would be further back.

**5**  Mr. Scheelar says that he asked if the procedure would change the appearance of his nose in any way, and that he was assured that what was to be done was all internal and would have no external effect. He says he would not have gone through with the operation if he had been told of such a risk.

**6**  Mr. Scheelar says that the day the surgery was performed he showed Dr. Kibblewhite a mouth guard he wanted to use so that the anaesthesiologist's tracheal tube would not damage the cosmetic dental work he had had performed some years before to perfect his appearance.

**7**  Mr. Scheelar is sure he was told only that there was a risk the opening would not completely seal, and says that he was told at least twice that the look of his nose would not change.

**8**  A series of exhibits were introduced to illustrate the difference between the plaintiff's pre-operation and post-operation nasal profile. He produced several before and after photographs. He also produced a full bust of his head made for the purpose of constructing a mask for a role he had played before the operation. A facial cast was made for the purposes of this litigation in November of 2002.

**9**  There was some controversy about the accuracy of the casts and whether they reliably showed the change in the plaintiff's nose before and after. Were this a matter of more subtlety, I might have to weigh the evidence on this subject carefully. I am, however, satisfied that the photographic evidence produced and the other evidence adduced supports a finding that there was an alteration in the plaintiff's nose from a straight profile to one that had a slight, but noticeable, dip just before the tip. This left the plaintiff with a nose that was not, in any ordinary sense, a disfigurement, but that could not be called perfectly straight. This change was personally very distressing to the plaintiff.

**10**  This Court heard from Kylie Furneaux, a stunt performer, who met the plaintiff after he had had the perforation surgery. She testified that she and the plaintiff were in a relationship for more than two years. She said that on their first date, Mr. Scheelar spent about an hour talking about his nose. She said he obviously felt very uncomfortable about it. She said she thought he looked "great" and that she did not consider his post-surgery nose unattractive. She said that Mr. Scheelar's preoccupation with his nose was the source of a number of disagreements between them, and that thinking about his nose would make the plaintiff angry. She said she tried to help him feel better about himself, but that the change was obviously a matter of great concern to Mr. Scheelar.

**11**  Mohammed Pardhar, a high school friend of Mr. Scheelar's, testified that he noticed that the plaintiff's nose was quite different after the operation. He noticed a small hollow in it and also thought that it was somewhat wider. He said Mr. Scheelar was not very happy about the change and that it bothered him quite a bit. He said he was "pretty conscious" of it.

**12**  Mr. Scheelar saw Dr. Kibblewhite about a week after the surgery, at which time he said that his nose was "incredibly painful."

**13**  By contrast, Dr. Kibblewhite's note of September 27, 2002 reads:

Facial swelling. Not much pain. Completely blocked. Is to use ointment in his nose and follow-up next Thursday for splint removal.

Rx Clindamycin 600 mg tid x 5 days

London Drugs 437-9621

**14**  On October 3, 2002, Dr. Kibblewhite noted that the repair looked good.

**15**  On October 17, 2002, Dr. Kibblewhite's notes include a question mark as to whether there had been a change of shape.

**16**  On October 23, 2002, Dr. Kibblewhite saw Mr. Scheelar again, and Mr. Scheelar told him there had been a change in his nose. Dr. Kibblewhite did not think the change was significant. He noted:

[Mr. Scheelar] again feels that his nose has changed in appearance and that he feels that it has a dip in the supra tip area. He feels that he cannot get work because of this.

This is interesting as pre-operatively he felt that light would shine through his perforation and this would also have a negative effect on getting work.

**17**  On November 12, 2002, Mr. Scheelar returned. Dr. Kibblewhite noted:

This patient has been reevaluated. Still feels that he has a supra-tip dip and his tip has dropped. He wonders what can be done to put it back to where it belongs. I have pointed out I do not have pre photos of him and it is not clear to me whether indeed his nose has changed in shape.

Endonasally his septal perforation has healed and palpation of both his dorsal and caudal struts of his nose show that they are intact.

Review of his operative note shows that neither dorsal nor caudal strut was indeed touched and that the cartilage closure for his septum came from his postero-inferior septal cartilage.

As before, I have reassured this patient that his perforation is closed. He is not happy with the appearance of his nose. I do not realistically feel that I can get involved with his further care at this stage, particularly as the patient already has an appointment to see Dr. Gelfant. I have indeed offered to put him in contact with two experienced nose surgeons in town, but he is not interested in this.

I have also pointed out to him that aesthetic nasal procedures that change the appearance of the nose have their own significant incidence of risks and problems post operatively.

**18**  The two experienced doctors, Dr. Kibblewhite said he would have recommended were Dr. Younger and Dr. Dmytryshyn.

**19**  Mr. Scheelar eventually saw Dr. Dmytryshyn on December 18, 2002. There was discussion of an ear graft, but Mr. Scheelar did not want that. On January 20, 2003, Dr. Dmytryshyn wrote to Dr. Carkner:

Here's the problem. Did the surgery cause a slight collapse of his nasal tip, or was there already some nasal collapse caused by the septal perforation? I cannot answer this question with the information I have presently.

Darryl does have a **mild** nasal saddle deformity, in other words a **mild** dorsal concavity with a slight droop of his nasal tip. We did computer imaging and together with this [sic] thoughts, he would like to leave his nasal hump as is, and just elevate the nasal tip. We will design an operation that will do this, and not remove any cartilage. Tentatively, he is scheduled for surgery 18 Feb 03. All risks and complications were explained to him, and a copy of pre and postoperative instructions plus the risks was given to Darryl. [emphasis in original]

**20**  On February 18, 2003, Dr. Dmytryshyn performed nasal surgery on Mr. Scheelar which largely restored the straight appearance of the nose. Mr. Scheelar said the nose looked better but still was not "perfect." He said he felt he had a "gummier smile" after this surgery.

**21**  Following further surgery on January 5, 2005, this time using ear cartilage, Dr. Dmytryshyn achieved a result that he recorded in his notes as looking "fabulous."

**II**

**22**  There is a conflict in the evidence respecting informed consent. The plaintiff says that he was repeatedly assured by Dr. Kibblewhite that his appearance would not change. Certainly, given the nature of Mr. Scheelar's evidence and that of the collateral witnesses, it seems likely that Mr. Scheelar would have raised the matter in view of his marked preoccupation with his appearance.

**23**  Dr. Kibblewhite has no specific note of such conversations, however. He says that the main risk, as far as he was concerned, was that the perforation would not fully close, and that he placed the chance at 25% in Mr. Scheelar's case. This was confirmed in a letter to Mr. Scheelar's referring physician, Dr. Carkner on July 18, 2002:

Thanks for having me see Darryl and thanks for your note. This pleasant 38 year old stunt man tells me that he had a lot of problems with anterior crusting in his nose when in Calgary 15 years ago, and developed a perforation in his nose, which he feels is recently becoming visible during filming and wishes an opinion on whether it can be closed. It does not bleed, and his nose does not whistle. There is no nasal obstruction. He has had no previous nose surgery. He has had 6 knee surgeries.

**On Examination:** He has a 1.2cm healthy perforation in his anterior nose with an otherwise midline septum, and little else of note on ENT head and neck exam.

**Plan:** I spent some time discussing the risks and expected outcome of a standard endonasal closure of his septal perforation. These closures are successful in the majority of cases up to approximately 1.5cm in size and Darryl has an advantage in that his nose has not been operated on previously. He still has at least a 25% chance of not having this perforation completely close which has been discussed with him. He is interested in proceeding thus we have completed booking forms, and he has been placed on our surgical wait list.

**24**  Dr. Kibblewhite does not recall discussing any risk that Mr. Scheelar's appearance would change, or any conversation about the mouth guard Mr. Scheelar had brought to surgery to protect his teeth. He allows that he might have told Mr. Scheelar that such an outcome was unlikely, but that any assurance he would have given would not have been anything in the nature of a guarantee. He says that he did not expect there to be any change to the appearance of the nose as a result of this procedure.

**25**  Risks that Dr. Kibblewhite says were discussed included the possibility of infection, and the possibility that Mr. Scheelar might be left with a "whistling" noise.

**26**  Mr. Scheelar says that, but for the assurance he received, he would not have had the surgery. This must be assessed in terms not only of this Court's finding as to the actual nature of the conversation, but also in terms of an objective evaluation, in the circumstances, as to whether the plaintiff would have declined to go through the procedure had the risk been more completely or more accurately explained.

**27**  I accept that Mr. Scheelar asked Dr. Kibblewhite whether his appearance would change. The evidence clearly establishes, as I have said, that he was, by his nature, preoccupied with his looks and that he was also inclined to carefully weigh medical alternatives.

**28**  I accept that Dr. Kibblewhite reassured Mr. Scheelar in terms consonant with his own appreciation of the risk at the time, which was that such an outcome was unlikely. I accept Dr. Kibblewhite's evidence to the effect that whatever he said did not amount to a flat guarantee, which is no more than to say that I accept that he exercised an ordinary degree of common sense for a surgeon in the circumstances.

**29**  I accept, as well, Dr. Younger's evidence to the effect that, in his experience, the deformity that occurred in Mr. Scheelar's case was not a risk that would have occurred to him up to that time. I accept, in other words, that Dr. Kibblewhite's state of knowledge relative to this risk conformed to that of a highly specialized practitioner who considered Mr. Scheelar's outcome unprecedented and virtually inexplicable.

**30**  Constructing the sort of hypothetical dialogue described by McEachern C.J.B.C. (as he then was) in ***Diack v. Bardsley*** [*(1983), 46 B.C.L.R. 240*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-21YN-00000-00&context=) at pp. 249-250, I must conclude that, even after the most thorough discussion, the risk of a change in the external appearance of Mr. Scheelar's nose would have been described as highly remote, and that, weighed against the considerations that brought Mr. Scheelar to Dr. Kibblewhite - that is, a present and apparently increasing problem he thought might threaten his employability or the range of his employability - it is not at all likely that Mr. Scheelar would have declined the operation.

**31**  It cannot be said on the evidence that there was a known risk that was not disclosed to Mr. Scheelar, nor can it be inferred that even if a risk had been disclosed - which could only, on the evidence, have been a somewhat firmer assertion that nothing is an absolute certainty - he would not have accepted the risk. Mr. Scheelar had a problem he wished to address. His sometime occupation, as a stunt man meant he was habitually familiar with the concept and weighing of risk. He had undergone major surgeries in the past involving general anaesthetics. He was, in fact, prepared to accept a 25% risk that the operation would fail to achieve its purposes. It is not possible to find that a reasonable person in his circumstances would have declined to go ahead with the operation on any conceivable iteration of the remote risk that his appearance might change, given the present, worsening perforation he wanted to address. There is no merit in the suggestion that there was a lack of informed consent.

**III**

**32**  For the plaintiff to succeed, then, he must establish Dr. Kibblewhite's ***negligence***. There is no question that Dr. Kibblewhite owed Mr. Scheelar a duty of care. The issues in ***negligence*** are whether he breached the standard of care and whether that failure caused injury to Mr. Scheelar.

**33**  The test respecting standard of care is found 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 pp. 811-812, per Rand J.:

... [W]hat the surgeon by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them. In a given situation some may differ from others in that exercise, depending on the significance they attribute to the different factors in the light of their own experience. The dynamics of the human body of each individual are themselves individual and there are lines of doubt and uncertainty at which a clear course of action may be precluded.

There is here only the question of judgment; what of that? That test can be no more than this: was the decision the result of the exercise of the surgical intelligence professed? Or was what was done such that, disregarding it may be the exceptional case or individual, in all the circumstances, at least the preponderant opinion of the group would have been against it? If a substantial opinion confirms it, there is no breach or failure. ...

**34**  This case has most recently been applied by our Court of Appeal in ***Carlsen v. Southerland***, [*[2006] B.C.J. No. 973*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22K-00000-00&context=), [*2006 BCCA 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22K-00000-00&context=), released May 3, 2006.

**35**  A more recent articulation by the Supreme Court of Canada of the applicable principles is found in ***ter Neuzen v. Korn***, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) per Sopinka J., at para. 38:

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent. As L'Heureux-Dubé J. stated in *Lapointe* [*v. Hôpital LeGardeur*, *[1992] 1 S.C.R. 351*], in the context of the *Quebec Civil Code* (at p. 15):

Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of competing theories. As expressed more eloquently by Andre Nadeau in "La responsabilite medicale" (1946), 6 R. du B. 153 at p. 155:

"[TRANSLATION] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference."

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| [emphasis in original] |  |

**36**  In this case, the evidence of Dr. Dmytryshyn, for the plaintiff, was that he had performed only 7 or 8 septal perforations in total, and none in "probably 15 years." His evidence is of little assistance as to the standard that could be expected of Dr. Kibblewhite at the time the operation was performed. Dr. Younger, on the other hand, testified that he had performed some two to three hundred such operations. It was his view, based on Dr. Kibblewhite's records, that Dr. Kibblewhite met the standard expected:

Question 1) Did Dr. Kibblewhite act in accordance with the standard expected of a reasonably competent plastic surgeon in the performance of the surgery conducted on the plaintiff?

Answer: A careful review of the preoperative letters from Dr. Kibblewhite's office to Dr. Carkner's office reveals that Dr. Kibblewhite conducted a very comprehensive history and physical examination outlining a 1.2 cm healthy perforation in the anterior nose. He indicated that there was a 25% chance of not having the perforation completely closed, and subsequent to the preoperative visits, the patient was taken to the operating room on September 25, 2002 at Vancouver General Hospital at which time the patient underwent a septal perforation repair. A review of the operative note indicates that this is a standard technique for closure of septal perforations and a review of the postoperative records of Dr. Kibblewhite indicates that the repair was successful in that the septal perforation was closed. In light of review of these perioperative records, it is my opinion that Dr. Kibblewhite did act in accordance with the standard expected of a reasonably competent plastic surgeon and the performance of the surgery conducted on the plaintiff.

**37**  Dr. Younger also commented that very few doctors perform this surgery and that any doctor who had performed more than ten such surgeries - and Dr. Kibblewhite had done more than twenty - would be considered to have a wealth of experience. Dr. Younger commented that the outcome Mr. Scheelar complained of was unprecedented in his experience. His report suggests that his practice has changed since this case:

I have been performing septal perforation repair surgery for 20 years, and I do not take pictures as a matter of routine prior to the repair of septal perforations. The reason for this is that it is quite extraordinary that a septal perforation repair would undergo changes postoperatively after completion of a septal perforation repair, and since the surgery itself should not alter the outward appearance of the nose, it would not be considered mandatory to take photographs. By the nature of septal perforations, particularly the larger ones, the nose of a patient can undergo changes in appearance prior to any surgical intervention, but even then, when we are dealing with them surgically, I do not routinely take pictures. My practise has now changed with regard to this in light of this case since because of this, I now do take routine pictures pre and postoperatively on septal perforation repairs since photo documentation can always be very accurate and helpful in these circumstances. Prior to my involvement in this case, it would not in my mind be considered standard of care to take pictures in advance of a repair for septal perforation.

**38**  Dr. Dmytryshyn gave evidence by video deposition. He testified that the difference between his note in January of 2003 (reproduced in para. 19 above) and his report of April 28, 2005 was that he had seen a note in Dr. Carkner's records post surgery indicating "surgery changed the profile of [Mr. Scheelar's] nose" and some photographs that Mr. Scheelar showed him. His opinion included the following observations:

My initial examination of Mr. Scheelar indicated a loss of support of the nasal dorsum, reflecting a moderate nasal saddle deformity, easily seen by the observing eye. More subtle was the retraction of the columella, the mid portion of the nose, and a very mild widening of the base of the nose. These later two medical finding [*sic*] indicate a mild loss of support for the nasal tip.

The cause of the change of appearance of the nose, most significantly the nasal saddle deformity, was the surgical repair of the septal perforation. Mr. Scheelars nasal appearance was normal prior to the septal perforation repair and his nasal appearance was abnormal after the septal perforation repair.

Upon review of Dr. Kibblewhite's operative report it was stated that "there was not a lot of cartilage to be found in the nose". It is the cartilage of the septum that provides support for the nasal dorsum, and if this cartilage support is removed or weakened then a nasal saddle deformity and lack of tip support may occur. Further in the report "but posterior inferiorly, a disk was identified, harvested, and sewn and shaped to fit his cartilage perforation". This "disk" would refer to removing cartilage and moving it to fill in the cartilage defect. If the original cartilage defect was 1.2 cm, with the removal of this contiguous cartilage (another 1.2 cm), we would now have a cartilage deficit of 2.4 cm. With this size of cartilage loss (2.4 cm) it is possible to postulate that there is now significant loss of support for the dorsal and caudal struts of cartilage, which can lead to nasal saddle deformity and lack of support for the nasal tip.

Flaps of mucosa were developed within the nose and closed in two separate vector planes, one vector plane perpendicular to the nasal dorsal strut (the nasal dorsum) and the other vector plane perpendicular to the nasal caudal strut. This physical tension contributes to the nasal dorsal saddle deformity.

The septal perforation has been successfully closed.

Answering your questions specifically:

1. Is the change reported by the plaintiff in the shape of his nose following the operation consistent with the closure of the septal perforation being achieved with an undue degree of tension in two directions? I enclose a copy of Dr. Kibblewhite's operative report.

I would consider a septal perforation of 1.2 cm moderately large (0.5 - 1.5cm) and moderately difficult to correct (about 50% chance of closure). Obviously the bigger the perforation the more tension would be required to close flaps, so tension is a contributing factor to the change of shape of this nose. I would also add the removal of more cartilage could also be a significant direct factor, as was done in this case. This could easily add to loss of dorsal strut support. Also, as the tissue heals, it heals by a scar tissue, which contracts and slow healing scar tissue can also pull on the dorsal strut further, adding to the nasal saddle deformity.

1. Is the supra tip dip or depression on the bridge of the nose consistent with stressing of the dorsal strut as a result of the procedure?

Yes

1. In the absence of an intervening trauma, could the changes observed by the plaintiff after the procedure, all other things being equal, more likely than not be the result of surgery?

Yes. The facial and nasal photographs and "bust" were normal prior to septal surgery and his nasal appearance was abnormal after septal surgery.

1. In the absence of an undue degree of tension in the stitching, what other "agency" could the deformities complained of by the plaintiff could have caused the changes?

Other "agencies" include more cartilage loss, as done by removing a "disk" of cartilage, during the surgery. Removing more cartilage removes more support for the nasal dorsum.

The healing process itself, with scarring as the main reparative factor leads to a contraction and more tension on the dorsal and caudal struts, gradually, over a few weeks.

...

**39**  In cross-examination, Dr. Dmytryshyn said the following [references are to the diagram mentioned later in this excerpt]:

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|  | Q |  | All right. Now, within that -- that portion that is cartilage, do you have an understanding of where the perforation was in Mr. Scheelar's nose? |  |
|  | A |  | In his operative note, he didn't actually measure the distance from the edge in here, but he did say it was 1.2 millimetres -- I'm sorry, 1.2 centimetres in diameter. And -- and, as I said, most of the -- the dorsum cartilage in there is 2 centimetres, so I'm -- it wouldn't be right at the edge, so I'm assuming it was somewhere near the front, where most perforations occur of the nature that -- that -- that this Darryl has in there. So, I -- I assume it's near the front part of the septum, not in the back part in here. |  |

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|  | Q | All right. |  |
|  | A | So, I'm assuming it's near the front part. |  |

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|  | Q |  | Now, do you have an understanding of where Dr. Kibblewhite harvested the cartilage which was used to fill the perforation? |  |
|  | A |  | According to his report, he went posterior. If this is top, this is bottom, this would be anterior, and this would be posterior. |  |

...

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| --- | --- | --- | --- | --- |
|  | A |  | Yeah. So - - and according to his report, then he removed a piece of cartilage that was the same size to move it forward into the deficit in here. And it was contiguous with what -- what remaining cartilage there was. And it would be posterior, so he probably got it from somewhere along in here. This would be, again, donor site in here and -- and I would suggest that might be perforation; that might be donor. So, they -- they were contiguous together. |  |

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|  | Q |  | Dr. Dmytryshyn, if this drawing, which is on the left and bottom of page 3 of Dr. Kibblewhite's note, is an accurate reflection of the relative positions of the perforation and the donor site, you will agree with me that the donor site is more inferior than you had assumed or deduced from the operative report, correct? |  |

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| --- | --- | --- | --- |
|  | A | That's correct. |  |

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|  | Q |  | All right. Now, looking back at this drawing, which we have been referring to, you personally do not know the distance between the -- the site of the perforation and the dorsal strut, correct? |  |
|  | A |  | I do not. There was no measurement in the operative report. |  |
|  | Q |  | And you don't know the measurement between the perforation and the caudal strut either, do you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I do not. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | All right. And you will agree with me that as a general proposition, cartilage in the dorsal strut and the caudal strut which is at least 1 centimetre thick is sufficient to support the structure of the nose? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Generally if that's -- if it remains, that's true. |  |
|  | Q | All right. |  |
|  | A | Yeah. |  |

...

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| --- | --- | --- | --- | --- |
|  | Q |  | Now, looking at the drawing that's Exhibit 5, you'll agree with me that if the donor site in the case of Mr. Scheelar was approximately where you drew the third circle, that that donor site in and of itself would not interfere with the dorsal strut, correct? |  |
|  | A |  | If -- if you took it from that exact spot, I -- I agree. |  |
|  | Q |  | And one would not expect that by taking cartilage from that spot, one would not expect that that would interfere with the structural integrity of the dorsal strut, would you agree with that? |  |
|  | A |  | Yeah, I'd have to agree that that might not impact it. |  |
|  | Q |  | But it's not just a matter of might not impact it. You wouldn't expect it to impact it, would you? |  |

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| --- | --- | --- | --- |
|  | A | Well, yeah, I -- that's -- that's correct, yeah. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | All right. Now, in fact, one of the objectives of using cartilage to fill the perforation is the hope that the cartilage will actually become continuous with the existing cartilage surrounding the -- the perforation site, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so, if anything, one might expect that, at least in the long term, by placing cartilage from the donor site depicted in Exhibit 5 and putting it in the perforation, one might increase the structural stability of the dorsal strut? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, I would think that's correct, yeah. |  |

**40**  Although Dr. Dmytryshyn pointed to tension of the mucosa as a contributing factor, he said the following at his deposition:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so, when you were performing septal surgeries of the seven or eight you did, you were aware at the time that you didn't want to have tension on the mucosa because if you did, you would -- you would very likely end up without a corrected perforation, that the -- the correction would break down, correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's absolutely true, yeah. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And you will agree with me that Mr. Scheelar's perforation has healed properly? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It has. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And that fact tells you that there couldn't have been significant tension on the mucosa in all likelihood, correct? |  |
|  | A |  | Well, that's an interesting question in there. I'm -- I'm not sure if I could say -- yeah, I guess if you're using the word "significant", as opposed to "relative" in there, there's some tension involved in there, I'm sure, but it did close nicely in there and I -- and I agree with that, so, yeah, I guess I could maybe accept the word "significant" in there. |  |
|  | Q |  | You will also agree that mucosa is of a consistency that if you try to put sutures through it under significant tension, the sutures often break down? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's true. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you saw no indication that Mr. Scheelar's sutures had broken down in any way? |  |
|  | A |  | I didn't examine him after, but he certainly had correction of his perforation. |  |

**41**  On re-direct examination by Mr. Scheelar's solicitor, he said:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | ... [I]f there was a change in the exterior appearance of the nose immediately following surgery, how it could be other than as a result of one or the other of or this procedure? |  |
|  | A |  | I -- I don't know if I have answers to that sort of question in there. I'm not sure whether -- he obviously has a saddle deformity as we see him today in there, and -- and my assumption is that he didn't have one before the surgery. So, I mean, we're postulating on various factors that might be contributing to his -- his saddle deformity in here at this point in time, and -- and this is one of the factors in here. Tension, and he's indicated that it's -- he's had relative tension-free closures, which I think is -- you know, is positive in there. He's also taking out cartilage in here as well. That also could be a contributing factor. And I'm not sure why he has the saddle deformity in there. I'm just postulating that these are possibilities in there that might create that. |  |

...

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|  | Q |  | At the bottom of the -- the page, the first page, you have said, "The cause of the change of appearance of the nose, most significantly the nasal saddle deformity, was a surgical repair of the septal perforation." Do you still hold that view? |  |
|  | A |  | Well, I -- yes, and, again, I'm basing that on -- on the fact that -- that I -- I, I made the assumption that the -- the, the dorsum was full and strong to -- to begin with in there and after he has a -- he has a -- a saddle deformity in there. So, the only thing he had done in the interim was a surgical repair of the perforation. So, there's some reason in there why that occurred. That's ... |  |

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|  | Q | Thank you. |  |

**42**  A considerable part of the case was given over to discussion of the drawing made by Dr. Kibblewhite in his post-operative report and mentioned in the passages above. The drawing is crude and clearly not reliable as to scale, but was, according to Dr. Kibblewhite, an attempt to show generally what he put into words as "posterior inferiorly, a disk was identified, harvested and sewn and shaped to fit his cartilage perforation." The drawing appears to show the existing perforation, said to be 1.2 cm. across, in a position where its leading edge would be perhaps 1/3 - 1/2 of that distance from the line meant to be the forward edge of Mr. Scheelar's nose. Inasmuch as Mr. Scheelar said that he could touch the tips of his fingers through the perforation before the operation, the drawing is plausible on a common-sense basis.

**43**  Both Dr. Younger and Dr. Dmytryshyn relied on Dr. Kibblewhite's notes. Dr. Younger's evidence was that what Dr. Kibblewhite indicates he did was acceptable practice. Dr. Dmytryshyn essentially said that *whatever* was done must have weakened the support for the dorsal strut. Dr. Dmytryshyn's ultimately equivocal notion that tension on the mucosa could have contributed, was disputed by Dr. Kibblewhite, who explicitly described how flimsy and fragile that tissue is. Dr. Younger testified to the same effect. As Drs. Kibblewhite and Younger both actually perform these surgeries, I prefer their evidence on this score to that of Dr. Dmytryshyn. In passing, I note that a portion of Dr. Kibblewhite's examination for discovery that was not put to him or read in as part of the plaintiff's case was put to Dr. Younger. It is possible to read it as suggesting there is some elasticity in the mucosa. Dr. Younger flatly disagreed with this proposition. Given the manner in which the transcript was introduced, it only amounts to a proposition put to, and negated by, Dr. Younger. It does not amount to anything like an admission or an inconsistency on Dr. Kibblewhite's part, since it was not put to him or properly introduced.

**44**  Both Dr. Kibblewhite and Dr. Younger emphasized the importance of not interrupting blood supply. Dr. Younger suggested the "key thing" is blood supply. Dr. Kibblewhite explained that, while the mechanism is not fully understood, the health of the cartilage is related to oxygenation that passes from the blood in the mucosal membrane to the cartilage. Dr. Kibblewhite suggested that a post-operative infection interrupting the blood supply might account for what occurred.

**45**  In submission, counsel for the plaintiff posited another theory. He suggested that, in fact, Dr. Kibblewhite's drawing had been misinterpreted and that what it really showed was that the tissue harvested for the septal perforation repair was taken from a location "superior" and "anterior" to the perforation, seriously weakening the caudal strut or the leading edge of the nose. This suggestion was made in terms that questioned the candour of Drs. Kibblewhite and Younger and that had no foundation in any observation by Dr. Dmytryshyn. In full flight, the submission included allegations of a "cover up" and an "intention to mislead" on the part of Drs. Kibblewhite and Younger.

**46**  The simple fact of the matter is that this court is left with evidence from Dr. Kibblewhite as to what he did; evidence from Dr. Younger that, if Dr. Kibblewhite did what he said he did, he met the standard of care in the circumstances; and evidence from Dr. Dmytryshyn that whatever he did must have caused the nasal collapse because the proximity in time between the operation and the deformity.

**47**  There is not a shred of evidence supportive of the theory advanced by plaintiff's counsel. It is manifestly illogical that an operation meant to close a septal perforation, which was, by all accounts, successful, would be achieved by taking cartilage from a place that would clearly have made the problem worse. I have no doubt that the operation was performed as described by Dr. Kibblewhite, and that it was performed successfully in terms of its primary objective. I accept that there was an unanticipated change to Mr. Scheelar's nose, but it was a change that could not reasonably have been anticipated of such a procedure performed in the manner that it was.

**48**  Dr. Younger observed that it is possible to do everything by the book and not get a good result. The evidence in this case is that the operation was performed in accordance with an appropriate standard and that a good result was obtained. It seems more probable than not (although it is not free from doubt) that the slight change in Mr. Scheelar's appearance was somehow related to the surgery. It has not been established on a balance of probabilities, however, either what the mechanism of injury was, or how it came about as a result of any ***negligence*** on the part of the defendant. The mere fact of injury does not lead to an inference of ***negligence*** (see ***Brock v. Anderson***, [*[2003] B.C.J. No. 2090*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20S1-00000-00&context=), [*2003 BCSC 1359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20S1-00000-00&context=)). It is generally incorrect, in other words, to reason from the result, an error addressed in ***Carlsen*** at para. 15:

... the trial judge improperly focussed only on the result of the surgery, and not on the precise manner in which Dr. Southerland failed to meet the appropriate standard of care. In the result, he held Dr. Southerland to a standard that amounted to a guarantee. That such a standard has never been the law is exemplified in the passage from *Greaves & Co. (Contractors) Ltd. v. Baynham Meikle & Partners*, [1975] 3 All E.R. 99 at 103-104, [1975] W.L.R. 1095 (C.A.), *per* Lord Denning M.R.:

The law does not usually imply a warranty that [a professional] will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.

**IV**

**49**  Here, the evidence is simply that notwithstanding a successful operation performed in accordance with the requisite standard of care, Mr. Scheelar experienced an unexpected outcome. That does not found a claim for damages in ***negligence***. The plaintiff's claim must accordingly be dismissed.

**50**  I have found that Dr. Kibblewhite performed this surgery in accordance with his duty. He did not contractually undertake to do more, or to guarantee the surgery in any way that would support a claim for breach of contract. The contractual claim was not pressed, but, for certainty, it is also dismissed.

**51**  In the circumstances of this case, I see no utility in proceeding to assess damages.

**52**  The defendant is entitled to costs at scale 3 unless there are circumstances of which I am unaware that require further submissions.

McEWAN J.

**End of Document**

[***Seatle (Guardian ad Litem of) v. Purvis, [2005] B.C.J. No. 2400***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2F7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Garson J.

Heard: April 11 - 15, 18, 22,

25 - 26 and 29, and June 6 - 10 and 28-30, and

September 15 and 16, 2005.

Judgment: November 7, 2005.

Vancouver Registry No. C985301

**[2005] B.C.J. No. 2400** | 2005 BCSC 1567 | 38 C.C.L.T. (3d) 125 | 143 A.C.W.S. (3d) 765 | 2005 CarswellBC 2616

Between Connor Seatle, an infant, by his Guardian ad Litem Lisa Michelle Farley and Lisa Michelle Farley, plaintiffs, and Dr. Allison Purvis, Dr. Kay Perry, Dr. Thomas, Dr. Gould, Dr. R. Wishart, Dr. John Doe, Dr. Jane Doe, (Doctors) Lions Gate Hospital, P. Ritchie, S. Wilkinson, R. Johnston, Ms. Machon, J. Symans, L. Dobbin, Jane Doe and John Doe (Nurses), defendants

(181 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Causation — Standard of care — Action by the plaintiff against the delivery doctor and the obstetrician for alleged *negligence* during his birth resulting in shoulder dystocia dismissed.**

|  |
| --- |
| Action by the plaintiff against the delivery doctor and the obstetrician for damages for alleged ***negligence*** during his birth resulting in shoulder dystocia Shoulder dystocia is the impaction of an unborn baby's anterior shoulder against the mother's pubic bone after the fetal head has been delivered -- During the plaintiff's birth, his was broken, following which he was quickly delivered and he was born without a heartbeat and needed resuscitation -- Following resuscitation, the plaintiff had a very low heart rate, was bluish in colour and was hypotonic -- The plaintiff suffered from cerebral palsy but otherwise was a bright above average child -- All the experts acknowledged that risk factors for shoulder dystocia were present before the delivery of the plaintiff -- All the experts also agreed that suspected macrosomia (large baby weighing more than 4,500 g.) was not on its own an indicator to perform a Caesarean section -- Action dismissed -- Shoulder dystocia should have been anticipated by the delivery doctor and had she better appreciated the developing risks of shoulder dystocia she would have called the obstetrician and he would have recognized the significant possibility of shoulder dystocia at that point in the delivery -- The outcome 'might' have been better if the delivery was in the hands of the more experienced and specialized hands of the obstetrician, as his greater general experience could be expected to have enabled him to handle the emergency with greater skill -- However, the plaintiff had proven only that the outcome might have been better, and not that it would probably have been better -- The plaintiff's cerebral palsy was cased by asphyxia, which was in turn caused by shoulder dystocia -- There was insufficient evidence to demonstrate that the delivery doctor's breach of her standard of care materially contributed to the plaintiff's injuries. |

**Counsel**

Counsel for the Plaintiffs: N.H. Smith, Q.C. L. Wong D.J. Holubitsky

Counsel for the Defendants, Dr. Purvis and Dr. Thomas: C.E. Hinkson, Q.C. R. Samtani S.L. Kovacs

Counsel for the Defendants, Lions Gate Hospital, Ritchie, Wilkinson, Johnston, Machon, Symans, and Dobbin: R.J. Harper J.C. Grauer E.J.A. Stanger

[Editor's note: Corrigenda were released by the Court November 15 and 25, 2005. The corrections have been made to the text and the Corrigenda are appended to this document.]

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| **GARSON J.** |

INTRODUCTION

**1**  Shoulder dystocia is the impaction of an unborn baby's anterior shoulder against the mother's pubic bone after the fetal head has been delivered. This is what happened at the birth of Connor Seatle. At this trial concerning the alleged malpractice of the doctors and hospital, shoulder dystocia was described as one of the most serious and frightening complications of childbirth.

**2**  This case turns on the question of whether in the circumstances of Ms. Seatle's labour and delivery, Dr. Purvis should have anticipated shoulder dystocia and whether she should have consulted with the specialist, Dr. Thomas, before the final stage of the delivery. The plaintiffs say that the risk factors in Ms. Seatle's case were, as one witness put it, "so glaringly obvious," that Dr. Purvis should never have delivered the baby without first consulting Dr. Thomas, the on-call obstetrician. They say the outcome may have been different if Dr. Thomas was consulted. The plaintiffs also say Dr. Thomas was negligent in failing to anticipate shoulder dystocia and in leaving the hospital without more specific instructions about consulting further with him.

**3**  The defendants say that none of the risk factors were such that labour should have been abandoned in favour of a Caesarian section. They say the physicians' management of Ms. Seatle's labour and delivery was well within the standard of care of their professions. The defendants say that even if Dr. Purvis had consulted with Dr. Thomas in the final stage of delivery there is no proof that her failure to do so caused the injury to Connor Seatle. The defendants say that the necessary causal link between the alleged failure to consult with Dr. Thomas, and Connor's birth injury, has not been proven.

THE PARTIES

**4**  The plaintiff, Lisa Seatle, is now 37 years of age. She is married to Stephen Seatle. She resides with her husband and children: Tyler, age 20; Connor, age 8; and Jack, age 4; in Squamish. Mr. Seatle works in Whistler as a resort manager. Ms. Seatle works part-time at a golf course.

**5**  Connor Seatle suffers from cerebral palsy. He is a bright child of above average intelligence. His most serious deficit is his speech impediment. His speech is mostly unintelligible to someone unfamiliar with his speech pattern. He also has difficulty with strength, balance, co-ordination, and endurance.

**6**  Dr. Purvis is a family doctor; she shares her North Vancouver medical practice with Dr. Perry. She attended the labour and delivery of Ms. Seatle.

**7**  Dr. Thomas is the consulting obstetrician who saw Ms. Seatle once before her admission to Lions Gate Hospital, once during her labour, and immediately after the delivery.

**8**  The nurses and hospital remained defendants until the conclusion of the evidence. At that time, the parties agreed that there was no arguable case against the hospital defendants and I dismissed the case against Lions Gate Hospital, P. Ritchie, S. Wilkinson, R. Johnston, Ms. Machon, J. Symans, L. Dobbin, Jane Doe and John Doe (Nurses). The action against Dr. Perry was dismissed by consent. The action did not proceed against the defendants, Dr. Gould, Dr. R. Wishart, Dr. John Doe, Dr. Jane Doe, (Doctors).

OUTLINE

**9**  I will begin by describing Ms. Seatle's obstetrical history. I do so because the defendants argue that her misrepresentation of her previous obstetrical history (that is, previous to her pregnancy with Connor) impacts her general credibility as a witness.

**10**  I then describe Ms. Seatle's prenatal history and the stages of her labour and delivery.

**11**  I review the opinions of the expert witnesses concerning the alleged breaches of the applicable standard of care.

**12**  I continue my analysis with an enumeration of findings of fact necessary to resolve the issues in this case. I then review the evidence and make those findings of fact. I conclude with a determination of whether the defendants breached their duty to the plaintiffs. In the final part of my reasons for judgment, I consider the onus of proof of causation and then determine if the conduct that the plaintiffs allege breached the standard of care did cause the injury to Connor Seatle.

FACTS

Ms. Seatle's Obstetrical History

**13**  Ms. Seatle had her first child, Tyler, when she was 17 years old. At birth he weighed nine pounds. Ms. Seatle told the physicians who treated her pregnancy with Connor that her labour with Tyler was two hours, that she was induced, and that she had a vaginal delivery. Dr. Thomas elicited a history from Ms. Seatle that Tyler was delivered with forceps.

**14**  Ms. Seatle chose not to disclose to any of her treating physicians her complete obstetrical history, that is, the event that occurred when she was 19 years old. She also did not disclose her complete obstetrical history when she first testified at her examination for discovery, although later she did disclose the full history.

**15**  This non-disclosure may be relevant in two ways. First is the question of whether a more accurate history would have affected the management of her labour and delivery. Second is whether her failure to describe her obstetrical history accurately influences any findings of fact I must make concerning her credibility.

**16**  By the time of the trial, the treating doctors, that is, Dr. Purvis and Dr. Thomas, and all the expert witnesses, were made aware of Ms. Seatle's full obstetrical history and the fact that the history given to her treating doctors was not accurate. Dr. Thomas and Dr. Purvis both testified that their treatment of Ms. Seatle and the management of her labour and delivery would not have been different had they known the full obstetrical history. All the experts were asked if their opinions (written before they became aware of the full history) would be different if they had known of her full history. All testified that their opinions would not change regardless of the corrected obstetrical history.

**17**  Defence counsel asserts that Ms. Seatle knowingly misrepresented her history to her physicians and on her examinations for discovery. He was scathing in his criticism of her. He says that because of her "deceit" and other conflicts in the evidence of Mr. and Ms. Seatle when contrasted with the evidence of Drs. Purvis and Thomas, I should prefer the evidence of the doctors where it departs from that of the plaintiff and her husband.

**18**  At trial, Ms. Seatle acknowledged the inaccuracy of the medical history she had given to her treating doctors and to counsel at her examination for discovery. She testified that the event she did not disclose was not something she "carries around consciously." She says "I live with this - its my own way of protecting myself from getting hurt - I was unaware I was lying. I wouldn't be able to function - a lot of pain, sorrow and trauma around that event. I do my best to get through my day without thinking about it." She says that her husband is aware of her history but other family members are not.

**19**  What happened to Ms. Seatle when she was 19 years of age (and she chose not to fully describe the surrounding circumstances at trial) was obviously an extremely traumatic event. There was no reason for her to withhold the information other than the explanation she gave, which is essentially a denial that the event happened, as her way of coping with what was apparently a devastating emotional experience for her.

**20**  Her decision to withhold the information from her physicians was unwise. To give a physician an inaccurate medical history is risky. To withhold such information when asked for at an examination for discovery cannot be condoned. However, to castigate her as a liar and a witness who ought not to be believed on account of this non-disclosure is not appropriate. Her failure to disclose this medical history is not evidence of a general propensity to be untruthful. I have concluded, for other reasons, that there are problems with the reliability of Ms. Seatle's account of the events surrounding the birth of Connor, but my assessment of her credibility and reliability as a witness is not based in any way on her failure to accurately describe her obstetrical history. I conclude that it is irrelevant to Ms. Seatle's credibility and also, because no witness testified otherwise, that it is irrelevant to the liability issues in this case.

Background and Medical History of Birth of Connor Seatle

**21**  Ms. Seatle became pregnant with Connor in January, 1996. She was then 28 years of age.

**22**  During the first part of her pregnancy, Ms. Seatle was treated by her physician in Whistler, where she was then living.

**23**  She was transferred to the care of Drs. Purvis and Perry in North Vancouver on August 31, 1996, because there was no obstetrical facility in Whistler. Drs. Purvis and Perry share a family practice with a large obstetrical component.

**24**  Drs. Purvis and Perry saw Ms. Seatle for the balance of her prenatal care. Ms. Seatle was tested for gestational diabetes; the test results were normal. Symphysis fundal height measurements (a gross means of assessing fetal size by measuring in centimetres from the top of the fundus to the pubic bone) taken by Drs. Purvis and Perry consistently indicated a large baby. Expert witnesses at trial testified that the rule of thumb is that the centimetre measurement should roughly equal the weeks of the pregnancy, and that a discrepancy of more than five centimetres may be significant. Below I refer to testimony that this measurement is not a reliable indicator of birth weight. Towards the end of her pregnancy, the following chart entries were made of Ms. Seatle's symphysis fundal height measurements:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Date | Gestational | Symphysis | Chart Notes |  |
|  |  | Age | Fundal |  |  |
|  |  |  | Height |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Aug. 21/96 | 32 wks. | 34 cm |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Aug. 28/96 | 34 wks. | 38 cm | "large babe" |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Sept. 24/96 | 37 wks. | 40 cm |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Oct. 9/96 | 39 wks. | 45 !\* cm | "++ lg baby" |  |

\*exclamation noted on chart

**25**  On October 9, 1996, because of her concern about the size of the baby, Dr. Purvis referred Ms. Seatle for ultrasound measurement of the fetus. On October 15, 1996, the ultrasound report indicated that fetal growth was within normal limits but over the 50th percentile.

**26**  Because of Ms. Seatle's complaint of back pain, concern about travel from Whistler, and desire for an induction, Dr. Perry referred Ms. Seatle to Dr. Thomas, a consulting obstetrician. Dr. Thomas saw Ms. Seatle on October 16, 1996. Her expected due date was October 13, 1996.

**27**  Dr. Thomas agreed to admit Ms. Seatle for induction on October 21, 1996.

**28**  Ms. Seatle gained 33 pounds during her pregnancy. She is 5'9" tall and weighed about 223 pounds by the time she was admitted to Lions Gate Hospital.

**29**  On October 21, 1996, at 08:30 h Ms. Seatle was admitted to Lions Gate Hospital, a level 2 hospital. A level 2 hospital in British Columbia does not have an obstetrician in the hospital at all times although an obstetrician is always on call and readily available if needed. Dr. Purvis or Dr. Perry planned to attend her delivery. Ms. Seatle's cervix remained closed. Dr. Perry inserted prostaglandin gel in an effort to ripen the cervix.

**30**  Dr. Purvis saw Ms. Seatle at 15:00 h on October 21, 1996, and, at that time, noted that the cervix was dilated 2 cm. and was 30% effaced (thinned out). The fetus was at station -2 and the fetal heart rate was normal. The assessment of the station is a measurement of the level of descent through the birth canal of the presenting part - preferably the head of the fetus. Station zero or spines is the narrowest part of the birth canal and the assessment below spines is described as "+1, +2," etc. and then "at the perineum" just before delivery. Above station zero is described as "-1, -2", etc. Dr. Purvis inserted a second dose of prostaglandin gel.

**31**  At 10:10 h on October 22nd, Oxytocin (a drug given intravenously to stimulate contractions) was started. At 13:00 h, Dr. Purvis did a vaginal examination and noted that the cervix remained thick and Ms. Seatle was getting mild contractions every five minutes.

**32**  At 15:00 h, Dr. Purvis artificially ruptured Ms. Seatle's membranes to stimulate effective labour and by 15:30 h Ms. Seatle began to feel stronger contractions.

**33**  At 16:50 h, Dr. Purvis conducted another vaginal examination. The cervix measured 3 cm, an indication that labour was progressing.

**34**  At 19:20 h, a nurse performed the next vaginal examination. She observed and recorded that Ms. Seatle's cervix had dilated to 4 - 5 cm. and the fetus had descended to station -1. Contractions were not good. The head was poorly applied to the cervix, not a promising sign, and the nurse noted the presence of caput (accumulation of fluid on baby's head caused by contractions).

**35**  At 19:35 h, a nurse notified Dr. Purvis of Ms. Seatle's condition. Dr. Purvis ordered intravenous Demerol for pain control, in the hopes of relaxing Ms. Seatle, to help the labour progress.

**36**  At 20:00 h, the nurse noted that the Demerol was effective for pain relief.

**37**  At 21:00 h, Nurse Ritchie conducted a vaginal examination and observed that Ms. Seatle was 8 cm. dilated, there was caput, and the fetus was at station -1.

**38**  At 21:30 h, Dr. Purvis re-attended. The nursing note records Ms. Seatle was "coping well".

**39**  At 22:00 h, Ms. Seatle's cervix was still dilated at 8 cm. and at 22:15 h a second dose of Demerol was given.

**40**  At 22:30 h, Dr. Purvis noted no further dilation from 8 cm. between 21:00 and 22:30 h. She recommended an epidural.

**41**  At 22:45 h, the nursing note records Ms. Seatle was "distressed". The contractions were milder and no further dilatation had occurred so Dr. Purvis requested a consultation with Dr. Thomas.

**42**  At 23:00 h, Dr. Thomas examined Ms. Seatle and conducted a vaginal examination. Dr. Thomas agreed that Ms. Seatle might benefit from an epidural. Dr. Thomas' consultation note states:

... I don't think much of her contractions - strength or frequency but she is under the influence of Demerol and N2O/02.

The presenting part is still high but [occiput anterior]. This is a good size infant. I hope that [cephalopelvic] disproportion [meaning the widest part of the baby's head may be too large to fit through the mother's pelvis] is not playing its part but there is certainly some degree of the above.

May end up being instrumental delivery but until then - increase Syntocinon [similar to Oxytocin and used to stimulate contractions] + after epidural in situ feeling then we may get some more co-operation from her. [meaning we may get better contractions]

Dr. Thomas testified that he found a small amount of caput and that it did not confuse the pelvic findings.

**43**  At 23:45 h, the epidural was put in place. The anaesthetist was not available earlier. Dr. Thomas then left the hospital, leaving instructions that he be called if Ms. Seatle did not progress.

**44**  At 23:45 h, Nurse Ritchie noted "Epidural in good relief, continuous epidural commenced."

**45**  At 24:00 h, Nurse Ritchie conducted a subsequent vaginal examination and observed a thin anterior rim, meaning that a lip of the cervix was not quite fully dilated.

**46**  At 01:15 h on October 23rd, Nurse Ritchie noted that Ms. Seatle was fully dilated.

**47**  At 02:00 h, Dr. Purvis arrived and Nurse Ritchie noted that Ms. Seatle was pushing well.

**48**  At 02:32 h, Nurse Ritchie noted that Ms. Seatle was pushing well.

**49**  By 02:40 h, Dr. Purvis had decided, according to her testimony, that Ms. Seatle was "fatiguing" and needed help and she had applied the "Mityvac" (Vacuum-assisted delivery - this is a rubber cup applied to the top of the baby's head, then inflated to produce a vacuum by suction, and then used to pull the baby down for delivery).

**50**  At 02:49 h, the baby's head was delivered. The shoulders were impacted. Dr. Purvis noted in the hospital record as follows:

Mityvac applied at 0240 hours as Mom fatiguing

1. Easy delivery of head within 3 contractions.
2. Nuchal cord loosely x1 eased over head

Following delivery of head at 0250 hrs, patients' contractions slowed and severe shoulder dystocia ensued. All measures attempted with supra pubic pressure and hips flexed completed.

Baby delivered 6 minutes following delivery of head.

**51**  Ms. Seatle described the sequence of events around the delivery in her examination for discovery:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q.: |  | Why don't you just tell me what you can of your recollection of the events of October 22nd and 23rd and any particular involvement with Dr. Purvis over those two days? |  |
|  | A.: |  | I can just remember getting up to 8 centimetres and dilation stopped, and that was when I was told that I would need to relax and that the spinal block should help me fully dilate. A couple of hours it seemed after that, Dr. Purvis told me I was fully dilated except for a little rim she saw around the baby's head that she was going to push back around the top of his head, she could push it back with her hands. I then remember Dr. Purvis showing me the vacuum, the mighty vac, I believe it was. And that was the first time she had ever shown that to me or even talked about it. And I was scared because I was pushing and I couldn't feel the baby move at all and I knew the baby was stuck. She told me she was going to deliver the baby's head with the vacuum extraction and that I needed to push with my contractions. She applied the cup to his head and had to reapply it a few times, but I think after about four or five pushes that his head did come out. And she looked very scared when she saw his head. In fact, I think everybody looked really scared when they saw his head. It was then that I was told to push some more with my contractions, and nothing was happening. The baby wasn't moving at all. And everything hurt. I remember saying, "My bones hurt, my bones hurt." I remember sometime in there getting cut for a large episiotomy along existing scar tissue, that's what I was told, and after about three or four pushes, and I was really pushing, the nurse had said, "Should I call?" and Dr. Purvis looked up and finally said "Call," and I didn't know what any of that meant. And I just remember a noise, a buzzing or a bell going off by the room, and a light flashing, and people just seemed to come out of everywhere in the room. I am not even sure how many people came into the room. I remember Dr. Purvis and the nurse having a conversation with a nurse who was at the nurses' station on the phone with someone, and information was being -- we were directly across the hall from the nurses' station, and information being passed back and forth as to how to manipulate my body to get the baby out. It was at that point that she asked my husband to assist and another, a huge male nurse, I believe he was a nurse, to get right on top of me and start pushing down on the top of my uterus as she pulled. Two other nurses and both my husband and the other nurse lifted my body to about halfway up my back off of the bed with my legs straight up in the air. And I could hear the nurse across the hall saying, "Get her straight up, get her straight up," and them trying to pull the baby out. And I remember one of the nurses yelling to turn either myself or the baby into a position, and she attempted to do so, and the nurse beside her saying, "No. The other way." She said to do it the other way. |  |

**52**  Dr. Purvis performed a large episiotomy after the Mityvac was applied. I infer from the evidence that at some point during the efforts to deliver the shoulder there was additional tearing of the perineum.

**53**  The baby's arm was broken, following which he was quickly delivered. He was born without a heartbeat and needed resuscitation. A photograph taken shortly following his birth shows bruising on the baby's head, although Nurse Ritchie testified that she did not recall any bruising.

**54**  Following resuscitation, the baby had a very low heart rate, was bluish in colour and was hypotonic. Seizures occurred, and he was then transferred to B.C. Children's Hospital for further care.

**55**  Dr. Thomas arrived at the hospital at 03:05 or 03:10 h. He delivered the placenta and repaired Ms. Seatle's episiotomy that had extended around the anal passage about two inches.

EXPERT EVIDENCE

**56**  I now turn to a review of the evidence of the experts who testified concerning the standard of care provided by Drs. Purvis and Thomas as described in the preceding narrative of the stages of labour and delivery.

Dr. Liston

**57**  Dr. Liston is an obstetrician and gynaecologist. He is the head of the Department of Obstetrics and Gynaecology at both the University of British Columbia and the major tertiary care centre in British Columbia, the Women's and Children's Hospital. Dr. Liston's report was relied upon by the defendants.

**58**  Dr. Liston testified that the combination of an anticipated large baby and an arrest of labour raises the risk of shoulder dystocia. However, he said that the prevailing standard of care in British Columbia would not dictate the immediate abandonment of labour and the performance of a Caesarian section in such circumstances. He agrees that some obstetricians may do a Caesarian in such circumstances, but he did not think such a procedure would withstand "scrutiny by a Caesarian section audit committee." He testified that in British Columbia 65 percent of all deliveries are attended by family physicians and they are expected to be able to deal with the complications of labour and shoulder dystocia.

**59**  Dr. Liston opined in his written report that because the baby's head was visible at the perineum at the time the Mityvac was applied, there was no indication for a Caesarian section. His evidence is based upon Dr. Purvis' and Nurse Ritchie's observations of the baby's head at the perineum. He recognized that no vaginal exam was charted on the partogram or elsewhere noting the level of descent just before the Mityvac was applied. He also acknowledged that it is important not to confuse the head with caput (swelling on baby's head from contractions) when assessing the level of descent of the head, as this can mislead a physician to conclude that labour has progressed more than it in fact has.

**60**  He listed the risk factors facing Ms. Seatle as: a suspected large baby (he said "a very real possibility the baby was over the 4,500 gram mark"); a large mother; a previous large baby; an overdue baby; some period of arrested labour; and a second-stage of labour that was at the top end of normal time limits.

**61**  He agreed that where the head is a "tight fit" (cephalopelvic disproportion as noted by Dr. Thomas), "the more concerned one is going to be about delivering the shoulders."

**62**  He agreed that the incidence of shoulder dystocia in babies weighing more than 4,500 grams is 8 - 10 percent.

**63**  Dr. Liston testified that there is a known relationship between pain and arrested labour. He said arrested labour is very common.

**64**  His opinion is that if the baby's head was indeed at the perineum, it was within the purview of the family physician to proceed without specialist assistance. If labour or descent of the baby had been arrested in the second stage of labour, then the specialist should have been called in. He agrees that in any event, it would have done no harm to have called the specialist and to have waited for his arrival, because the fetus and mother were healthy and there was no urgency to deliver the baby.

**65**  Dr. Liston testified that he would think very carefully about using vacuum-assisted delivery if there was suspected macrosomia and non-progressive labour. He said it is normal practice when using a vacuum extraction to record the station (Dr. Purvis did not do so). He also said that when somebody says they can see the head, they could be seeing caput and therefore the head may not be at the perineum even though hair can be seen.

**66**  On cross-examination, Dr. Liston testified:

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| --- | --- | --- | --- | --- |
|  | Q.: |  | In any event, Doctor, you'd agree with me that any physician seeing this patient at 0240 hours on April -- October 23rd, 1996, would know that this patient was at a significant risk for shoulder dystocia; right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A.: | Correct. |  |

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| --- | --- | --- | --- | --- |
|  | Q.: |  | And although the presence of those risk factors doesn't necessarily mean that shoulder dystocia will occur, it's certainly a situation where the possibility has to be anticipated? |  |

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| --- | --- | --- | --- |
|  | A.: | Correct. |  |

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| --- | --- | --- | --- | --- |
|  | Q.: |  | And anticipation includes having the appropriate facilities and personnel available; right? |  |
|  | A.: |  | Having the -- as I indicated earlier, ready for shoulder dystocia in any delivery, and you're going to be particularly ready in this particular case. |  |

Dr. Pendleton

**67**  Dr. Pendleton was head of the Department of Obstetrics and Gynaecology at the Women's and Children's Hospital from 1993 to 1998. He was succeeded in this position by Dr. Liston.

**68**  His opinion is relied upon by the defendants. Dr. Pendleton opined that the management of the labour and delivery of the plaintiff was appropriate, and there was no need for Dr. Purvis to have called Dr. Thomas before applying the Mityvac.

**69**  Dr. Pendleton testified that he would have expected the baby to be more than nine pounds, but would be unable to estimate the actual weight. His view is that for purposes of estimating the fetal weight, ultrasound is the "best yardstick that we have, but it's not a very good one." He noted that the ultrasound report that estimated the baby's size as normal turned out to be quite misleading.

**70**  In his written report, Dr. Pendleton stated that the plaintiff "delivered a vast infant weighing 5435 g., which is very close to 12 lbs in weight .... It is almost inevitable in such cases that not only will the head be a tight fit, but the shoulders will likely produce problems of delivery."

**71**  Dr. Pendleton agreed with the management of the arrest of labour in the first stage. He also agreed that Dr. Thomas was "quite right to caution the possibility that the slowness is related to bigness of the child." In other words, Dr. Pendleton agreed with Dr. Thomas that the arrest during the first stage of labour was likely caused by the tight fit owing to the size. But he also agreed that the plaintiff should have been allowed to continue to labour.

**72**  Dr. Pendleton testified extensively about Dr. Purvis' decision to use the Mityvac. He agreed with Dr. Purvis' decision. He acknowledged that neither Dr. Purvis nor Nurse Ritchie recorded the level of descent on the partogram, but his evidence is that the level of descent would be assessed at the time the Mityvac was applied. He testified that there was no indication at the time the Mityvac was applied to decide to do a Caesarian instead. One of his reasons is that if you pull too hard on the Mityvac the cup comes off the head, and therefore, he said, there is a very low risk in using the Mityvac. He said, "So if the head is really a tight fit, the vacuum extractor will come off. And I saw nothing on the chart that suggested that this had been the case." Dr. Pendleton did not think that the arrest of first stage of labour was an indicator for a Caesarian section, nor did he think that Ms. Seatle's second stage of labour (i.e., after she achieved full dilatation) was prolonged because she had been given an epidural, which can slow labour because the mother does not feel the contractions so acutely.

**73**  The plaintiffs argue that caput confused Dr. Purvis' assessment of the level of descent of the head, assuming she did do a pelvic exam before she applied the Mityvac.

**74**  Dr. Pendleton said that it is difficult to apply the Mityvac to caput if the head is not fully descended, "If it was only caput, ... which is swelling of the scalp, it's quite difficult to put a Mityvac on to caput only. So this head has to have been low enough to produce adequate application of the Mityvac."

**75**  Dr. Pendleton said that if the Mityvac came off when Dr. Purvis pulled, its use should have been abandoned. This proposition is not disputed by the defendants, but the defendants do dispute the plaintiffs' evidence that the Mityvac popped off three times (or at all) before the head was delivered. Below I will review the evidence of Ms. Seatle, her husband, Dr. Purvis, and Nurse Ritchie on this point.

Dr. Peace

**76**  Dr. Peace gave evidence for the plaintiffs. She is a general practitioner but she has special expertise in obstetrics. She is vice-chief of obstetrics at Surrey Memorial Hospital, which is the same level hospital as Lions Gate Hospital. Her level of expertise is similar to that of Dr. Purvis.

**77**  Dr. Peace concludes her report with the following statement:

With back up of experienced personnel available, it is unreasonable and dangerous not to be in communication with them. The obstetrician and paediatrician should be free and in hospital, or better yet, physically standing by ready to help before application of the vacuum. Most cases of shoulder dystocia are unexpected. However, in a situation such as this, where the increased risks are glaringly obvious, the obstetrician at the very least should be in the hospital and ready to help at a moment's notice, rather than being at home. The outcome may have been different had this occurred.

**78**  The thrust of Dr. Peace's opinion is that the combination of risk factors for shoulder dystocia were so obvious that it was foolhardy for Dr. Purvis to proceed with a vacuum extraction without the benefit of a more experienced consultant at hand. She points to the size of the fetus, the first stage labour arrest and the prolongation of the second stage of labour as evidence of a looming shoulder dystocia.

**79**  Under cross-examination, she agreed with the other experts that it is difficult to measure fetal size and ultrasound was the best method available. She also agreed that there is no accurate predictor of shoulder dystocia. Although Dr. Peace opined that Dr. Thomas should have been consulted after one hour of pushing in the second stage of labour, she could not say one way or the other if six minutes was an unreasonable time for delivery of the baby. She agreed that Connor Seatle's delivery would have been an extremely difficult delivery because of the size of the baby.

**80**  Her criticism of Dr. Purvis comes down to the decision to proceed with the delivery without Dr. Thomas present. She, like the other experts, does not express the opinion that labour should have been abandoned in favour of a Caesarian section, nor does she specifically say that a Mityvac should not have been used. Rather, she says Dr. Thomas should have been present for the final stage, although she cannot say that Dr. Purvis' management of the final delivery was incorrect or took longer than it should. Dr. Peace says only that the outcome may have been different had he been present.

Dr. House

**81**  Dr. House is a general practitioner with obstetrical expertise who was relied upon by the plaintiffs. He states in his report:

I think at issue here is not the fact that the shoulder dystocia caused the injury to the newborn but whether or not a different approach may have had a better outcome. One could have anticipated I believe that this mother with a past history of a very large baby and a large baby this time, a prolonged stage of labour from 8 cms to full dilation, a suspicion by the obstetrician that pelvic disproportion may be playing a role and that shoulder dystocia was certainly more likely than in an otherwise normal delivery.

Under the circumstances of the above it would have been more appropriate for Dr. Thomas to have been summoned at the time of full dilation so he could have been in attendance to assist with the delivery if there were difficulties encountered.

...

If Dr. Thomas the consultant obstetrician had been called and in attendance at full dilatation the outcome could have been different and hopefully the injuries could have been avoided.

**82**  Dr. House testified that the use of the Mityvac increased the risk of shoulder dystocia.

Dr. Mitchell

**83**  Dr. Mitchell is an obstetrician and gynaecologist. He has held senior positions at the University of Alberta in Edmonton, including Chief of the Department of Obstetrics and Gynaecology. His opinion is relied upon by the plaintiffs.

**84**  He says that Dr. Thomas should have been present for "this predictably difficult delivery". Although Dr. Mitchell does not opine that at any point in time during the delivery the physicians should have performed a Caesarian section, he does say that:

... I believe that, if Dr. Thomas had been present at the time of delivery, he would, in accordance with the standards of practice for an Obstetrician, have elected to perform a Caesarian section or would have performed the vaginal delivery in a more expeditious and safer manner. In either instance, the damage to the baby would have been prevented or minimized.

**85**  The defendants submit that under cross-examination Dr. Mitchell resiled from much of his written opinion.

**86**  Under cross-examination, Dr. Mitchell was asked about the draft answers he had handwritten on plaintiffs' counsel's letter to him requesting an opinion. Question No. 8 from counsel asked, "What an obstetrician would have done if consulted prior to the application of the vacuum extractor?" Dr. Mitchell's handwritten answer was, "Don't know". The report in evidence does not reproduce the questions asked by counsel and this answer to Question No. 8 was not in Dr. Mitchell's final report.

**87**  Dr. Mitchell stated that the handwritten answers were his initial impressions. There is no indication that he reviewed or received different information after his initial notes were made. Dr. Mitchell's final opinion in his written report concerning what an obstetrician would have done if he had been consulted by Dr. Purvis is equivocal. He does not say that the risk factors for shoulder dystocia were such that an obstetrician would not have used the Mityvac, rather he says the general practitioner should not have used the Mityvac without first consulting the obstetrician. Dr. Mitchell does not opine that the use of the Mityvac in the circumstances presented to Dr. Purvis was wrong. Rather he gives a more guarded opinion, that is, it would have been preferable to have involved Dr. Thomas, the specialist.

**88**  Dr. Mitchell agreed with the other experts that suspected macrosomia (large baby) is not a reason to perform a Caesarian section. Later in the trial, Dr. Thomas testified that he would not have performed a Caesarian section in this case.

**89**  Dr. Mitchell says in his report that one of the risk factors that should have alerted Dr. Purvis to "anticipate a difficult delivery that may have exceeded her capabilities" was the persistent high station. By this he means that the presenting part had not descended. Dr. Mitchell relied on the partogram in making this statement, but the evidence of Mr. and Ms. Seatle and Dr. Purvis and Nurse Ritchie was that the baby's head was visible at the perineum. Also, it would be difficult to apply the Mityvac to the head if it had not yet passed through the ischeal spines. Although the presence of caput may have confounded the precise assessment of the descent, on the whole of the evidence I think it is highly improbable that the head had not descended. Also, Dr. Mitchell never uses a vacuum extractor in his practice so he may not be as familiar with its use as, say, Dr. Pendleton, who testified that the Mityvac would be difficult to apply if the head had not descended.

**90**  However, I agree with Dr. Mitchell that Dr. Purvis should have appreciated that this delivery might be a tight fit. Many factors point to this conclusion - the apparent size of the baby, the arrest of labour in the first stage, Dr. Thomas' assessment that there was some cephalopelvic disproportion, and the somewhat prolonged second stage of labour. Dr. Mitchell noted that cephalopelvic disproportion could be absolute, meaning there is a mechanical impediment to descent (not the case here), or something less meaning a tight fit (which was the case here).

**91**  Dr. Mitchell's opinion was to a certain degree successfully challenged because it was based on some erroneous assumptions, chiefly, his understanding that the baby remained at a high station.

Dr. Feinstadt

**92**  Dr. Feinstadt has practised as a family physician in British Columbia for 32 years and in the course of that time has delivered or participated in the delivery of about 1,800 babies. In past years, he was the head of family practice at B.C. Women's Hospital and currently sits on the Quality Assurance Committee of that hospital. He appeared as a witness for the plaintiffs.

**93**  Dr. Feinstadt testified that Dr. Purvis should have called for obstetrical back-up before employing the Mityvac owing to the risk indicators of shoulder dystocia. In response to a question about what Dr. Purvis had done wrong, Dr. Feinstadt said in cross-examination:

What, in my opinion is unacceptable, [is] she undertook the procedure, knowing that there were significant risks for shoulder dystocia - or she should have known that there were significant risks. Shoulder dystocia, as I have stated, as been described as the nightmare of the obstetrician. If there are significant risks of this taking place, one must have adequate back-up there to assist. To undertake a procedure which is fraught with danger without a great deal of experience in managing those - those risks, is not acceptable.

These risks were exacerbated by the fact that the delivery took place in the middle of the night and there were no obstetricians at the hospital.

**94**  The key to Dr. Feinstadt's evidence is his statement that he would not undertake an operative procedure, such as the use of a vacuum extraction, without assistance. By assistance, Dr. Feinstadt meant that the obstetrician called from home in the middle of the night to consult, ought to have been present when the vacuum extraction was undertaken. Technically, shoulder dystocia is very difficult to manage and requires a great deal of experience and skill, which Dr. Feinstadt testified that general practitioners, especially those with little experience with shoulder dystocia, do not have. Dr. Feinstadt is of the opinion that a family physician would need guidance on whether it would be safe to do the vacuum delivery, whether a Caesarian delivery should be performed, and what other resources should be available to minimize the risk involved in the vacuum delivery. At the same time, however, Dr. Feinstadt recognized that once the risk of shoulder dystocia was realized, Dr. Purvis "did her best".

**95**  The risk factors of shoulder dystocia present in this case identified by Dr. Feinstadt are as follows: anticipated macrosomia, since at 34 weeks the symphysis fundal height is 28 centimetres, which places the baby well above the 90th percentile, and the family physician noted "Big Baby!" on the pre-natal chart; a previous birth to a nine pound baby; a post-dates pregnancy; induction; a slower than normal labour progression; and a vacuum extraction.

**96**  Given that one of the risk factors for shoulder dystocia is instrumental delivery, Dr. Feinstadt's view is that when a family practitioner is contemplating vacuum delivery, she should ask herself what harm she could do by attempting it. It is his opinion that by not bringing in the obstetrician to minimize the risks involved, Dr. Purvis' standard of care fell below the reasonable standard of care of a general practitioner.

**97**  Dr. Feinstadt testified that he inferred that Dr. Purvis did not anticipate shoulder dystocia despite the risk factors because she did not have a second nurse in the room. It was only when she hit the alarm bell that the second nurse came in.

**98**  When asked about Dr. Purvis' note that the head was easily delivered, Dr. Feinstadt said that if we go back to the chart itself, the Mityvac was applied at 02:40 h and it took until 02:49 h to effect delivery of the baby's head. The standard maximum time allowable for use of the vacuum device is ten minutes, so nine is approaching the maximum. He therefore disputes Dr. Purvis' note that the baby's head was delivered easily in three contractions since this is contraindicated by the fact that it took nearly the maximum allowable time to deliver the head.

**99**  Dr. Feinstadt testified that the vacuum extractor should only be applied if the head is at the perineum and visible between contractions.

FINDINGS OF FACT AND STANDARD OF CARE

**100**  The following are the findings of fact relevant to the liability of Drs. Purvis and Thomas that I must resolve.

1. What risk factors for shoulder dystocia were apparent by the time the Mityvac was applied?
2. Was the presenting part, the crown of the baby's head, at the perineum when the Mityvac was applied, or was Dr. Purvis' assessment confused by the presence of caput?
3. Should Dr. Thomas have elected to perform a Caesarian section at 23:00 h, the time of his last consult?
4. Given the identified risk factors, should Dr. Purvis have consulted with Dr. Thomas before proceeding with a vacuum extraction?
5. Did the Mityvac pop off as described by Mr. and Ms. Seatle and, if so, how many times?
6. Should the use of the Mityvac have been abandoned because the head was not easy to deliver? Was the head delivered with three easy pulls?
7. What difference would Dr. Thomas' attendance at the delivery have made to the outcome?
8. Was the injury suffered by Connor Seatle caused by lack of oxygen, which in turn was caused by the shoulder dystocia?

What risk factors for shoulder dystocia were apparent by the time the Mityvac was applied?

**101**  All the experts acknowledged that risk factors for shoulder dystocia were present before the delivery of Connor Seatle. All the experts also agree that suspected macrosomia (large baby weighing more than 4,500 g.) is not on its own an indicator to perform a Caesarean section.

**102**  The risk factors that were present include: post-term pregnancy; the apparently large baby; the mother's weight; the size of the previous baby - 9 lbs.; the arrest during the first stage of labour; the possibility of cephalopelvic disproportion; the prolongation of the second stage of labour; and the use of the Mityvac.

**103**  I conclude that: (1) Dr. Purvis and Dr. Thomas should have expected that the baby would weigh more than 9 lbs.; (2) the risk of shoulder dystocia for a baby weighing more than 9 lbs. is more than 10 percent but less than 20 percent; and (3) shoulder dystocia should have been anticipated in this case in the sense that it ought to have been in the forefront of Dr. Purvis' mind as a real possibility. She ought to have been particularly careful in using the Mityvac in such circumstances.

Was the presenting part, the crown of the baby's head, at the perineum when the Mityvac was applied, or was Dr. Purvis' assessment confused by the presence of caput?

**104**  Neither Dr. Purvis nor Nurse Ritchie recorded the results of the vaginal examination they say was done just before the Mityvac was applied. Dr. Purvis testified that she did a vaginal examination just before she applied the Mityvac. Mr. and Ms. Seatle testified that when Dr. Purvis arrived for the delivery (from the partogram at 02:00 h), Dr. Purvis did a vaginal examination and then Ms. Seatle was prepared for delivery.

**105**  Dr. Purvis, Nurse Ritchie, and Mr. Seatle all say that the baby's head was visible at the perineum. In submissions, the plaintiffs argue that the presence of caput confounded the assessment of the station or descent of the baby. The experts agree that caput, once present during the course of labour, will not disappear or decrease until after the birth. The partogram (the graphic record of the labour and delivery) records "caput +" at 19:30 h. At 22:30 h, Dr. Purvis' note records "Head remains at station -1 with significant caput." Dr. Liston testified that one has to be careful not to be misled by caput. He also testified that observation of the baby's head at the perineum may be caput. Dr. Thomas testified that if you can see hair, the baby is at station +3 or more.

**106**  In her testimony, Dr. Purvis says that when she applied the Mityvac there was very little caput. Mr. Seatle testified that he saw the baby's head before Dr. Purvis applied the vacuum. He testified that you could see a little bit of hair, and he touched that spot. Dr. Pendleton testified that, "If you are going to put a Mityvac on, you are there with the gloves on and you make a pelvic exam .... you don't put the vac on without doing a pelvic exam."

**107**  On the question of the station of the head prior to application of the Mityvac, Dr. Purvis testified that it is her practice to perform multiple vaginal examinations during the second stage of labour. Dr. Purvis testified that at 02:00 h, when she arrived at the hospital, she could not see the head. She testified, "So at some point in time during my presence it moved down." It is not her practice to chart the position of the head during the pushing phase. Dr. Liston testified that the standard of care would dictate charting the position of the head before application of the Mityvac.

**108**  I conclude that Dr. Purvis did do a pelvic exam before she applied the Mityvac or as part of the procedure to apply the Mityvac. I accept Dr. Pendleton's evidence that the physician assesses the level of descent as part of the process of applying the Mityvac. I also conclude that the baby's head was at the perineum as was observed by Mr. Seatle, Dr. Purvis and Nurse Ritchie. I accept the evidence that at 23:50 h, Dr. Thomas noted only a small normal amount of caput that did not confuse the assessment of descent. Dr. Pendleton testified that it is very difficult to apply the Mityvac to caput. To this, the plaintiffs respond that that is why the Mityvac popped off three times. Below I find that the Mityvac did not pop off. I conclude, based on the evidence just mentioned, that the assessment of the level of descent was not confounded by the caput.

Should Dr. Thomas have elected to perform a Caesarian section at 23:00 h, the time of his last consult?

**109**  In their written submissions, the plaintiffs say that Dr. Thomas ought to have opted for a Caesarian section at the time of his last consultation at 23:00 h. They also submit that had he re-attended during the second stage of labour, he would have considered a Caesarian section delivery. Although some of the experts (Drs. Mitchell, Peace, House, and Feinstadt) say the outcome may have been more favourable if Dr. Thomas had been in attendance, there is no evidence that Dr. Thomas ought to have performed a Caesarian section at 23:00 h.

Given the identified risk factors, should Dr. Purvis have consulted with Dr. Thomas before proceeding with a vacuum extraction?

**110**  There were risk factors for shoulder dystocia present during the labour and delivery of Connor Seatle. These risk factors were additive and increased as the labour proceeded. There were also reassuring signs. Although the clinical assessment of Ms. Seatle (measurement of symphysis fundal height) and history of the disclosed earlier pregnancy indicated a large baby, the ultrasound was reassuring that the baby was of an above average but normal size. All the experts agreed that the ultrasound was the best of the generally unreliable methods of assessing fetal size. Dr. Purvis was not incorrect in her assessment that the baby was big. But neither could she be said to have breached her duty of care to the plaintiffs by not anticipating that the baby would be huge.

**111**  The arrest of labour in the first stage was an indicator of risk for shoulder dystocia because it suggested a potential mechanical problem for the descent of the baby, i.e., a tight fit. However, many of the experts testified that a labouring mother not coping well with pain (which was the case here), can also cause arrested labour. Dr. Thomas and Dr. Purvis both thought that the appropriate management was to give Ms. Seatle an epidural to allow her to relax a little. The epidural had the desired effect. It did give her some temporary pain relief, and labour quickly began to progress to full dilatation. This was a reassuring sign. None of the experts criticized the decision of Dr. Purvis and Dr. Thomas to give Ms. Seatle an epidural. The fact that the baby's head descended through the ischeal spines to the perineum means there was no absolute cephalopelvic disproportion. Dr. Purvis was not wrong to conclude that the arrest during the first stage of labour was caused by the mother's pain and not the size of the baby.

**112**  Ms. Seatle then achieved full dilation and the baby's head was visible at the perineum. Ms. Seatle was fatigued, and Dr. Purvis attributed her inability to push out the baby to her fatigue. Dr. Purvis employed what is generally regarded to be a low risk instrument - the Mityvac - to assist the delivery.

**113**  As noted above, Dr. Liston testified in cross-examination as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q.: |  | You'd agree with me that any physician seeing this patient at 02:40 hours [just before the application of the Mityvac] on October 26, 1996 would know that this patient was at a significant risk for shoulder dystocia; right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A.: | Correct. |  |

**114**  Dr. Liston's testimony, just quoted above, was put to Dr. Purvis on cross-examination, and then she was asked:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q.: |  | If you had appreciated that there was a "significant" risk in your mind of shoulder dystocia, then you certainly could have consulted Dr. Thomas? |  |

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

**115**  But contrary to the defendants' own expert, Dr. Liston, Dr. Purvis testified she did not think that the baby was at a substantially or significantly higher risk for shoulder dystocia.

**116**  It must be remembered that the incidence of severe shoulder dystocia is so rare that, for example, Dr. Thomas testified that he has only encountered it once or twice in his 30-year career. Mild shoulder dystocia, on the other hand, is relatively common and Dr. Purvis and the nurses are accustomed to performing the disimpacting shoulder manoeuvres: first McRoberts, and then the Woods corkscrew.

**117**  An issue in this case is whether Dr. Purvis' decision to proceed with a vacuum assisted delivery without first taking the precaution of calling Dr. Thomas was a breach of her duty of care to the plaintiffs. With the benefit of hindsight, one can say she should have called Dr. Thomas. However, was her decision not to call Dr. Thomas negligent? According to Dr. Liston, Dr. Purvis should have anticipated shoulder dystocia because of the accumulation of risk factors.

**118**  I find that Dr. Purvis did not specifically have the risk of shoulder dystocia in the forefront of her mind. On the contrary, she testified that she always anticipated shoulder dystocia. This testimony is noteworthy for what she did not say. Dr. Purvis did not say that in this delivery she recognized that there were developing risk factors for shoulder dystocia. As already noted, according to Dr. Liston, she should have recognized the significant risk factors in this case. She failed to do so.

**119**  I find, based on her testimony, that Dr. Purvis did not specifically consider the accumulated and accumulating risks of shoulder dystocia in this case. I also find that if she had appreciated the risk, she would at the very least have called in a second nurse before applying the Mityvac, and more than likely would have called Dr. Thomas.

**120**  Because Dr. Purvis did not assess, or ignored, the risk factors of shoulder dystocia specific to this case, she did not give proper consideration to calling in Dr. Thomas before using the Mityvac. I conclude that if Dr. Purvis had assessed the risk for shoulder dystocia as significant, which she did not, she would have and should have called in Dr. Thomas.

**121**  I recognize that a general practitioner in British Columbia practising at a Tier two hospital like Lions Gate Hospital is competent to, and expected to, handle most deliveries unassisted by a specialist. In this case, Dr. Purvis was sufficiently concerned that she consulted Dr. Thomas earlier in the evening. By the time Dr. Purvis used the Mityvac the risk factors were greater than at the time she consulted earlier in the evening and called for greater caution on her part. I conclude that even balancing the risk factors and the reassuring signs, it must be said that Dr. Purvis breached her duty of care to the plaintiffs by deciding to use the vacuum extraction without consulting with Dr. Thomas.

Did the Mityvac pop off as described by Mr. and Ms. Seatle and, if so, how many times?

**122**  Mr. and Ms. Seatle both testified that the Mityvac popped off three times. Ms. Seatle testified that Dr. Purvis had difficulty placing the Mityvac, she grew frustrated, and that she pulled and it popped off. This, they say, happened three times. However, at discovery Ms. Seatle's evidence was far less specific, as noted above. The importance of this testimony is that the experts agree that if the Mityvac popped off three times, its use should have been abandoned.

**123**  Mr. Seatle testified (from my notes) that, "Dr. Purvis tried to apply the Mityvac to the baby's head. It didn't work very well. She fumbled, it was not a smooth process, and it kept popping off - three times." Defence counsel did not put the proposition to the Seatles that they were confused by the pumping up/suction off procedure described by Nurse Ritchie. Nurse Ritchie noted that procedure would have been repeated three times, which coincides with the Seatles' evidence that it popped off three times.

**124**  Nurse Ritchie described the use of the Mityvac, testifying:

When Dr. Purvis gets the cup on, she says, okay, pump it up. So she tells you it is in good position and it's safe to pump it up. So then with a contraction you pump it up. And then you say, suction on, so she knows that you have it to the green level, which is the maximum, and then the patient pushes and Dr. Purvis pulls. Then when the contraction is over, suction off.

**125**  The fetal heart monitor discloses five to six, or possibly seven, contractions between the time the Mityvac was applied at 02:40 and the time the head was delivered at 02:49 h. Dr. Purvis and Nurse Ritchie say that Dr. Purvis would pull on only the strong contractions. It is also entirely conceivable that the note concerning the correct time the Mityvac was on does not mean it was pumped up at that time.

**126**  Mr. Hinkson says that the Seatles' evidence is unreliable because they gave other evidence about the labour and delivery that has been proven wrong. I will now review some of the conflicting evidence.

**127**  The Seatles both gave evidence that Mr. Seatle was instructed by the nurses to apply fundal pressure in a downward motion to help deliver the body of the baby after the shoulders became impacted. Every doctor and nurse that testified stated unequivocally that such a procedure would never be used because it would (if it did exert any force on the baby) impact the shoulders more firmly. The plaintiffs did not resile from this evidence at trial, but instructed their counsel not to advance any claim against the hospital or nurses. I take this as a tacit admission that although they both have the recollection of Mr. Seatle's being told to apply fundal pressure, they recognize the improbability of that occurring. I find that the evidence of all the experts and the defendant doctors and nurses persuasive that such a procedure was not used. I therefore conclude that Mr. and Ms. Seatle were mistaken about this evidence.

**128**  Ms. Seatle testified that she was exhausted and tired by the time of the delivery. She acknowledged that she had been in terrible pain for many hours. Under cross-examination it was put to her that she did not have a clear recollection of the sequence of events or detail of what occurred. She responded that the delivery was a traumatic event and she says it was "printed in my brain like a picture." She concedes that there may be sequences of events and timing upon which she is confused, but she says she clearly remembers what happened.

**129**  Ms. Seatle and her husband testified that when the head was delivered and the shoulders became stuck, Ms. Seatle was manoeuvred by the nurses into a position with her legs straight up in the air. As noted above, Ms. Seatle testified at discovery that "a huge male nurse" and her husband "lifted my body to about halfway up my back off of the bed with my legs straight up in the air." All the doctors and nurses testified about the well-known methods used to disimpact shoulders. The first manoeuvre is what is known as the McRoberts manoeuvre. The knees are raised to the shoulders in order to widen the pelvis and then suprapubic pressure is applied. The idea is to enlarge the birth canal as much as possible. The bed is flattened out to aid in this process. The notion that a patient would have her legs and lower torso lifted off the bed is entirely improbable and I find that Ms. Seatle and her husband were incorrect in their recollection that this occurred.

**130**  Ms. Seatle and her husband both testified that when Dr. Purvis arrived at 02:00 h she said there was still an anterior rim (small lip of cervix not fully dilated). She told them, according to their testimony, that she would push it aside with her finger. The records show that there was an anterior rim at 24:00 h documented on the partogram by Nurse Ritchie. Nurse Ritchie noted that Ms. Seatle's cervix was fully dilated at 01:15 h, meaning that the anterior rim was gone. Dr. Purvis was not called back to the hospital until Ms. Seatle was fully dilated at 01:15 h. I find that Mr. and Ms. Seatle were mistaken in their recollection about Dr. Purvis' pushing back the anterior rim.

**131**  Ms. Seatle was certain that a large male she thought was a nurse was present at the delivery after the emergency buzzer was activated. She was seen the next day by a medical resident, Dr. Rimmer. She became convinced that this was the individual who had been present. The evidence before me is compelling that there was no male nurse on duty that night. Dr. Rimmer swore an affidavit that he was not present at the delivery. No one remembered him being present. He was a resident at the time. He was not cross-examined on his affidavit. I find that Ms. Seatle was mistaken in her evidence about a large male nurse being present. She was also mistaken in her evidence about the number of nurses and doctors in the room after Nurse Ritchie activated the buzzer.

**132**  Ms. Seatle gave evidence that she leaned down and touched the baby's head after the head was delivered. This is inconsistent with the evidence of Dr. Purvis and Nurse Ritchie and seems improbable, given the immediately apparent emergency that presented itself when the head was delivered.

**133**  In Faryna v. Chorny, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) at 356-357, [*4 W.W.R. (N.S.) 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.), O'Halloran J.A. discussed the assessment of credibility, stating:

Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility ...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

**134**  The assessment of the credibility and reliability of a party or a witness is particularly difficult where, as with those present at Connor Seatle's birth, all witnesses gave their evidence in a forthright, sincere and honest way. The Seatles' evidence about the Mityvac popping off three times is in direct conflict with the evidence of Dr. Purvis, Nurse Ritchie and their individual records. I was impressed with both Mr. and Ms. Seatle. They are intelligent, sincere, articulate individuals. I have no hesitation in concluding that neither Ms. Seatle nor her husband intentionally misled the court. However Ms. Seatle's evidence is, in part, the product of her re-living over the course of the last eight years what must have been a harrowing experience for her and her husband. Her opportunity to observe the application of the Mityvac was somewhat obscured by her position. She and Mr. Seatle were not familiar with the equipment, nor did they understand how it worked. Neither of them mentioned the pumping up/suction off mechanism. However, the most important factor going to reliability is Ms. Seatle's condition. She was in such terrible pain from the long day and night of contractions that Dr. Thomas described her as withdrawn and uncooperative. She was obviously tired. She had been prescribed Demerol. The fact that her recollection of several other incidents immediately surrounding the application of the Mityvac was shown to be wrong leads me to conclude that Ms. Seatle's evidence on the question of the Mityvac application is not reliable. Most notable of these recounted is her recollection that her legs and torso were lifted off the bed, and her recollection about fundal pressure. I have no hesitation in concluding neither event happened. I am therefore led to the conclusion that I cannot rely on Ms. Seatle's evidence concerning the application of the Mityvac where it is in direct conflict with the other witnesses and their contemporaneously created records. There is no doubt that Mr. and Ms. Seatle's collective recollection is impressed with their repeated discussions, re-living, and re-telling of the events of their son's birth. I know they are convinced beyond doubt as to the correctness of their recollections, but I cannot accept their evidence on this point. I prefer instead the evidence of Nurse Ritchie and Dr. Purvis. Dr. Purvis was not at all shaken on this point on cross-examination. Ms. Seatle's evidence at discovery was far less specific than at trial on this point. Accordingly, I find that the Mityvac did not pop off three times or at all.

Should the use of the Mityvac have been abandoned because the head was not easy to deliver? Was the head delivered with three easy pulls?

**135**  The plaintiffs submit that I ought to prefer the parents' evidence and find that the vacuum extraction was not as easy as claimed by Dr. Purvis. The plaintiffs say that it defies logic that there could be an easy delivery of one of the largest babies within the experience of a number of persons who testified, with the biggest head they had seen. The plaintiffs point to: the size of the head; the bruising on the head; the tearing of the perineum; the slow progress of descent to that point; the fetal heart monitor that shows six contractions during the time the Mityvac was applied; the parents' evidence that the Mityvac popped off three times; and the evidence that there was some cephalopelvic disproportion or at least the fact that the baby was a tight fit. The plaintiffs submit that Dr. Purvis' note about delivering the head in three easy pulls is self-serving, having been made after the poor outcome was known and submit that I should reject Dr. Purvis' evidence on this point. Mr. Holubitsky says "It defies common sense that the head could pop out with minimal effort." Dr. Mitchell testified that he was not prepared to accept that there was minimal traction in delivering the head.

**136**  Dr. Pendleton and Dr. Mitchell testified that the three attempts at vacuum extraction occurred over a period when there were six full and a seventh partial contractions. Dr. Mitchell testified that this indicated a difficult extraction consistent with the bruising noted on the baby's head after his birth, and cephalohaematoma which could be caused by significant traction. The protocol document that Dr. Fritz (another expert called by the defendants) testified was evidence of the standard of care for the management of shoulder dystocia states, "Beware vacuum delivery or forceps delivery using excessive force, ie. you deliver the head and then you are in big trouble."

**137**  All the experts who testified on this point, and Dr. Purvis agreed that use of the Mityvac should be abandoned if excessive resistance was encountered. In this case, given the significant risk of shoulder dystocia, it would be negligent for Dr. Purvis to have persisted with the vacuum extraction if she encountered significant traction. The only experts who testified about possible significant resistance were Dr. Mitchell and Dr. Feinstadt.

**138**  Dr. Mitchell suspects that there was more traction encountered by Dr. Purvis when she used the Mityvac than she admits. Dr. Feinstadt testified that the nine-minute time interval in which the Mityvac was applied suggests it was not so easy to deliver the head. No opinion is given by any of the experts that the use of the Mityvac ought to have been abandoned. I agree with Mr. Holubitsky that it seems surprising the head was delivered easily. However, there is no credible analysis by the experts of the factors relied on by the plaintiffs in their closing submission that satisfies me on a balance of probabilities that Dr. Purvis applied excessive traction when using the Mityvac. In fact, other than Drs. Mitchell and Feinstadt, the experts make no mention of the question of possible excessive traction. A judge can find a breach of a standard of care in the absence of expert evidence but only when the matter can be judged negligent without enquiring into clinical expertise (Webster v. Chapman, [*(1997), 155 D.L.R. (4th) 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JX3N-B0HK-00000-00&context=) (Man. C.A.) at page 88). This is not one of those cases. I conclude there is insufficient evidence from which I could find or infer, on a balance of probabilities, that excessive traction was applied when using the Mityvac.

What difference would Dr. Thomas's attendance at the delivery have made to the outcome?

**139**  The plaintiffs contend that in the face of all of these mounting risk factors, which the evidence establishes are synergistic, the defendants should not have proceed with the delivery using the Mityvac in the absence of either the obstetrician or paediatrician. Doing so, the plaintiffs, say provoked severe shoulder dystocia, with which Dr. Purvis, had essentially no experience. The plaintiffs further contend that the evidence is unequivocal that Dr. Thomas, being a qualified obstetrician for more than 23 years, had considerably more practical hands-on experience in dealing with cases of shoulder dystocia. They say that there was a consensus of expert opinion to the effect that the management of shoulder dystocia is an art that benefits from practice and repetition. The plaintiffs also submit in their written submissions that "While no one can say with certainty that had Dr. Thomas been present at the time shoulder dystocia manifested itself, it is only common sense to assume, he would probably have effected the delivery more expeditiously and more safely. ... in the face of increasing risks, both Dr. Purvis and Dr. Thomas were under an increasing duty of care to prevent the foreseeable risks to the fetus. ... This could only be accomplished by having the most skilled person present to assess and deal with a potentially catastrophic delivery, to make the decision as to whether to undertake an instrumented delivery (which can provoke an immediate crisis), and to handle the serious complications which may ensue. Why else do specialist physicians undergo years of postgraduate training and experience?" [emphasis added]

**140**  None of the experts, including Dr. Mitchell, who reviewed the conduct of the defendant physicians concluded that there was a specific point in time at which the physicians ought to have elected to perform a Caesarian section. None of the experts stated that a vacuum extraction should not have been performed. None of the experts have any criticism of Dr. Purvis' conduct in attempting to deliver the baby once the shoulder dystocia became apparent. To that extent there is no specific criticism of Dr. Purvis' conduct. The plaintiffs' case rests on the theory that had Dr. Purvis recognized the risk factors, she would have called in Dr. Thomas before attempting the vacuum extraction. If she had done so, the plaintiffs submit that Dr. Thomas, according to Dr. Mitchell, would have elected a Caesarian section or he would have performed a safer vaginal delivery. The plaintiffs' theory rests on the proposition that Dr. Thomas would have done something different than Dr. Purvis, but the experts do not say what he should have done differently.

**141**  Dr. House testified that the outcome could have been different if Dr. Purvis had called in Dr. Thomas. He testified, "That is as far as I could go [in giving the opinion]". He agreed that Dr. Purvis used all recommended procedures in delivering the baby once the shoulder dystocia was encountered. Dr. Peace agreed that six minutes was a reasonable time in which to accomplish such a difficult delivery.

**142**  I have found that shoulder dystocia should have been anticipated by Dr. Purvis and that had she better appreciated the developing risks of shoulder dystocia she would have called Dr. Thomas before she proceeded with a vacuum assisted delivery. I also have found that I could not say that there was a point in time that the use of the Mityvac should have been abandoned. I have also found that there was no urgency to deliver the baby insofar as the baby was not in any distress and could have awaited the arrival of Dr. Thomas. (He was about 15 minutes from the hospital.) It follows from my finding that Dr. Purvis should have anticipated shoulder dystocia, that if Dr. Thomas had been called he would have recognized the significant possibility of shoulder dystocia at that point in the delivery. The issue is whether on a balance of probabilities the plaintiffs have proven that Dr. Thomas would have done anything differently than Dr. Purvis or whether the outcome would have been better. The plaintiffs say such a conclusion follows as a matter of common sense.

**143**  I find that the outcome "might" have been better if the delivery was in the hands of the more experienced and specialized hands of Dr. Thomas. Dr. Thomas was a more skilled physician by virtue of his long years (30 years) as a specialist, contrasted with Dr. Purvis' relatively few years of practise. It does not matter that Dr. Thomas had few experiences of severe shoulder dystocia. His greater general experience could be expected to have enabled him to handle the emergency with greater skill. He may have been able to manoeuvre the baby's shoulders more expertly than Dr. Purvis. Dr. Thomas might have decided to perform a Caesarian section before the Mityvac was applied. His greater expertise and experience might have either led him to decide to abandon the Mityvac after one or two pulls or to deliver the baby more safely. None of the experts opined about what specifically Dr. Thomas would, or could be expected to, have done differently than Dr. Purvis. Dr. Mitchell says that he doubts the head delivered as easily as Dr. Purvis claims. If he is correct about his suspicion then this leads to the conclusion that Dr. Thomas would probably have abandoned the attempts to use the Mityvac without delivering the head, in which case one can assume Dr. Thomas would have performed a cesarian section. I cannot without opinions from the experts conclude that Dr. Thomas probably would have abandoned the efforts to deliver vaginally. In this regard I cannot rely on Dr. Mitchell's evidence about the use of the Mityvac because he was mistaken about the station the baby was at when the Mityvac was applied and also because he is not experienced in the use of the Mityvac. But in any event even Dr. Mitchell did not, other than to voice suspicions about the correctness of the note made by Dr. Purvis ("three easy pulls"), opine that the Mityvac ought not to have been used or should have been abandoned before the head delivered.

**144**  As noted above, Dr. Mitchell was asked by plaintiffs' counsel "What an obstetrician would have done if consulted prior to the application of the vacuum extractor?" His answer on his draft report, was "Don't know". Dr. Mitchell testified that Dr. Purvis' description of the manoeuvres she used to deliver the baby were appropriate and also that once shoulder dystocia declared itself, Dr. Purvis "did exactly what she should have done."

**145**  I conclude that it is not possible to know if the outcome would have been more favourable if Dr. Thomas had been called to the hospital and was in attendance during the critical period of time. The plaintiffs have proven only that the outcome might have been better not that it would probably have been better.

Was the injury suffered by Connor Seatle caused by lack of oxygen, which in turn was caused by the shoulder dystocia?

**146**  Dr. Van Aerde is a neonatologist employed as the Divisional and Regional Director for Newborn Services at the Northern Alberta Neonatal Intensive Care Program. His opinion is relied upon by the plaintiffs. It is Dr. Van Aerde's opinion that Connor Seatle was correctly diagnosed with asphyxia at birth and that his injuries (cerebral palsy) were consistent with and caused by asphyxia.

**147**  Dr. Van Aerde testified about the causal relationship between the intrapartum event and Connor's cerebral palsy.

**148**  The essential criteria to diagnose asphyxia are: metabolic acidosis in the arterial cord blood or very early neonatal blood samples, as evidenced by a pH of less that 7.00 (although anything less than 7.15 is cause for concern) and a base excess below minus 12 mmol/L, reflecting the acid build up in the body because of a lack of oxygen; early onset of severe or moderate neonatal encephalopathy in infants at greater than 34 weeks gestation; and cerebral palsy of the spastic quadriplegic or dyskinetic (ataxic) type. In Connor's case, he had a cord pH of 7.12 and a base excess of minus 11.1 mmol/L, and at 35 minutes of life, his body (as opposed to cord) pH was 7.06 with a base excess of minus 18.6 mmol/L. At more than 34 weeks of gestation, Connor experienced immediate onset of symptoms at birth (such as seizures) of moderate hypoxic ischemic encephalopathy stage two, meaning moderate to severe injury to the brain linked with perinatal asphyxia. Finally, Connor presented symptoms and was diagnosed with dyskinetic, ataxic cerebral palsy.

**149**  Dr. Van Aerde also discussed criteria that suggested, but were not independently conclusive of, intrapartum timing. Where there was documentation on the relevant characteristics, these less conclusive criteria were also suggestive of the causal relationship between the asphyxia and the cerebral palsy.

**150**  The defendants did not tender an expert report refuting Dr. Van Aerde's conclusions, but Mr. Hinkson submits that Dr. Van Aerde's conclusion is wrong. Mr. Hinkson demonstrated that a precise calculation of the minutes between delivery of the head (beginning of time without oxygen) and the first recorded gasp (noted by nurse as occasional gasp) is less than the amount of time usually considered to diagnose brain damage caused by asphyxia.

**151**  Dr. Van Aerde responded that he considered all the clinical signs of asphyxia, as well as the circumstances of the delivery, and the results of medical testing throughout the first year of Connor's life and concluded that the evidence supported a diagnosis of asphyxia. I accept Dr. Van Aerde's evidence that an overly rigid calculation of the time lapse does not carry more weight than his clinical judgment based on all factors, including the international criteria of the causal relationship between intrapartum events and cerebral palsy.

**152**  I conclude that Connor Seatle's cerebral palsy was cased by asphyxia, in turn caused by shoulder dystocia.

Dr. Thomas' liability

**153**  There is no persuasive evidence that Dr. Thomas ought to have conducted a Caesarian section at 23:00 h, the last occasion he saw Ms. Seatle before the delivery.

**154**  It is not a breach of the standard of care for Dr. Thomas to have left the hospital when he did with the instructions that he left. At the time he left it could not be said that it was then evident that shoulder dystocia was a significant risk. He was entitled to rely on Dr. Purvis' assessment of risks and also on her assessment of the need to consult him. He was not called back to the hospital, nor was he consulted until it was too late for him to assist. I am not persuaded that he breached the standard of care in any way by leaving the hospital with the instructions detailed above. The risk of shoulder dystocia gradually unfolded. I have accepted Dr. Liston's opinion that it was at the point when the second stage of labour stalled, about one and a half hours, that the risk became evident. Accordingly, the case against Dr. Thomas is dismissed.

CAUSATION

**155**  There are two aspects of causation in this case. First is the question of whether Connor Seatle's injury was caused by asphyxiation and whether the asphyxiation was caused by the shoulder dystocia. I have found that his birth injury was caused by asphyxiation, which in turn was caused by the shoulder dystocia. The second aspect of causation is whether the plaintiffs have proven that Dr. Purvis' failure to consult with Dr. Thomas caused the infant plaintiff's damage.

**156**  I have made the following findings of fact relevant to causation:

1. Although a Caesarian section was a treatment option before the Mityvac was applied, it was not negligent not to have then performed a Caesarian section.
2. No expert testified that the Mityvac ought not to have been used in the circumstances and I so find.
3. Dr. Thomas should have been consulted before Dr. Purvis applied the Mityvac.
4. The outcome of the delivery, if Dr. Thomas had been consulted before application of the Mityvac, might have been better.
5. Once shoulder dystocia declared itself, Dr. Purvis performed the correct manoeuvres to deliver the baby.
6. If Dr. Thomas had been present, he might have been able to deliver the baby faster and more safely.

**157**  The parties disagree about the applicable test for causation in this case. The defendants argue that the traditional tort causation analysis applies such that the plaintiffs bear the onus of proving, on a balance of probabilities, that there is a causal connection between the defendants' breach of the standard of care and the damage or injury that arose, as that test was described 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=) at 289-290. In this case the defendants say, the plaintiffs have to prove that the infant's injuries would not have occurred "but for" Dr. Purvis' failure to consult Dr. Thomas.

**158**  The plaintiffs argue that while the generally accepted test for causation is the "but for" test, 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=) found that, "[t]he "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 ...". A contribution is material if it falls outside the de minimus range, or is more than a negligible contribution.

**159**  The plaintiffs further argue that if it can be said that the defendants, by their breach of duty, have created a material risk that the damage could occur it is open to the court to infer or presume that it has in fact materialized in this case, absent evidence to the contrary. In other words, the material contribution test in Athey could be met by demonstrating a material risk of harm which in fact materialized. For this proposition, the plaintiffs rely on Webster v. Chapman, [*[1997] M.J. No. 646*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JX3N-B0HK-00000-00&context=) (Man. C.A.) in which the Court found that the administration of a drug during pregnancy materially increased the risk of damage to the fetus despite no positive causal expert evidence.

Review of the applicable case law on causation

**160**  In McGhee v. National Coal Board, [1973] 1 W.L.R. 1 (H.L.), the House of Lords departed from the traditional "but for" test. The plaintiff developed dermatitis while working as a labourer emptying pipe kilns, which exposed him to clouds of abrasive dust. The plaintiff left work covered in dust and sweat and would shower at home, as no washing facilities were provided by the employer. The plaintiff sued the employer in ***negligence***. The evidence showed both that the dermatitis was caused by the working conditions and that the longer skin was exposed to dust the greater the odds of developing the disease. However, the experts could not attribute the dermatitis to the additional exposure after work, nor could they state that if shower facilities had been provided, the worker would not have developed dermatitis. The House of Lords found the employer liable, and Lord Wilberforce advocated a reversal of the burden of proof such that if the plaintiff could establish that the defendant breached a duty and created a risk, and the plaintiff's injury occurred within that area of risk, there is liability unless the defendant can show there was some other cause for the injury. This reversal of onus of proof has not been applied in Canada and has not been extended in England beyond the toxic exposure cases.

**161**  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=) (S.C.C.) is the leading medical malpractice case on causation. The plaintiff Snell lost sight in one eye after surgery performed by the defendant doctor, who negligently continued to operate after noticing a haemorrhage in the plaintiff's eye. While the operation was one possible cause of the blindness, no expert could say that it was the cause in this case. The difficulty in determining causation was due to the defendant's ***negligence*** because by continuing the operation, the defendant had made it impossible for the bleeding which allegedly caused the injury to be detected. The Supreme Court of Canada rejected the reversal of the burden of proof approach adopted by the House of Lords in McGhee. Instead, the Court found that traditional principles of causation are adequate to protect a plaintiff so long as they are not applied too rigidly. While the burden to prove ***negligence*** rests with the plaintiff, an inference of causation can be made based on common sense, even where the medical evidence is not conclusive. Further, where the evidence of ***negligence*** is particularly within the defendant's knowledge, very little affirmative evidence will be needed to establish causation. For these reasons, the Court found sufficient causation to determine the defendant was liable in ***negligence***.

**162**  In Levitt v. Carr [*(1992), 66 B.C.L.R. (2d) 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B10P-00000-00&context=) (B.C.C.A.), the Court of Appeal applied Snell and permitted causation to be established by an inference of fact. In doing so, within a helpful analysis of the law of causation, the court stated at [paragraph] 83:

... We now have the advantage of the unanimous judgment of the Supreme Court of Canada in Farrell v. Snell, supra, written by Mr. Justice Sopinka and handed down on August 16, 1990. The judgment begins with a concise statement of the issue:

The issue of law in this case is whether the plaintiff in a malpractice suit must prove causation in accordance with traditional principles or whether recent developments in the law justify a finding of liability on the basis of some less onerous standard. The practical effect of a determination of this issue will be whether the appellant was liable for the loss by the respondent of the vision in her right eye.

The facts were that following an operation for cataract removal Mrs. Snell's optic nerve atrophied. The atrophy resulted from a loss of the blood supply to the optic nerve. There were two possible causes: ***negligence*** by Dr. Farrell in the conduct of the operation; or a naturally occurring stroke in the eye itself. Quoting Sopinka J.:

Neither expert was able to express with certainty an opinion as to what caused the atrophy or when it occurred.

In respect of the burden of proof, at p. 294 Sopinka J. stated the "two broad principles" which apply in a civil case:

1. that the onus is on the party who asserts a proposition, usually the plaintiff;
2. that where the subject matter of the litigation lies particularly within the knowledge of one party, that party may be required to prove it.

After reviewing the judgments in McGhee and Wilsher, [1988] 2 W.L.R. 557, and a sampling of Canadian malpractice decisions, at p. 298 Sopinka J. restated the issue before the court:

The question that this court must decide is whether the traditional approach to causation is no longer satisfactory in that plaintiffs in malpractice cases are being deprived of compensation because they cannot prove causation where it in fact exists.

Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation?

That passage requires that at this point we distinguish between the two senses in which the term "causation" is commonly employed. One is in reference to the agency which led to the injury: in Bonnington Castings, [1956] 1 All E.R. 615, it was dust from a grinder; in McGhee it was brick dust; in Farrell v. Snell it was atrophy of the optic nerve; here it is not disputed that it was high dosage steroids. The second sense focuses on the question of whether the ***negligence*** of the defendant caused the injury. Both in Farrell v. Snell and here the second sense brings the question of time to the fore because in each there is an unbroken span of time divided at some unknown point into negligent and non-negligent periods. It is the second sense that we are concerned with and that Sopinka, J. was concerned with when he asked: "Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous?"

At p. 300 of Farrell v. Snell there is discussion about the rigid application of the traditional approach to causation and the extent of the burden upon a plaintiff in a malpractice case:

I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475 (H.L.), at p. 490, "... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory." Furthermore, as I observed earlier, the allocation of the burden of proof is not immutable. Both the burden and the standard of proof are flexible concepts. In Blatch v. Archer (1774), 1 Cowp. 63 at p. 65, 98 E.R. 969 at p. 970, Lord Mansfield stated: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." (emphasis added)

In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. This has been expressed in terms of shifting the burden of proof. In Cummings v. City of Vancouver (1911), 1 W.W.R. 31 at p. 34, [*16 B.C.R. 494*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6P1-JXNB-61XH-00000-00&context=) (C.A.), Irving J.A. stated:

Stephens in his Digest (Evidence Act, 1896) says: "In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties relatively."

Hollis v. Young, [1909] 1 K.B. 629, illustrates the rule that very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side.

In Dunlop Holdings Ltd's Application, 1979 RPC 523 (C.A.) at p. 544, Buckley L.J. affirmed this principle in the following terms:

Where the relevant facts are peculiarly within the knowledge of one party, it is perhaps relevant to have in mind the rule as stated in Stephen's Digest, which is cited at page 86 of Cross on Evidence [3rd ed.]:

"In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the facts to be proved which may be possessed by the parties respectively".

"This does not mean", Sir Rupert continues, "that the peculiar means of knowledge of one of the parties relieves the other of the burden of adducing some evidence with regard to the facts in question, although very slight evidence will often suffice".

Then, at page 301, Sopinka J. states the principles to apply in Canada to these kinds of cases:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).

It is not, therefore, essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

Finally, at p. 302, Sopinka J. gave tacit approval to this passage from p. 880 of Lord Bridge's judgment in Wilsher:

But where the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in McGhee's case.

**163**  In Levitt, the defendant doctor gave the plaintiff a prescription for steroids to be taken for a longer period of time than was normally recommended. The plaintiff later developed avascular necrosis in his hip. The question before the Court was whether the prolonged course of steroid treatment caused avascular necrosis in the plaintiff's hips. The defendant argued that although the plaintiff had proven that steroids were the probable cause of the development of avascular necrosis, the plaintiff had failed to prove that it was the negligent prolonged course of treatment that caused the condition as opposed to the initial non-negligent course of treatment. Relying on expert evidence that the longer the course of treatment, the more likely avascular necrosis would develop, the Court of Appeal found that:

Applying the principles of Wilsher and Farrell v. Snell it was open to the trial judge to infer from the evidence that the duration of the high dosage steroid treatment beyond six weeks materially increased the risk of the development of avascular necrosis. It was further open to him to conclude that the material increase in risk was a contributing cause and as such a foundation for a finding of liability. [Emphasis added.]

**164**  While there was no scientific evidence that the steroids caused avascular necrosis in the plaintiff's case in particular, the fact that it was known that extended steroid use was one cause of the disease combined with the fact that steroid use was extended in the plaintiff's case, led the Court to conclude that by negligently extending the steroid prescription, the defendant doctor created a "material increase in the risk of harm" to the plaintiff and therefore causation was established.

**165**  In Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), the Supreme Court of Canada elaborated on its decision in Snell by stating that in the cases where the "but for" test is unworkable, for instance where there are multiple factors contributing to a plaintiff's damage, causation can be established where the defendant's ***negligence*** "materially contributed" to the injury, even if it was not the sole cause. At [paragraph] 41, the Court held:

The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test.

**166**  The facts of Athey were that the plaintiff had a history of back problems and had injured his back in two car accidents. On the advice of his doctor, he resumed his regular exercise routine after the second accident and suffered a herniated disc while exercising. The trial judge found that the motor vehicle accident played some causative role in the disc herniation and assessed liability at 25 percent for the injury. The Supreme Court of Canada held that the defendants were liable for the whole of the plaintiff's injury because the defendants' ***negligence*** materially contributed to the injury.

**167**  In Webster v. Chapman [*(1997), 155 D.L.R. (4th) 82*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JX3N-B0HK-00000-00&context=) (Man. C.A.), the Manitoba Court of Appeal relaxed the causation principles in the cases cited above and found the defendant physician negligent because he failed to advise the plaintiff mother of the risks of continuing to take the drug Coumadin while she was pregnant. The infant plaintiff was born with severe physical and mental abnormalities, allegedly caused by the mother's ingestion of Coumadin during pregnancy. There was no clear evidence about whether the damage to the infant occurred before or after the mother's consultation with the physician. However, the Court found that continuing to ingest the drug after the pregnancy was discovered materially increased the risk of damage, which was sufficient to establish causation.

**168**  I conclude from reviewing these authorities that there are four possible theories of causation available to this plaintiff. At the risk of oversimplification, I would summarize these theories as follows:

1. The plaintiff must prove that "but for" the ***negligence*** of the defendant no injury would have occurred. This test should not be applied too rigidly, which means that an inference of causation may be made even in the absence of conclusive, precise, scientific evidence (Snell).
2. Where there are multiple possible causes of an injury, but the plaintiff can prove the defendant's ***negligence*** materially contributed to the injury, liability for the whole loss, subject to claims of contribution, will attach to the defendant (Athey).
3. If the plaintiff can establish that the defendant materially increased the risk of a specific injury, and that specific injury occurs, the court may infer on a sufficient evidentiary basis that the material increase in risk was a contributing cause of the injury such that causation is established (Levitt, Webster). "The evidence is to be applied according to the proof which it was in the power of one side to have produced." (Snell)
4. The House of Lords has held that there may be a reversal in the burden of proof for causation such that if a plaintiff establishes that the defendant created an area of risk and the injury occurred in that area, the defendant must show that the injury had some other cause in order to escape liability (McGhee). This theory has not been applied in Canada and seems to have been restricted in England to toxic exposure cases.

Application to the Facts of the Case at Bar

**169**  Are any of these theories of causation proven on the facts of this case, given the finds of fact made at [paragraph] 156.

"But for" Test

**170**  Can the plaintiffs prove that but for Dr. Purvis' failure to consult with Dr. Thomas no injury to Connor Seatle would have occurred? There is clearly insufficient evidence to conclude on a balance of probabilities that "but for" the absence of an obstetrician, the infant plaintiff would have been delivered sooner and the injury would not have occurred.

"Contribution" Test

**171**  Did Dr. Purvis' failure to consult with Dr. Thomas contribute to the injury suffered by Connor Seatle? The plaintiffs must prove on a balance of probabilities not that the injury would have been avoided, but that the failure to consult, did along with other causes, materially contribute to the injury. This theory of causation does not relieve the plaintiff of the burden of proving an evidentiary link between the breach of duty and the damage. There is no suggestion in this case that there are multiple causes of the infant plaintiff's injuries. Rather, the plaintiffs contend that the injury was caused by Dr. Purvis' failure to consult with Dr. Thomas at an earlier stage of the delivery. I find that there is insufficient evidence to demonstrate that Dr. Purvis' breach of her standard of care materially contributed to the infant's injuries. The plaintiffs did not produce a single expert who would have managed the delivery differently from Dr. Purvis in terms of the decision not to perform a Caesarian, the use of the Mityvac, or the manoeuvres used to deal with the shoulder dystocia. Further, while I accept that if Dr. Thomas had been consulted the result might have been better, there is no evidence that Dr. Thomas, had he been present, would have acted in any way differently from Dr. Purvis in the circumstances. There must be evidence of a causal link between the plaintiff's ***negligence*** and the defendant's injury. For these reasons, it cannot be said that Dr. Purvis' failure to call in Dr. Thomas was a significant or important contribution to the infant plaintiff's injuries. Causation is therefore not established using the material contribution test in this case.

McGhee

**172**  The McGhee causation analysis, even if it were the law in British Columbia, is not applicable to this case. McGhee appears to have applied only to toxic exposure cases.

Inference of Evidence from Material Increase in Risk

**173**  The plaintiffs contend that causation can be established where, as in Levitt and Webster, the defendant's actions materially increased the risk of harm to the plaintiff, even if it is not known whether the harm was an actual result of the breach of the standard of care. They submit that Dr. Purvis' failure to call in Dr. Thomas materially increased the risk of oxygen deprivation to the infant plaintiff because Dr. Thomas may have been able to facilitate the birth faster, or perform another procedure. In Snell Sopinka J. soundly rejected the notion that proof only of the defendant's breach of the standard of care causing a material increase in risk is sufficient to prove causation: (at [paragraph] 26 quoted above.)

**174**  Courts in Ontario and Alberta have rejected finding that a "material increase in the risk of harm" satisfies the material contribution test. (For example, in Robinson v. Sydenham District Hospital Corp., [*[2000] O.J. No. 703*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD91-F30T-B4TC-00000-00&context=); Rhine v. Millan, [*[2000] A.J. No. 367*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-F2MB-S0JJ-00000-00&context=) (Alb. Crt. Q.B.), the Ontario Court of Appeal found that the trial judge was wrong to apply the "material increase in harm" analysis given its express rejection by the Supreme Court of Canada in Snell at [paragraph] 26, excerpted above. In Robinson, the Court nevertheless upheld liability on the broader inference of causation approach discussed in Snell.

**175**  Levitt does not represent a departure from Snell. I believe Levitt is distinguishable from the case at bar. In Levitt, the "material increase in the risk of harm" came from the doctor's prolonged use of steroids in treating a patient, despite clear evidence of the increased incidence of avascular necrosis when steroids are taken for longer than six weeks. The Court concluded that it was reasonable to infer from the evidence that avascular necrosis was caused by the negligent prolonged administration of steroids. Scientific expertise was not available to prove that the steroid actually caused the necrosis in the plaintiff.

**176**  My findings that Dr. Thomas might have been able to deliver the baby faster and the outcome of the delivery might have been better had Dr. Thomas been present constitute an insufficient evidentiary basis on which to infer that his absence caused the oxygen deprivation, absent any testimony from Dr. Thomas, or any other expert that they would have handled the delivery differently.

**177**  The plaintiffs' analysis is akin to arguing that she lost her chance of a better outcome by Dr. Purvis' failure to call Dr. Thomas. But whether the result would have differed is still only speculative because the outcome of the hypothetical consultation with Dr. Thomas is unknown. It was in the plaintiff's power to tender evidence that Dr. Purvis ought not have used the Mityvac, or ought not to have persisted in its use for nine minutes, or that a Caesarian section ought to have been performed at some point in time, or that some other intervention should have been considered. Here, no such evidence was led, and so the outcome of the hypothetical consultation is entirely speculative. To date, the law in Canada or in the United Kingdom does not attach liability to a defendant upon proof only of the loss of a chance of a better outcome (see Athey at p. 37 and Gregg v. Scott, 2005 UKHL 2 at [paragraph] 215).

**178**  For the foregoing reasons, the plaintiffs have not established that the defendants' breach of duty caused the infant plaintiff's damage, and the infant claims against the defendants are therefore dismissed.

Adult Claim

**179**  Ms. Seatle claims damages for the tear of the perineum that occurred at the birth of Connor. Because of the severity of the tear she suffers from fecal incontinence which she plans to have surgically corrected.

**180**  The issue is whether the severe tear was caused by the ***negligence*** of Dr. Purvis. There is no direct evidence about when the tear occurred. Dr. Purvis performed the episiotomy in association with the application of the Mityvac. Then the head was delivered. I infer from the evidence that the frantic manoeuvres performed to deliver the shoulders resulted in the severe tear beyond the episiotomy. Because I have not found that Dr. Thomas would have done anything differently, the plaintiff cannot prove that shoulder dystocia would not have occurred, if Dr. Thomas had been consulted. The tear of the perineum was caused by the efforts to deliver the shoulders and not by the ***negligence*** of Dr. Purvis.

Disposition

**181**  The plaintiffs' claims are dismissed. If the parties are unable to agree as to costs, they may make arrangements through the registry to speak to costs.

GARSON J.

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CORRIGENDUM

Released: November 15, 2005.

INTRODUCTION

[1] This is a corrigendum to Reasons for Judgment released on November 7, 2005.

[2] D.J. Holubitsky should be added as Counsel for the Plaintiffs.

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| [3] | Paragraph [8] should be replaced with the following: |  |

The nurses and hospital remained defendants until the conclusion of the evidence. At that time, the parties agreed that there was no arguable case against the hospital defendants and I dismissed the case against Lions Gate Hospital, P. Ritchie, S. Wilkinson, R. Johnston, Ms. Machon, J. Symans, L. Dobbin, Jane Doe and John Doe (Nurses). The action against Dr. Perry was dismissed by consent. The action did not proceed against the defendants, Dr. Gould, Dr. R. Wishart, Dr. John Doe, Dr. Jane Doe, (Doctors).

CORRIGENDUM

Released: November 25, 2005.

INTRODUCTION

[1] This is a corrigendum to Reasons for Judgment released on November 7, 2005.

[2] S.L. Kovacs should be added as Counsel for the Defendants.

GARSON J.

**End of Document**

[***Slocan Forest Products Ltd. v. Trapper Enterprises Ltd., [2009] B.C.J. No. 1728***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6294-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.M. McEwan J.

Heard: June 2-6, 9-13, 18-20, 23-27, July 24, 25 and 28,

2008.

Judgment: August 28, 2009.

Docket: S026494

Registry: Vancouver

**[2009] B.C.J. No. 1728** | 2009 BCSC 1175

Between Slocan Forest Products Ltd., Plaintiff, and Trapper Enterprises Ltd., Northern Trailer Ltd., Daryl H. Zimmerman, Bernadette M. Rhodes, Dimas Jose Carvalho and Michael Peter Fedechko, Defendants

(135 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Causal connection — Action for damages in *negligence* allowed — Plaintiff hired the defendant company to operate and manage its logging camp — The camp sustained extensive damage from a propane explosion — A front end loader had been parked near a riser that was part of the camp's propane supply — The defendant's employees knew the position in which they parked the loader created the foreseeable hazard it would come into contact with the propane distribution system and break it — A disconnection of propane lines inside the kitchen was not a source of the propane leak.**

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| --- |
| The plaintiff sought damages from Trapper Enterprises Ltd. (Trapper) and Northern Trailer Ltd. (Northern) following a massive propane explosion that leveled its logging camp. The plaintiff had delegated the day to day operation of the camp to Trapper. At the time of the explosion the camp was vacant and Northern was doing some needed renovations to the camp's kitchen facilities. The camp was serviced by a propane tank farm, which had a plastic pipe feeding a vertical steel riser located just outside the kitchen trailer. Trapper's owner and operator parked a loader where its bucket could come in contact with the riser. Trapper took the position that Northern was negligent for not capping the flow of propane at the riser, when disconnecting propane lines inside the kitchen, and that Northern's disconnection of the propane lines in the kitchen was a source of the propane leak. No odour of propane was detected inside the building prior to the explosion. The plaintiff sought approximately $2 million for rebuilding the camp and additional damages, which were settled at $483,850.  HELD: The plaintiff's damages were assessed against Trapper at $1,750,000 plus the $483,850 agreed between the parties.  Trapper's ***negligence*** was the sole cause of the accident. The loader bucket came into contact with the riser, probably due to a loss of hydraulic pressure. The owner and operator of Trapper knew the position in which they parked the loader created the foreseeable hazard it would come into contact with the Christmas tree and break it. Damages were reduced on account of betterment. The new camp would last longer and could be expected to be less expensive to maintain. |

**Counsel**

Counsel for the Plaintiff: R. Shamenski, J.P. Kennedy.

Counsel for the Defendants, Northern Trailer Ltd., Dimas Jose Carvalho and Michael Peter Fedechko: R. Lindsay Q.C., J.J. Kim.

Counsel for the Defendants, Trapper Enterprises Ltd., Daryl H. Zimmerman and Bernadette M. Rhodes: T.P. Matte.

**Reasons for Judgment**

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| --- |
| **T.M. McEWAN J.** |

**I**

**1**  On April 18, 2002, at about 2:20 a.m., a massive propane explosion levelled the "Munro" logging camp, northwest of Mackenzie in the central interior of British Columbia. The camp was owned by the plaintiff and consisted of a number of connected portable buildings and ancillary structures. It accommodated up to 153 workers and had been in continuous use, under various owners, since 1988.

**2**  The day to day operation and management of the camp was delegated to the defendant Trapper Enterprises Ltd. ("Trapper"), pursuant to a year to year contract with the plaintiff for what were called "consulting services".

**3**  At the time of the explosion, the camp was vacant, owing to spring break-up. This provided an opportunity for renovations to be undertaken on the camp's kitchen facilities. There was some concern that this be done, inasmuch as health authorities had imposed a deadline for certain upgrades, and there was an operational need to have the work completed within the few weeks available.

**4**  The camp had only been down a matter of days when the work commenced. It was being performed, on a contract basis, by the defendant, Northern Trailer Ltd. ("Northern Trailer").

**5**  There were seven people in the camp when the explosion occurred. Three were from Trapper, including the defendants Daryl Zimmerman and Bernadette Rhodes. The Northern Trailer personnel included the defendants Dimas Carvalho and Michael Fedechko. No one from the plaintiff was on site.

**6**  The plaintiff claims that the combined activities of the defendants during the renovation caused the loss of the camp, and that in relation to the loss each were negligent and in breach of their contracts with the plaintiff. It seeks recovery of the costs to reinstate the camp -- a sum of roughly $2 million -- as well as judgment against them for additional damages, the quantum of which has been settled at $483,850. It is the position of each corporate defendant that the other, or its employees, were responsible for the loss, and each claims that the ***negligence*** of the plaintiff contributed to the damages alleged.

**II**

**7**  Photographs of the camp taken before the explosion show a series of four long bunkhouses attached at one end to a structure that forms a corridor linking them, and that is also attached to a kitchen/bakery, dining and recreation complex on the other side of the corridor from the accommodation blocks. There are also a number of stand-alone structures.

**8**  The camp was serviced by a propane "tank farm" comprised of nine 1000 US gallon capacity storage tanks located some distance from the main buildings. Propane was supplied by an underground plastic pipe that divided such that one proceeded underground to service the accommodation blocks, and one fed a vertical steel riser located just outside and adjacent to the north east corner of the kitchen trailer.

**9**  This riser, colloquially called a "Christmas tree" further split the propane flow into two systems, a high pressure line that ran through a 3-foot crawlspace under the kitchen/bakery complex and supplied detached trailers to the northwest of the complex, and one that, by means of a regulator, fed a low pressure line that ran through the kitchen/bakery crawlspace and supplied propane to the appliances and furnaces in the kitchen/bakery and dining room complex. These lines were suspended from the underside of the floor of the complex by metal strapping.

**10**  The Northern Trailer renovation contract required the disconnection of a number of propane appliances in the kitchen area so that structural repairs to the floor and walls of the kitchen and the replacement of a walk-in cooler/freezer could take place. The work also required removal of the outside east wall of the kitchen trailer which was right next to the Christmas tree supplying the low pressure line to the appliances that needed to be disconnected.

**11**  Michael Fedechko and Dimas Carvalho from Northern Trailer arrived on April 15 and started work on April 16, 2002. Mr. Carvalho first disconnected a number of the propane appliances using pipe wrenches. He shut off valves at each of the lines leading to each disconnected appliance. He did not, however, cap the lines, which would have been better practice. He did not shut off the system entirely because there were other appliances outside the kitchen area, including two propane fuelled furnaces, that were to continue to operate.

**12**  The two men then began ripping out material that needed to be replaced, removing interior walls between the walk in-cooler and the walk-in freezer, and between the kitchen and the walk-in cooler. They used a sledgehammer to remove the studs in the walls and a chainsaw to cut out blocks of frozen insulation. Some of this material hit the floor hard enough to cause the kitchen trailer to vibrate. They also took off the eastern wall of the kitchen. At the end of the day they covered the area where the wall had been with a plastic sheet.

**13**  These activities generated a fair amount of debris. Mr. Carvalho asked Mr. Zimmerman if he could help by using a 980 Cat front end loader that belonged to Slocan and that Trapper used in and about the camp for snow and garbage removal and occasional road work. Mr. Zimmerman asked Trapper's owner, Arden Smith, and he authorized him to assist. Trapper's "consulting services" contract with the plaintiff was, despite its length and apparent complexity, an arrangement that included a fair amount of latitude to simply do what seemed appropriate in the operation of the camp. Its terms were explicitly subject to a "general condition" that "All of the above [terms of the contract] are intended as an opening guideline. Flexibility on the part of the Consultant and Company is required."

**14**  The relationship was familiar and relatively casual. For example, Mr. Zimmerman had some carpentry skills and had been asked to supply cabinets to the new kitchen, supplemental to what Northern Trailer was doing. No specific terms were negotiated and it was simply expected that an account would be submitted by Trapper and paid by Slocan. I do not think there is any question that Mr. Smith's instruction to Mr. Zimmerman was within the authority he ordinarily exercised under his contract with the plaintiff, notwithstanding Mr. Anderson's suggestion that he had not given permission to use the loader in this specific way, and that this was not explicitly part of the contractual arrangement between the plaintiff and Trapper. It was certainly part of Mr. Zimmerman's job to haul the waste generated by the camp when it was operating, and Northern Trailer's contract did not specify that it was responsible for debris.

**15**  Mr. Zimmerman accordingly removed a number of loads of debris to the camp dump over the course of the day April 17, 2002. This was accomplished by moving the loader into a sort of alcove behind the open kitchen wall close enough, and with the bucket elevated enough, that the workers simply had to toss the waste material into the bucket. At various times Mr. Carvalho or Mr. Fedechko guided the loader into the alcove area. At about 5:00 p.m., Mr. Zimmerman manoeuvred the loader into place under the guidance of Mr. Smith, who says he may have directed Mr. Zimmerman to stop only a foot or so from the wall, or very close to the Christmas tree, with the bucket elevated and tilted back. At the time Mr. Zimmerman may have anticipated another load. It was not unusual for work to continue later than 5:00 p.m. and there was some suggestion that a televised hockey game may have had something to do with the decision of the Northern Trailer crew to quit work early on that particular day.

**16**  Placing the loader in this proximity to the Christmas tree was unprecedented. In ordinary circumstances the alcove contained boxes of firefighting equipment that served to protect the Christmas tree, and there was ordinarily no traffic in that area. The Christmas tree was located there *because* it was out of the way.

**17**  Both Mr. Zimmerman and Mr. Smith acknowledged that the loader should never have been left with the bucket elevated because of the possibility that a loss of hydraulic pressure might make it drop. They knew that it was contrary to the *Occupational Health and Safety Regulation,* [*B.C. Reg. 296/97, section 16.37*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RBY1-FC1F-M0TT-00000-00&context=) of which reads as follows:

16.37 (1) An operator must not leave unattended any elevated load, part extension or machine unless it has been immobilized and secured against inadvertent movement.

**18**  Mr. Smith said that he had in the past reminded Mr. Zimmerman not to leave the bucket elevated, even briefly. Mr. Zimmerman said it was his normal practice to park with the bucket on the ground and that he had never before left the loader with its bucket elevated overnight. He acknowledged that there was a risk that there might be a loss of hydraulic pressure which could cause the bucket to drift downward.

**19**  Mr. Zimmerman's evidence was, however, that he had performed the routine maintenance on the loader as required, and that, although it was old, it was in good condition. He says he did not notice any drift or downward movement on this job, or at any other time.

**20**  Although Mr. Zimmerman said he felt a minimum of three feet should have been left between the bucket and the Christmas tree, he never checked the distance before he left the loader that evening.

**III**

**21**  The propane supplied to the camp normally contained an odorant, "ethyl mercaptan", which gives its vapour a distinct, unpleasant smell. This is a safety measure intended to alert anyone near an escape of propane that a leak has occurred well before it reaches a concentration dangerous enough to cause an explosion.

**22**  During the day no one reported smelling "propane" (that is, the odorant) including Mr. Carvalho and Mr. Fedechko. In the afternoon between 5:00 and 5:30, Bernadette Rhodes, the camp cook, passed through the kitchen carrying food to the attached dining room area where dinner was served. She did not report any smell. Neither did Mr. Penner or Mr. Delaney, workers who had arrived about 8:00 in the evening and had briefly entered the kitchen and dining room area. Lastly, Mr. Smith says he walked through the kitchen trailer from the dining room to the bakery and back at around 11:30 p.m. without detecting any smell of propane. He also says he walked past the loader parked in the alcove with its bucket elevated and thought nothing of it.

**23**  The explosion in the early hours of the next morning was vividly described by the occupants of the camp. Some of them were tossed from their beds by the force. When they got out, they observed the kitchen/bakery and dining room area to be on fire. Mr. Fedechko said the bunkhouse looked like a bomb had gone off in it. The occupants noted debris strewn about the site.

**24**  There was no attempt to suppress the fire, which was clearly out of control, and the occupants left the camp in vehicles very shortly afterwards. The propane from the tank farm continued to flow. It was not shut off until the following afternoon.

**25**  There is no credible evidence that anything pre-existing the activities on April 16th and 17th had anything to do with the explosion. The propane system had functioned uneventfully for 14 years.

**26**  Trapper submits that a deterioration in the condition of the lines might have contributed to what it says was the probable cause of the explosion, a leak introduced to the system by the disturbance caused either directly by Mr. Carvalho, in disconnecting the appliances, or indirectly as a result of the demolition work that was done.

**27**  The other possibility relates to the position of the loader. In the aftermath of the explosion the Christmas tree was broken in two places, the regulator had melted into an unrecognizable lump, and the metal stem of the riser had become a torch of high pressure propane that had apparently burned from the time of the explosion until Bradley Mondor of the BC Safety Authority turned it off about 1:30 pm. Whether the leak was caused when the loader bucket came in contact with the Christmas tree, causing propane to migrate into the building, or whether, in detaching the appliances in the kitchen area, the Northern Trailer employees caused a leak or leaks in the lines within the building, is the primary issue in this case, and the one around which a number of others revolve.

**IV**

**28**  As might be expected, Trapper provides the most detailed articulation of the theory that the explosion was caused by a leak in the propane system within the building or within the footprint of the kitchen complex itself.

**29**  The explosion caused massive damage and the remaining physical evidence is not definitive. The observations of the witnesses and the location of the debris establish that the explosion occurred within the kitchen/bakery dining room complex. Examination of the gas lines after the fire showed leaks at a majority of the joints but these were related to fire damage, and no particular breach or fissure could be identified as a probable source of leaking before the explosion. The likely ignition source was one of the pilot lights in one of the appliances or furnaces that had not been disconnected, although an electrical source could not be entirely ruled out. This would seem, on first impression to suggest a leak somewhere within the building itself, related to the work that had been done by Northern Trailer.

**30**  There are difficulties with this, however. Such a leak would have been ongoing for over a day if it were caused when Mr. Carvalho disconnected the kitchen appliances, and for several hours if it had occurred as a result of the vibrations caused by the demolition activities. There is no persuasive evidence to suggest that such activity could cause a form of weakening that would result in a significant leak to form sometime in the middle of the night. A leak of any kind should have resulted in a detectable smell of propane well before an explosive concentration of propane had accumulated.

**31**  Trapper accounts for the fact that there is no report of a smell in a number of ways:

1. The propane, being heavier than air, stayed close to the floor;
2. The kitchen was well ventilated while the east wall was removed, and propane would not have accumulated significantly until late in the day when the barrier was erected;
3. The leak was only slight or did not occur until the disturbances that occurred late in the day, and the accumulation of propane while people were visiting the kitchen area was insufficient to notice;
4. The persons visiting the kitchen lacked the ability, for various reasons, to detect the smell. Thus, Ms. Rhodes may not have noticed because she was carrying food which masked the smell, Penner and Delaney and Carvalho may not have entered very far into the kitchen or for very long, and Mr. Smith was smoking and says he has a poor sense of smell;
5. The odorant itself failed or had faded.

**32**  Trapper also posits that a combination of these factors may also have come into play.

**33**  There is evidence that is not consonant with these suggestions from Trapper's own witnesses, however. When Mr. Zimmerman came back to the camp later in the morning of April 18th, he noticed that there was a fire still burning in front of the loader and he says that he went over to the propane tanks to turn the valve off. He said he backed off because "I smelled propane".

**34**  Mr. Smith noticed the same thing. He described how Mr. Zimmerman "attempted to get at the shut-off valve by digging through the snow ... and then he smelled propane, and so I went over there and leaned down and you could smell propane, so we just left it burning".

**35**  Despite some speculative evidence about propane "fade", this evidence tends strongly to establish that the odorant was present in the propane at the camp. The evidence was that ethyl mercaptan does not adhere to the propane into which it is mixed but is released into the atmosphere when propane escapes and is noticeable at relatively low volumes. This renders the theory of a leak inside the kitchen area less likely, or suggests a leak of so little volume that it becomes difficult to see how, in the time that elapsed, the concentration of propane could have reached a level sufficient to cause the massive explosion that followed.

**V**

**36**  The fact that no smell of odorant was detected in the hours before the explosion was a significant factor in persuading some of the opinion witnesses that an internal leak was not entirely plausible. Wayne Brox, an engineer called by the plaintiff, made the following observations:

While it is possible that the propane could have escaped from one of the uncapped lines at a disconnected appliance, it is reasonable to expect that such a condition would have been detected when the kitchen was last visited three hours prior to the explosion. Propane which in its natural state is odourless is for safety reasons intentionally odourized in order to make it detectable. We understand ... that Mr. Smith last visited the kitchen at approximately 11:20 pm. One would expect that if the source of the propane leak was in the kitchen trailer that it would have reached a detectable level by that time. The absence of a detectable leak in the kitchen supports the conclusion that the source of the leak was outside the kitchen.

**37**  Peter Senez, an engineer called by Northern Trailer, noted that the fact that, and the manner in which the appliances had been disconnected some 40 hours before, with no odour having been detected in the intervening period, tended against a theory that the leak occurred in the kitchen area.

**38**  Lynn Johnson, an engineer called by Trapper, does not appear to have considered the absence of any smell of propane of particular note, perhaps because the facts he assumed for the purposes of his report appear to have understated the activity in and about the kitchen that night. The facts he assumed were that, "The last workers had completed the work in late afternoon (4:30 - 5:00) but a person had 'walked through' the kitchen on a late night errand" and had not noticed any smell of propane.

**39**  All three of these opinion witnesses had access to the same information and access to the testing that was done on the propane system. This showed that there were numerous leaks in the fittings following the explosion that all agree were the result of the fire and not the cause of it. Mr. Senez noted that no particular valve or line showed any particular area of damage consistent with a leak and flash back from an ignition source to the piping system. Mr. Brox suggested that it would be impossible to tell whether any of the leaks were the cause rather than an effect of an explosion and fire, given the condition of the lines after the fire, and Mr. Johnson suggested it was not possible to preclude a leak in the line within the building itself, although the exact location of the leak was not determinable given the post-event damage to the system.

**40**  It does appear that any such leak would have to have been as a result of either direct interference with the joints caused by the force applied to disconnect the appliances, or by the indirect application of force during the demolition. While the disconnected lines were not capped by Mr. Carvalho, the surviving valves to the disconnected lines were all in the closed position.

**41**  Apart from the direct application of force in physically disconnecting the lines, Trapper suggests that the other activities of the Northern Trailer crew may have indirectly jarred the lines, causing a leak. This relates to the fact that the renovation work included dropping loads of frozen insulation estimated at up to 240 lbs on the floor from some height onto the floor. Northern Trailer called Robert Mills, a structural engineer who testified that loads of 30 lbs or so would have no effect on the propane pipes below the kitchen floor, but was not quite as definitive respecting more significant weights. The kitchen complex had for many years borne loads relating to the traffic generated by up to 153 workers in the camp, however, and the lines were strapped, not fixed, below the floor, so that any loading was significantly absorbed by the strapping. This possible mechanism, again, does not account for the fact that no smell of propane was detected in the aftermath of this activity.

**42**  Mr. Johnson parted company with Mr. Brox and Mr. Senez on the question of whether an external cause was probable. His reasoning was as follows:

When considering the possibility of a propane leak outside the cookhouse and subsequent propane entry into the crawlspace, it is necessary to assess the physical circumstances. The possible source of leakage outside the cookhouse may be the fractured close nipple at the "Tree" (assumption -- this requires the bucket to settle, contact the assembly, and fracture the fitting). The fractured fitting would release a significant and steady volume of propane. The terrain at the site and outside the cookhouse loading bay slopes away from the cookhouse. Although there would be some snow banks present, the propane would tend to "roll away". The build-up of external propane would potentially allow the entry into the crawlspace through small holes in the skirting. However the entire crawlspace would again be required to "fill up" before the propane would migrate up into the cookhouse to cause the explosion. There would be no other source of ignition (assumption -- outside the cookhouse). If the fire/explosion had initiated in the crawlspace after propane migration from outside the building and around the entire camp it would have resulted in an astronomical explosion which potentially would have levelled every building in the camp (including the three which remained standing after the fire at the time of the Matec inspection).

**43**  The evidence is, however, that there was a significant opening in the skirting surrounding the crawlspace near the Christmas tree. Mr. Smith described it as being about two feet square. Mr. Zimmerman said that there was always an opening there, although a piece of plywood was propped against it to keep "a lot of cold air from blowing in". He said that was the way it probably was on April 17, 2002.

**44**  Mr. Johnson's suggestion that there would have been an "astronomical" explosion if the propane had come from an outside source was clearly dependant on his view that the crawlspace was relatively "sealed". Even so, Mr. Senez, in a more detailed analysis of explosion theory suggests that an outdoor (i.e. unconfined) vapour cloud explosion would not build up a level of destructive pressure posited by Mr. Johnson. Mr. Johnson conceded that his conclusion that the propane could not have migrated might be incorrect if the skirting had an opening in it (as both Mr. Smith and Mr. Zimmerman suggested it did). This would also, of course, have an effect on the relative distribution by volume of the propane inside and outside the kitchen/bakery dining room area, and the premise of Mr. Johnson's opinion.

**45**  Mr. Johnson lastly suggested that the terrain sloped away from the buildings on the side where the Christmas tree was located. This appears to have come from Mr. Anderson, whose evidence was rather equivocal. It was not persuasively demonstrated to be relevant if the context included an opening in the alcove area itself.

**46**  The relative probability of ignition due to an internal, rather than an external cause (that is, a leak at the Christmas tree) also requires a consideration of the damage at the Christmas tree itself. There were two breaks at the Christmas tree, one at a point just below the regulator, and one on the standing pipe upstream of the junction splitting the regulator (the low pressure line) from the high pressure line.

**47**  The characteristics of each break were the subject of considerable debate among the opinion witnesses, who disagreed on the inferences to be drawn from the damage observed. The relevance of which break came first, from the plaintiff's perspective, relates to its contention that Northern Trailer ought to have disconnected the flow of propane to the entire low pressure system and that had it done so, a break of the Christmas tree at Break "B" would not have given rise to a propane escape and to the explosion which destroyed the camp, and incidentally caused Break "A".

**48**  In answer to this, Northern Trailer called Robert Charlton, an engineer whose opinion was that Break "A" was caused by the loader and came first. If that were the case shutting off the valve to the low pressure system would not have made any difference. Northern Trailer's position is not dependent on acceptance of Mr. Charlton's opinion, however. Its primary submission on this point is that its duty to the plaintiff did not extend to such a precaution, and that the order of Break "A" and Break "B" do not fundamentally matter to its case.

**49**  Trapper's position is that both breaks are explicable as *consequences* of the explosion and not as causes of it.

**VI**

**50**  When Messrs. Smith, Zimmerman, Carvalho, Fedechko and later Eric Anderson and others went back to the scene in the morning of April 18, 2002, they observed that the loader was still burning. Bradley Mondor noticed that there was a "whoosh" of gas near the loader, and he went to the tank farm and shut the propane off at the source. All that was left of the Christmas tree was a standing pipe with a torch of propane issuing from it. The regulator had melted. The opinion witnesses differ significantly on the inferences that they say should be drawn from these remains.

**51**  Wayne Brox, compared Break "A" and "B" and suggested that Break "A" exhibited the characteristics of a "tensile over-load type failure ... generated due to a bending-type mode of failure." He described it as consistent with a bending failure in which the top of the Christmas tree was bent away from the kitchen trailer. He called it a high strain rate fracture due to the limited deformation of the sheared surface at the break. He said this was consistent with a break that was a result of a pressure wave displacing material outward from the explosion and coming into contact with the Christmas tree. He considered the displacement of skirting or other material in the aftermath to be a mechanism that could account for this failure. His view was that Break "A" was not the source of the propane leak that caused the explosion.

**52**  Mr. Brox described Break "B" as exhibiting a noticeable degree of ductility. He said this was consistent with a slow strain rate of failure, indicative of pressure applied over time. He said this suggests that the regulator must have been intact when this break occurred. Because the regulator melted in the fire, he opined that Break "B" must have occurred before the fire. This was consistent with Break "B" preceding Break "A".

**53**  I have already alluded to the conclusion of Robert Charlton, an engineer called by Northern Trailer. He stuck to his view that Break "A" preceded Break "B" despite the fact that under cross-examination it appeared that his theory did not account for the physical evidence.

**54**  Peter Senez, another engineer called by Northern Trailer, differed from Mr. Brox in concluding that Break "A" was caused by the same mechanism as Break "B", because he thought the pressure wave emanated from the kitchen area and not from the crawlspace below, which would have meant that the pressure wave was above the location of Break "A". The distinction turns essentially on what one makes of evidence that the skirting was displaced by the explosion.

**55**  Mr. Johnson, Trapper's opinion witness, said that the fractures on the Christmas tree were both caused by the bucket of the loader coming into contact with the Christmas tree, although he also conceded in cross-examination that Break "A" may have been a result of the explosion. The principal difference between Trapper and the other parties respecting the mechanics of the damage to the Christmas tree, is not a question of whether the loader caused the damage, but of what caused the loader bucket to come in contact with the Christmas tree.

**56**  The theory posited by the plaintiff, and essentially endorsed by Northern Trailer, is that the bucket drifted downward as it lost hydraulic pressure overnight until it came in contact with the Christmas tree. The most detailed description of this possible mechanism is found in the April 4, 2008 Report of Mr. Brox:

The heat damage patterns to the right vertical side of the bucket (see Figure 23) on the front-end loader and to the bucket's push-rods (see Figure 26) supports the premise that there was a leak in the bucket's hydraulic system that allowed the bucket's push-rods to progressively extend (creep) and the bucket to tilt forward (down). The bucket exhibited a pronounced heat damage pattern limited to a discrete area on the right vertical side of the bucket. The pattern was indicative of exposure to a relatively localized but intense heat source which could only be attributed to a burning jet of propane escaping from a low elevation at the Christmas Tree. There was no such pattern to the front lip or underside of the bucket indicates the bucket must have tilted forward (down) prior to the development of a burning jet of propane escaping at the Christmas Tree. Since there is no reasonable explanation for a burning jet of propane escaping the Christmas Tree until after the explosion, the tilting down of the bucket must have pre-existed the explosion.

The fire damage patterns to the bucket's push-rods also support the conclusion that the bucket tilted forward (down). In this loader, extension of the push-rods tilt the bucket forward (down) and contraction tilts the bucket backward (up). The longer the push-rods are extended the further the bucket is tilted forward (down) and vice versa. When the loader was left at the end of the working day the bucket was left UP and titled backward (up) to receive debris, this position corresponds to a relatively short push-rod extension. When examined post loss, the bucket was found lying on the ground with more forward tilt (rotation) than when originally parked and with a corresponding increase in push-rod extension. When the bucket's push-rods were extended and photographed after the fire, they revealed a fire damage pattern characteristic of the push-rods having been extended to an even greater length than was consistent with the bucket's resting position found post loss. This indicates the bucket's push-rods had extended to a position with significantly more downward tilt than corresponded with its resting position post loss.

Break B is consistent with the bucket having contacted the Christmas Tree. Depending upon the precise location of the bucket relative to the Christmas Tree, the bucket may have tilted forward and forced the top of the regulator out and away from the kitchen trailer, or it may have contacted the Christmas Tree somewhere slightly below the regulator and Break B.

Based upon the observed orientation of the portion of the Christmas Tree just below the Break B, which was deflected inward toward the kitchen trailer, it is more likely that the bucket contacted the Christmas Tree somewhere below Break B. Such contact would not necessarily leave a witness mark post loss, particularly if it contacted the badly fire damaged isolation valve immediately upstream of the melted regulator.

The most probable explanation for the propane escape is that a leak in the bucket's hydraulics allowed the bucket to progressively tilt forward (creep) and ultimately contact the Christmas Tree below Break B. This would have deflected the Christmas Tree inward (toward the kitchen trailer) and the regulator would have contacted the trailer or skirting generating a bending moment at Break B. As the bucket crept further forward (down) this probably initiated a crack at this location allowing propane to escape. This crack would have progressively grown and ultimately segmented the gas line at this location. Propane would have escaped once the crack initiated and would have continued to escape until the explosion occurred causing Break A and ignition of the propane from that location.

A crack in a 10 psi propane line would have resulted in a large leak. Some of this propane migrated into the crawl space and the bakery, kitchen and dining area either via the open manway in the crawl space or through the opening at the end of the kitchen trailer, or perhaps some combination of the two.

While the necessary bending direction required to cause both Break A and Break B could be satisfied by the bucket contacting the top of the regulator, only Break B is consistent with a low strain rate failure (bucket contact) while only Break A is consistent with a high strain rate failure (explosion). In addition, once Break B was initiated any bending moment transmitted through the piping to the location at Break A would have been interrupted. So the bucket contact with the Christmas tree can only explain a single break and that is Break B.

**57**  Mr. Brox explained how a pilot light could be a source of ignition notwithstanding the severance of the supply of propane at the site of the broken Christmas tree:

A propane explosion such as this requires a competent ignition source. Unfortunately, there was no surviving physical evidence with which to conclusively determine the source of ignition. However, ignition under these conditions it is most commonly caused by either a spark or flame. Electrical energy released in the form of a spark can be a competent ignition source. The most common sources of sparks are the opening and closing of switch contacts, brush contacts in electric motors, and static electricity.

While it is possible a spark may have ignited the propane, there was no reason for electrical appliances to have been manually switched at the time. The compressor motors in the refrigeration equipment will cycle on and off automatically in order to maintain the preselected temperature. It is possible a spark occurred during one of these cycles and ignited the propane.

Another possible source of ignition is a flame. The only known flames in the area were those associated with the standing pilot lights in those propane appliances that remained connected to the propane system and which were operative. Of the five connected appliances, four had standing pilot lights but one of these was sealed, so only three drew combustion air from inside the bakery, kitchen and dining room area. These three appliances were: the up-flow furnace in the dining area, the convection oven, and the make-up air furnace in the bakery. The pilot lights in any one of these three appliances would have been a competent ignition source.

The flow of propane through the regulator and to the pilot lights would be expected to continue as the crack propagated. However, once the propane line at Break B was completely severed, there would have been no more gas supplied to any of these appliances. The pilot lights, which do not consume much gas, would have remained lit until the gas line pressure downstream of the regulator (Break B) diminished below the minimum service pressure required for the gas control valve at each appliance to remain open. The propane pressure downstream of the regulator would not diminish to zero and pilot lights would not extinguish immediately upon completion of the break. This is because the regulator is designed to prevent backflow except in the event of an overpressure condition in which case it would vent. So under these conditions the pilot lights would simply continue to remain lit until there was insufficient pressure in the line to maintain them.

It is unknown exactly how long that would take as there is quite a length of gas pipe and the pilot lights require very little gas, but it might be as long as a few minutes.

While source of ignition may not be conclusively determinable, what is clear is that it was ignited and most likely by either a spark or a flame. [emphasis added]

**58**  Trapper's theory is that the explosion originated in a leak in the kitchen area both above and below the kitchen floor expelling material including the skirting surrounding the crawlspace. The immediate observations of Messrs. Smith, Zimmerman, Carvalho and Ms. Rhodes, Trapper says, are all suggestive of fire in the western or north western area of the complex, but not specifically near the loader. They say this indicated a "flashback" fire to the source of the leak in the kitchen rather than at the loader, even though the damage to the piping gave no indication that this had happened.

**59**  Trapper posits that with the collapse of much of the complex following the explosion, debris fell on the loader such that, for a time, the proximity of the loader to the Christmas tree actually protected it. Trapper posits that when fire burned the material on top of the loader it may have shifted forward causing the bucket to come in contact with the Christmas tree. The loader itself would then have begun to burn. The observations of Mr. Smith, Mr. Zimmerman and Ms. Rhodes that the loader bucket appeared to be elevated when they first arrived on the scene is accounted for in this theory by tire failure due to fire some time after 9:00 a.m., causing the hydraulic system to suddenly fail, causing Break "A". This would have caused a fire at that point which accounts for the scorching on the inside of the loader bucket. Because the loader was the last thing burning, Trapper suggests it drew the attention of those who were at the scene erroneously to the loader and the broken Christmas tree as the likely source of the explosion and fire.

**60**  Mr. Johnson is the only opinion witness whose evidence supports this theory. He placed considerable reliance on the evidence of those who said the bucket appeared to be elevated when they returned to the site. He agreed on cross examination that contact between the bucket and the Christmas tree was more likely due to the bucket tilting forward than to a loss of elevation. The eyewitness accounts do not address whether the bucket was in the load or unload position. Nor do they account for whether the bucket was resting on debris at the time of their observations. It was apparent later that some debris had burned underneath.

**61**  Mr. Johnson's evidence respecting the firemarks on the tilt rods was shown to be incorrect in that the photographs he used depicted the lift rods. Trapper concedes that this was so, but suggests that this did not affect the rest of his opinion.

**62**  The differences among the opinion witnesses, which were elaborated in evidence in far more detail than I have described, illustrate the difficulties posed in attempting to reconstruct massively destructive events involving complex variables. At the bottom of all of the analysis is one obvious fact: the loader was parked in a position where it came in contact with the Christmas tree and broke it. This was a consequence that Mr. Smith and Mr. Zimmerman knew to be a foreseeable hazard of leaving it near the Christmas tree with the bucket elevated. This hazard is so clearly associated with hydraulic equipment that it is the subject of an explicit Workers Compensation Regulation.

**63**  Mr. Zimmerman said he had never previously left the loader with the bucket elevated overnight. Quite apart from the expert evidence, it would be remarkable coincidence that the very night this happened is also the night latent weaknesses in a system that had functioned uneventfully for 14 years would, because of the "disturbance" caused by disconnecting a number of appliances and/or dropping weight on the floor (at most equivalent to a large man falling off a stepladder) cause a leak in the propane distribution system.

**64**  Each of the scenarios posited by Trapper is unlikely. Northern Trailer admits that Mr. Carvalho should have capped the lines when he disconnected the appliances. Barry Cavens, who was qualified to give opinion evidence on B.C. Propane standards and safety standards for gas fitters, said that the work was a major kitchen renovation, and that in his view, it would require a permit which would require a person who was registered as a gas contractor. He further opined that the disconnection of the appliances on this job fit within his understanding of "altering" or "alteration" as those terms are used in the *Gas Safety Act* and the *Gas Safety Regulation*, and that therefore a qualified person should have done the work. There is no dispute that Mr. Carvalho did not have such qualifications and that no permit was obtained.

**65**  The plaintiff's witness, Mr. Anderson was emphatic that he insisted that the work be done by qualified people, and Mr. Zimmerman recalls asking Mr. Carvalho about whether he had the "tickets."

**66**  These conversations seem somewhat at odds with the otherwise casual nature of the relationships involved. The contract with Northern Trailer stipulates only that "the contractor has the Company's permission to subcontract skilled tradesman phases of the work". This suggests a degree of reliance on Northern Trailer's judgment that does not correspond with Mr. Anderson's presently firmer recollections. If he were insistent about proper trades being strictly employed it would not have been difficult to include such a stipulation in the Agreement. The tenor of the actual document is not that the plaintiff was insisting but that Northern Trapper had permission to subcontract where that was considered necessary.

**67**  Mr. Cavens' opinion was also not the only word on the subject of qualifications. Northern Trailer obtained an opinion from David Stainrod, a professional engineer who was qualified to give opinion evidence respecting propane installations. It was his view that:

... a deletion or addition to the actual gas piping system requires a permit. To remove a propane appliance a person would be required to simply close the 1/4 turn appliance shut-off valve and disconnect the appliance connector from the outlet of the gas shut-off valve. The propane piping system ends at the appliance shut-off valve. A nipple and cap or plug must be installed in the outlet of the appliance gas valve.

When one examines the scope of work agreed to between Northern Trailer Ltd. and Slocan Forest Products, with respect to the actual work related to the propane system, the only "alteration" to the propane system is the relocation of the gas lines in the water heater area. The work to be performed in the kitchen area, cleaning the propane piping and appliances, would be considered routine maintenance.

The simple task of disconnection and removal of the propane appliances is not an alteration to a gas piping system.

**68**  He continued:

Based on my review of the British Columbia Gas Safety Act and Regulations, and the way the particular task of removing appliances is handled in other jurisdictions, I disagree with Mr. Cavens opinion that in British Columbia "*a gas fitter's work would include disconnecting propane gas appliances".*

The British Columbia Gas Safety Act and Regulations are very specific in that a person must be the holder of a licence to *"install or alter"* a gas system. One can only conclude that disconnecting and removing an appliance in British Columbia does not require a person to be the holder of a license to do so.

A person can also work under the constant supervision of a license holder and would therefore not be required to hold a license.

**69**  I think that, to some extent, the question of whether disconnecting appliances is work requiring a pipe fitter depends on circumstances. As part of a seamless job altering a gas system, disconnection would just be part of what needed to be done and hence, part of the alteration. Where, however, disconnection, as such, is required for other purposes -- such as getting on with a different kind of work in a kitchen renovation -- it would simply be interrupting the system using available valves, and not an alteration. I am of the view that, given the nature of the Northern Trailer job and the fact that to the point the work had progressed, it was incidental to other purposes, Mr. Carvalho was simply detaching appliances from, and not altering, an existing system such as to give rise to a statutory breach, on the basis that he was not qualified to do that work, or on the basis that a permit was required.

**70**  There was later work planned in the renovation which would involve moving some lines, and which would clearly require a qualified person to do the work. The evidence is that such people would have done that aspect of the work.

**71**  As I have said, Northern Trailer acknowledges that Mr. Carvalho could have done a more complete job of disconnecting the lines. The question of whether there was a direct causal relationship between the manner in which Mr. Carvalho disconnected the lines and the escape of propane cannot, however, be answered affirmatively. There is no evidence that he did not effectively -- if not entirely properly -- shut off the gas propane lines to the disconnected appliances. The appliances were removed a day and half before the explosion. No odorant was detected. The isolation valves found after the fire were all in the closed position. Mr. Senez observed that an escape would have required two consecutive valves to leak.

**72**  The question of whether odorant was present is, in my view, answered by the fact that both Mr. Zimmerman and Mr. Smith detected it at the tank farm several hours after the explosion. The possibility that those in and about the kitchen in the hours after the disconnection did not detect odorant becomes less and less plausible as the number of explanations required multiples (i.e. masking by food odours; poor sense of smell; ventilation). In normal use the odorant is readily detectable when there is an escape. Odorant was present in the supply from the tank farm. The possibility of odorant fade, raised by Trapper, was never plausibly tied to the physical circumstances in the case, such that it could be regarded as more than speculative.

**73**  The question of whether the disturbance of the lines by the direct force applied by Mr. Carvalho in disconnecting them caused a leak -- as opposed to his failure to cap the lines -- also cannot be answered affirmatively for essentially the same reasons.

**74**  This leaves the question of whether the indirect disturbances associated with the renovation activities caused a leak or leaks. The fact that no odorant was detected is, at first impression, of somewhat less consequences than it is in the case of the earlier disconnection activities, inasmuch as there may have been as few as nine hours, several of which passed while people were elsewhere in the camp, during which an odour might have been noticed. The flip side of this is that the leak would have had to be considerable to fill the kitchen/crawlspace to the extent necessary to cause the explosion that occurred.

**75**  Fundamentally, there is no reason to suspect that the system was particularly fragile or vulnerable. It had served uneventfully for a long time. It was suspended under the floor by strapping that reduced the transfer of energy to the line from anything dropped on the floor. There is no credible case for anything more than an articulable possibility that these activities had anything to do with the explosion. The weight of the evidence is quite against it.

**76**  Trapper's case that Northern Trailer's direct or indirect activities caused the leak requires a chain of reasoning that resembles dividing fractions, with the probabilities diminishing as the contingencies multiply. Its theory would render the fact that the bucket of the loader struck the Christmas tree -- an irrefutable cause of a direct propane leak -- merely coincidental. The argument is more ingenious than persuasive, and while it accounts for a way in which the explosion might have occurred, it does not meet the much stronger case that the manner in which the loader was parked caused a leak at the Christmas tree. I am not persuaded that the chain of causation included anything arising out of the disconnection or demolition aspects of Northern Trailer's activities.

**VII**

**77**  This brings matters around to the question -- mentioned earlier -- of whether the *failure* or *omission* of Northern Trailer or its employees to do anything was a factor contributing to what happened. The strongest articulation of this theory of liability is found on the evidence of Mr. Cavens. His opinion included the following observations:

Consider if any of the 3 manual valves at the ChristmasTree could be shut off and capped or plugged for all or part of the renovation project.

One option would be to simply shut off the Riser Valve and disconnect the downstream piping and plug or cap the Riser Valve to prevent accidental operation if propane gas was not required in the kitchen and any other trailers being supplied by this valve during the construction project. This would eliminate the potential for an accidental release of propane gas either at the Christmas Tree, within the crawl space, or in the space above the floor.

A second opinion would be to shut off the High Pressure Shut Off Valve so that propane would not be available to the 10 psig pipe that ran through the kitchen/bakery complex crawl space to serve trailers that were northwest of the kitchen/bakery complex. A third option would be to shut off the Low Pressure Shut Off Valve on the inlet side of the pressure regulator so that 11" we gas would not be available in the piping supplying appliances in the kitchen/bakery complex. This option eliminates the potential for leakage from the regulator relief valve.

Determine if shutting off of the propane gas to the piping supplying the furnaces would require the use of portable electric space heaters or propane construction heaters.

If weather or operating conditions did not permit shutting off the propane gas at the Riser, he would be required to:

1. Provide additional protection for the piping and equipment during the construction work, and
2. Extend the pressure regulator vent away from building openings.

Practically speaking, after considering the above items, a gas fitter would very likely have shut off the Riser Valve at the Christmas Tree and plugged or capped that valve. Alternately, he would have removed the Riser Valve and capped the Riser pipe itself. The process of disconnecting the outlet piping in this manner would have released any propane gas from the piping in the crawl space or within the kitchen, dining, and bakery trailers thereby ensuring that there was no propane gas in the piping should it be accidentally damaged during the course of the renovation work.

With the Riser Valve shut off and plugged or capped, or with the Riser Valve removed and the Riser capped, no propane gas would be available to the pressure regulator or to any piping in the crawl space or within the kitchen, dining, and bakery trailers. That action ensures that there could be no release of propane gas from the regulator vent and that all pilot lights in the kitchen, dining and bakery trailers would be extinguished or eliminated as potential sources of ignition.

Shutting off the propane gas at the Riser Valve, or removing the Riser Valve and capping the Riser, would have eliminated the need to take alternative precautions for protection of the piping or extension of the regulator vent to provide an equivalent level of safety.

In my opinion, as gas fitter should have shut off the Riser Valve and plugged or capped it unless he was confident that substantial additional protection would be installed for the Christmas Tree and that he was instructed to extend the regulator vent clear of any permanent or temporary openings into the building. Otherwise, he would be leaving the piping in a condition contrary to the Code and unsafe thereby placing his gas fitter ticket at risk.

**78**  This essentially addresses two different considerations amplified in the earlier part of Mr. Cavens' evidence and in his report. The first is that Mr. Cavens suggests that were a properly qualified gas fitter on site he would "likely" have gone beyond capping the lines to the disconnected appliances and shut off the supply of propane below the regulator. This would have completely shut off all the propane to the kitchen/dining and bakery trailers and disabled the furnaces and appliances that remained in use for heating and cooking during the renovation. Mr. Cavens also suggests that a competent gas fitter would have taken responsibility for the degree of protection there was around the riser, and either seen that it was better protected or that the propane was off at the riser pipe itself.

**79**  On this subject, Mr. Stainrod, again, offers a contrasting view, which addresses the practicality of Mr. Cavens' suggestions given the situation at the site:

Section 40 of the Gas Safety Regulation refers to a person who is "*installing or altering"* a gas system. As previously stated the disconnecting and removal of the appliances was not installing or altering the propane system and as such Section 40 is not a relevant section to quote in this case.

The venting of the 2nd stage regulator had no bearing on this particular incident. There is no evidence to suggest that the regulator's internal pressure relief valve activated prior to the explosion.

With respect to turning off and plugging or capping the main riser valve Mr. Cavens opinion contradicts his 7th bullet point where he states; "*if propane gas was not required in the kitchen and any other trailers being supplied by this valve during the construction project".*

Give the time of year and the ongoing needs of the Munro Camp, Mr. Cavens opinion to shut off the main riser valve and cap or plug the valve is not a realistic option. It is normal practise to shut off the propane supply to the affected equipment and leave the rest of the system and appliances operating.

To shut off the propane supply to the entire camp area would have required that temporary heating be provided to all essential areas of the camp. Portable direct fired construction heaters, where all of the products of combustion enter the buildings atmosphere, operating on propane cylinders can only be used in areas under construction. Areas not under construction would have to be provided with temporary electric heat or vented propane or vented oil fired heaters. This does not address heating of hot water or cooking facilities required for the workers still on site. It is safer and more efficient to keep approved, correctly installed essential propane appliances such as furnaces, water heaters and cooking equipment operating.

Mr. Cavens refers to the remoteness of the Munro Camp. To acquire, transport and install temporary heating and cooking appliances and or propane supply systems when there are existing propane systems and appliances operating in place does not make sense when one must consider:

1. The ability of the electrical supply to handle the additional temporary load of portable electric heaters without creating potential safety hazards.
2. Portable propane cylinders used to supply propane vapour must be installed outdoors for each individual appliance: 1st and 2nd stage regulators must be installed; temporary piping or hose must be installed to connect to each appliance. The cylinders would have to be exchanged or continually filled as they ran out of propane.
3. Propane tanks used to supply several appliances requires that the tanks be set away from the buildings as required by code; underground or protected lines must be run between the tanks and buildings; 1st and 2nd stage regulators installed; temporary piping or hose run to connect to the appliances. The tanks would have to be continually filled as they ran out of propane.
4. Portable indirect fired propane heaters must be temporarily vented to the outdoors in areas not under construction.
5. All piping, tubing or hose assemblies would have to be pressure tested in accordance to code requirements.
6. The installation of temporary electrical lines and propane piping, tubing, hoses can hamper the movement and provide additional safety concerns to personnel and machinery working at the site.

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Opinion

It is my opinion that given the remoteness, structural configuration, size of the camp, the ongoing needs for heat, hot water heating and cooking, the sheer work involved in establishing temporary systems, it would have been impractical and would have created other significant safety issues to completely shut off the propane to the camp at the piping riser.

For reasons listed, normal industry practice is to leave operating the installed propane appliances that provide essential services to the camp.

**80**  The model pipefitter Mr. Cavens posits would have attended the site at the beginning and taken responsibility for disconnecting the system at the riser, ideally shutting off the propane to the entire system served by the Christmas tree. This was manifestly impractical in the circumstances, where the areas served by the high and the low pressure lines required the propane service to continue. I accept Mr. Stainrod's suggestions that the provision of alternative services would pose their own risks and problems given the scope and duration of the job. I say so recognizing that some effort had been made to provide electrical heaters, for instance, should they have become necessary.

**81**  This was pertinent specifically in the context of the evidence respecting whether the force exerted by the loader caused Break "A" or Break "B" or both, or whether one or the other is attributable to the force of the explosion. I think Mr. Brox's view is the most attractive hypothesis, but it remains only that. Considering the physical evidence and the opinions of the professionals who tried to make sense of it, I am of the view that the mechanics of the Christmas tree failure have not been established to the degree that would be necessary to make distinctions about Break "A" and Break "B".

**82**  I am not, in any event, persuaded that Mr. Carvalho's duties in disconnecting the appliances extended past the better practice of shutting off the valves and capping them. Inasmuch as his failure to cap the lines has not been demonstrated to have had a consequence, because it has not been established that the leak probably occurred inside the complex, it has no relevance to what happened.

**83**  Further, inasmuch as the scope and nature of the task Mr. Carvalho performed was limited to disconnection and not to any further alteration of the propane system, he cannot have imposed on him the higher duty of Mr. Cavens' posited pipe-fitter. That hypothetical person would not, in any event, have shut off the riser, in my view, given the scope of this project and the utility in leaving the lines open for the services that were required to continue.

**84**  Any complex scenario can be played in reverse to a point where it can be shown that if something had not happened, the event would not have happened. It is not appropriate to reason backward from that point to a finding of ***negligence***, however. In the circumstances Mr. Carvalho's duty extended to ensuring that there was no escape of propane on account of his disconnection of the appliances, or as a result of his subsequent activities and those of his co-workers. In all the circumstances it is not reasonable to suggest that shutting off the propane at the riser -- either way -- was required or necessary, such that failure to do so amount to ***negligence***.

**85**  Lastly, the question of ***negligence*** arises respecting the location of the riser. The evidence is that it was placed in the alcove area of the kitchen complex because that was out of the way of traffic. It was not protected by any permanent physical barrier, but the practice in the camp had been to effectively shield it with a series of fire boxes which were seldom moved.

**86**  Not surprisingly, the *Propane Installation Code*, CAN/CGA - B149.2-M95 provides "A pressure regulator provided in a propane supply line shall not be installed (c) where it is subject to physical or chemical damage".

**87**  Again, context is important. In ordinary circumstances the riser was protected. The removal of the east wall exposed the area to a level of activity that was unusual but temporary. There was a duty imposed on those using the area to take a degree of care that would ensure that the Christmas tree was not in danger of being damaged. The plaintiff submits that Northern Trailer was negligent in "*launching* out studs with sledge hammers; in tossing of debris from the open end of the east wall of the kitchen trailer to the loader bucket," and most importantly, in Northern Trailer's decision to bring the loader into that alcove area.

**88**  There is no evidence that the manner in which the wall was removed, or the manner in which debris was expelled was specifically dangerous to the Christmas tree. One might infer from its proximity that more might have been done to protect it, but there is no suggestion of any consequence to such activity either directly, or of a kind that ought to have put Northern Trailer on particular notice.

**89**  The plaintiff submits that Northern Trailer is liable with Trapper by virtue of its request for and use of the services of Trapper, and specifically of the plaintiff loader in Trapper's use, on the basis that this was a "joint" decision.

**90**  In requesting access to the loader, Northern Trailer was not requesting assistance with something for which it was directly responsible. Its contract with the plaintiff is silent as to what was to be done with debris removed in the course of the renovation. Trapper was not assisting in something that was Northern Trailer's responsibility. It was, rather, doing something that needed to be done, and that fell within the "flexibility" expected in Trapper's contract with the plaintiff. Trapper had primary responsibility for the loader, and had overall responsibility for the camp itself, including the routine removal of garbage. Trapper could be expected to monitor the Christmas tree within that mandate.

**91**  Although the relationship was co-operative, the responsibilities of Trapper and Northern Trailer were distinct. The actual potential for joint responsibility appears to have arisen during the day of May 17, 2000, when, on a number of occasions, Mr. Zimmerman, operating the loader, was guided into place by Northern Trailer employees. Whatever might have been, they did not become joint-tortfeasors where the event that clearly caused the loader to endanger the Christmas tree was the last time it was parked in the alcove, under Mr. Zimmerman's control and Mr. Smith's guidance. They knew the camp and the location of the Christmas tree and they knew the hazard associated with leaving the bucket elevated. Mr. Smith guided the loader into place in that condition, and Mr. Zimmerman left it there, without checking its position himself.

**92**  In its defence, Trapper also pleaded that Mr. Zimmerman was, to the extent he participated in renovating the kitchen, performing work outside the management contract. It is not necessary to address this allegation except to say that to the extent Mr. Zimmerman's actions are relevant to these proceedings -- parking the loader in the alcove -- he was operating directly under the supervision of Mr. Smith, and well within the expectations outlined in the management contract between the plaintiff and Trapper, notwithstanding Mr. Anderson's suggestions of the contrary.

**VIII**

**93**  Trapper's claims of contributory ***negligence*** outlined in para. 7(a)(i), (ii) and (iv) of its statement of defence are all related to alleged inadequacies in the propane system, which have not been proved, and its failure to supervise Mr. Zimmerman, in the face of clear evidence that he and Mr. Smith were independently aware of the location of the Christmas tree, and of the hazards of leaving a loader nearby, in circumstances where the hydraulics might fail. It was not ***negligence*** to delegate the camp management to Trapper or to rely on its employees. Inasmuch as it has been shown that they were aware of the hazards involved in the activities leading to the explosion, it was their responsibility to carry out the duties they undertook prudently.

**94**  Trapper's claim that the plaintiff was contributory negligent on the basis that it failed to properly protect the riser is, essentially, an allegation that it ought to have treated the riser as if the alcove were a high traffic area when, in fact, it was not. The unusual, and temporary, activity in the alcove called for particular caution, but it was a caution in relation to things that was well within the knowledge and capacity of Trapper to adjust to appropriately, as manager of the camp.

**IX**

**95**  In cases where the pleadings set up the possibility of shared or divided liability among two or more parties, it is important to recognize the basis on which liability is determined. In this case, as I have noted, the plaintiff seeks to implicate both corporate defendants and their agents or employees on the basis that Trapper's negligent operation of the loader caused the Christmas tree to break; that that ***negligence*** was "joint" because they were acting at Northern Trailer's request, and/or, presumably, because the operation of the loader was so integrated into the work that was being carried out by Northern Trailer that it was simply a matter of happenstance that Trapper's Arden Smith, rather than one of the Northern Trailer defendants, guided the loader into place. Lastly, the plaintiff suggests that but for Mr. Carvalho's ***negligence*** in not behaving as a qualified pipefitter would, the event would not have occurred.

**96**  The physical evidence in the wake of this massively destructive event is not so definitive that the opinion witnesses are able to agree on all of the inferences to be drawn from it, particularly, as I have noted, respecting the mechanics of and the sequence of events leading to the breakage of the Christmas tree.

**97**  This is not however, an event of such complexity or ambiguity that the court must resort to the concept of "material contribution" to find liability. I am satisfied that but for the ***negligence*** of Trapper's owner Arden Smith and its loader operator, Mr. Zimmerman, the loader bucket would not have come in contact with the Christmas tree. While I consider Mr. Brox's explanation of what happened the most plausible of those offered, I have said I do not think it possible to make a positive finding respecting the sequence of Break "A" and Break "B". I have indicated that I do not consider the sequence of any particular significance, however because I do not think the person who disconnected the appliances had a duty in the circumstances to disconnect at the riser either below the regulator or at the stem. To the extent that Mr. Carvalho was negligent in failing to cap the lines, it was negligent without a material consequence, and hence outside the "but for" chain of causation, because it has not been plausibly established that any breach in the lines within the complex (as a result of the disconnection or the demolition) was the source of the leak that caused the explosion.

**X**

**98**  The law as it applies in the case of multiple potential tortfeasors was recently outlined in *Chambers v. Goertz*, [*2009 BCCA 358*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624T-00000-00&context=) (C.A.) at paragraphs 15-23. There, in the context of a case involving a stopped taxi, an approaching vehicle, and pedestrians, the Court, per K. Smith J.A., observed:

[15] Mr. Ahmad [the taxi driver] submits the trial judge erred in law in finding that his conduct was a "contributing cause" of the plaintiffs' injuries. He submits she erroneously applied the "material contribution" test of causation rather than the "but for" test. He contends the "but for" test is the basic test of causation and that the "material contribution" test applies only where, first, it is impossible for the plaintiff to prove causation for reasons out of his or her control, and second, where the plaintiff's injury falls within the ambit of the risk created by the defendant's careless conduct, citing *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, 24-25, [*278 D.L.R. (4th) 643*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=). In his submission, these necessary conditions are not present in this case.

[16] This submission stems from a misunderstanding arising from the use of the phrase "material contribution" in two different contexts by the Supreme Court of Canada.

[17] In the passages from *Resurfice Corp. v. Hanke*, to which Mr. Ahmad refers, Chief Justice McLachlin, writing for the Court, used the phrase in connection with cases in which it is impossible for the plaintiff to prove a causal link between the breach of duty and the harm, such as where the explication of the causal link is beyond the limits of current scientific knowledge (*Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305; *Barker v. Corus (UK) Plc.*, [2006] UKHL 20, [2006] 2 A.C. 576 - cases in which the defendants' breach of duty materially increased the risk of harm but it was not possible to prove a causal connection to the harm itself); where it is impossible to prove which of two simultaneous acts by two negligent actors caused the loss (*Cook v. Lewis*, [*[1951] S.C.R. 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=), [*[1952] 1 D.L.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=)); and where it may be impossible to prove what a third party, whose conduct was a "but for" cause of the loss, would have done absent the defendant's careless conduct (*Walker Estate v. York Finch General Hospital*, [*2001 SCC 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M47J-00000-00&context=), [*[2001] 1 S.C.R. 647*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M47J-00000-00&context=), [*198 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M47J-00000-00&context=)). As this Court noted in *Sam v. Wilson*, [*2007 BCCA 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=), [*78 B.C.L.R. (4th) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=) at para. 109, [*249 B.C.A.C. 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=), this use of "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap": see "Lords a'leaping evidentiary gaps", (2002) Torts Law Journal 276, and "Cause-in-Fact and the Scope of Liability for Consequences", (2003) 119 L.Q.R. 388, both by Professor Jane Stapleton. That is because to deny liability "would offend basic notions of fairness and justice": *Resurfice Corp. v. Hanke*, para. 25.

[18] The Supreme Court's other use of "material contribution" is seen 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=), where Major J., writing for the Court, held in the following passage that causation will be established if it is shown that the defendant's ***negligence*** "materially contributed" to the occurrence of the plaintiff's injury:

[15] 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*, [1972] 3 All E.R. 1008 *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=).

[16] 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. ...

[17] It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is ... caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their ***negligence***.

[18] This proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board*, supra, at p. 1010:

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

[19] *As this passage illustrates, every injury has multiple necessary or "but for" factual causes. The function of tort law is to identify those for which the defendant should be held responsible. Thus, 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=)*,* [*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=)*,* [*4 C.C.L.T. (2d) 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=)*, Sopinka J., writing for the Court, said, at 326*,

*Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former*.

[20] For purposes of determining whether a breach of duty was a "but for" cause of particular harm, there are no degrees of causation - specific conduct was either necessary for the harm to occur or it was not. However, not every cause necessary for the harm to occur can reasonably be considered a candidate for liability. For example, in this case, the accident would not have occurred but for the taxi company dispatcher's sending Mr. Ahmad to respond to Ms. McDonald's call, but no one would suggest that the dispatcher should be found liable for what happened. Therefore the law takes cognizance only of those causes that play a significant role in bringing about the outcome.

[21] This concept has been expressed in different ways. As I have noted, in *Athey v. Leonati*, the Court said at para. 15 that "causation is established where the defendant's ***negligence*** 'materially contributed' to the occurrence of the injury", and that a "material contribution" is one that "falls outside the *de minimis* range". To similar effect the Court said, in *Snell v. Farrell*, at 327, that proof of causation requires "a substantial connection between the injury and the defendant's conduct". "Substantial connection" was also used to describe this idea in *R. v. Goldhart*, [*[1996] 2 S.C.R. 463*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3R9-00000-00&context=) at 480, [*136 D.L.R. (4th) 502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3R9-00000-00&context=), [*107 C.C.C. (3d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3R9-00000-00&context=), where the Court said,

The happening of an event can be traced to a whole range of causes along a spectrum of diminishing connections to the event. The common law of torts has grappled with the problem of causation. In order to inject some degree of restraint on the potential reach of causation, the concepts of proximate cause and remoteness were developed. These concepts place limits on the extent of liability in order to implement the sound policy of the law that there exist a substantial connection between the tortious conduct and the injury for which compensation is claimed. ...

[22] Clearly, the "material contribution" test discussed in *Resurfice Corp. v. Hanke* has nothing to do with the circumstances of this case. Here, it was not impossible for the plaintiffs to prove causation. Rather, whether the breaches of duty of the parties played legally significant causal roles in the outcome was in each case a question of fact to be answered by rational inference drawn in the usual way from the evidence. *Causation is essentially "a practical question of fact which can best be answered by ordinary common sense": Snell v. Farrell at 328, citing Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475 at 490 (per Lord Salmon)*.

[23] It was this conventional "but for" test of causation that the trial judge applied when she held that Mr. Ahmad's breach of duty was a "contributing cause" of the accident and that he was therefore liable. Her use of the phrase "contributing cause" signifies that she found as a fact that Mr. Ahmad's conduct played an important enough role in the combination of events necessary for this occurrence to fix him with liability for the consequences. This was the correct approach in the circumstances and I would reject the submission that she erred in adopting it.

[Underline emphasis in original, italic emphasis added]

**99**  Trapper has attempted to meet the case against it by positing a series of possibilities that might, taken one by one, account for each of the phenomena addressed. The determination of causation turns on an over-all assessment of likelihood or probability, however, and is not necessarily negated by the suggestion of a possible alternative for each material fact. Moreover, to the extent that such facts depend on each other, the relative probability on an event will, in fact, diminish.

**100**  Taking account of what can be made of the evidence of the witnesses, the physical evidence, and the evidence of the opinion witnesses, I am persuaded that the source of the leak and the cause of the explosion was the break in the Christmas tree, and that for the reasons I have outlined, Trapper is solely liable for the plaintiff's loss.

**XI**

**101**  The plaintiff is entitled to be put back in the same position it would have been in had the damages not been incurred (see: *Nan v. Black Pine Manufacturing Ltd.* [*[1991] B.C.J. No. 910*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1BN-00000-00&context=) (C.A.); *Evans et al v. Balog et al,* [1976] 1 N.S.W.L.R. 36 (C.A.). There, the Court observed:

I do not find anything in the three judgments in *Bendera* [*[1983] B.C.J. No. 1582*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S08Y-00000-00&context=), that would require this court now to resile from the long established general principles applicable to damages to tort actions. The first of those principles is reflected by the *maxim restitution in integrum*, the damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort not occurred. The second is that the damages awarded must be reasonable both to the plaintiff and to the defendant.

The result of the application of these principles, in most cases involving the tortuous loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should then be adjusted, either for pre-loss depreciation or post-reinstatement betterment will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered.

**102**  At the time of the explosion, The Munro Camp had been in service since 1988 although the Atco Trailers on site dated to 1982. It was still considered fully serviceable, and worth the costs of the fire and kitchen upgrades that had been undertaken to keep it going. The business interests of the plaintiff required the camp to be reinstated as quickly as possible, and the plaintiff was working towards a July 2002 date.

**103**  The plaintiff sought bids for the replacement of the camp, and received several, including:

|  |  |  |
| --- | --- | --- |
| A. Shanco Camp Services Ltd. | $2,755,000.00 |  |
| (this bid did not break out the |  |  |
| cost of individual components) |  |  |

Tab 46, Exhibit 5

|  |  |  |
| --- | --- | --- |
| B. William Scotsman (slightly used) | $2,750,036.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Buildings | $1,972,023.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Installation | $640,553.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Transport to McKenzie | $137,460.00 |  |

(not inclusive of logging/road McKenzie to Munro)

Tab 47, Exhibit 5

|  |  |  |  |
| --- | --- | --- | --- |
| C. Northgate Industries |  | Ltd. $2,415,691.00 not inclusive of catering costs |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Buildings | $1,781,875.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Transport | $135,900.00 |  |

(McKenzie only, not inclusive of logging road to site)

|  |  |  |  |
| --- | --- | --- | --- |
|  | Set up | $125,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Snow roof and trusses materials only | $207,416.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Corridors | $125,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Temporary project camp | $40,500.00 |  |

Tab 49, Exhibit 5

|  |  |  |
| --- | --- | --- |
| D. ATCO Structures Inc. | $2,535,712.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Buildings | $1,667,123.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Transport (to site) | $143,836.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Installation | $724,753.00 |  |

Tab 52, Exhibit 5

|  |  |  |
| --- | --- | --- |
| E. Northern Trailer (used camp) | $2,097,766.00 |  |

Same or older vintage as existing

|  |  |  |  |
| --- | --- | --- | --- |
|  | Buildings | $1,130,567.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | New Furnace allowance | $24,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Transport | $210,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Construction | $706,112.00 |  |

**104**  The plaintiff accepted the bid from Atco Structures. This involved the replacement of the old structures with new trailers, which requires a consideration of whether, in that figure, some betterment is reflected which should lead to an adjustment in favour of the defendants.

**105**  The plaintiff submits that the question of betterment is not an "automatic" adjustment but is a factor to be considered in assessing damages, as reflected in the following passage from *Lamont Health Care Centre et al v. Delnor Construction Ltd., et al*, [*2003 ABQB 998*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JJK6-S2TW-00000-00&context=) at para. 177 per Macklin J.:

[177] As a general principle, an aggrieved party to entitled to be placed in the same position it would have been in had the tort not occurred. There is no requirement that damages be adjusted automatically to reflect betterment. It is simply a factor to be considered. For example, if a plaintiff is required to build a new home as a result of the defendant's negligent destruction of their original home, the plaintiff should not be required to finance "betterment" that is a necessary result of rebuilding; *Nan v. Black Pine Manufacturing Ltd.* [*(1991) 80 D.L.R. (4th) 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JGPY-X1BN-00000-00&context=) (B.C.C.A.); *Evans et al. v. Balog et al.* [1976] 1 N.S.W.L.R. 36 (C.A.).

**106**  As might be expected, the bids on the reinstatement of the camp did not exactly match the camp as it was. Those parts of the camp that were frame or "stick-built" construction, for example were not reproduced in that form in any of the bids. Modular buildings (trailers) were to be used in all of the bids that were received.

**107**  There was some controversy over whether the replacement of stick-build construction by modular units was a betterment, both in terms of quality, and on the basis that modular units could be moved.

**108**  I do not think that the assessment of damages can be approached strictly by the addition and subtraction of such considerations. Replacement cost is the most relevant measure of damage because there is no "market" for such camps, although there is some market for components of camps that are no longer needed at the sites where they have been placed. The difference between the use of modular units and "stick built" construction is partly a function of the exigencies of the situation at the time the camp needs to be rebuilt. The fact that new components were used to replace old, does not automatically translate into enhanced "resale" value where usefulness is measured in decades. It is, however, sensible to infer that a camp consisting of newer components might require less maintenance and have a longer period of ultimate utility, which would be lead to obvious, but not exactly quantifiable savings over time.

**109**  The plaintiff has attempted to illustrate the range of betterment, notwithstanding its position that the onus of establishing "betterment" rests with the defendants. There was considerable evidence respecting the other possible alternatives, some of which involved used buildings both older and newer than those at the Munro Camp, and different logistical difficulties with the various bids. Supply and transportation costs varied with the different options.

**110**  The court was given an estimate of the value of the Munro Camp as it was before the explosion. The author, Keith Crellin, was qualified as an opinion witness on the basis of a 35 year career in the business of buying, selling and assessing the value of used modular trailers, and the installation and renovation of remote camps. He estimated that the camp was worth $1,452,669 broken down as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Price for complexes and fire | $656,500 |  |
|  | code and alarm upgrades |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Installation | $280,800 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Site built construction, boot | $256,189 |  |
|  | rooms, arctic hallway, |  |  |
|  | food storage |  |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Water module | $39,865 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Snow roofs | $319,315 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $1,452,669 |  |

(not inclusive of transportation)

|  |  |  |  |
| --- | --- | --- | --- |
|  | Plus transportation | $210,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $1,662,669 |  |

**111**  Trapper submits that Mr. Crellin's estimate should be the starting point. It submits that the construction costs actually incurred by Atco to install the new camp were $461,498, or $294,806 less than Mr. Crellin's estimate of $756,304 ($280,800 + $156,189 + $319,315). It submits that this gives an adjusted camp value including $210,000 for transportation costs, a figure all parties accept of $1,367,671. It submits that after an allowance for the better condition of the reinstated camp, the lost Munro Camp was worth about $1,250,000.

**112**  Trapper further submits that on the evidence of Mark Brown, which related to the Northern Trailer bid, the Munro camp may have been worth as little as $1,150,000.

**113**  The plaintiff submits that these figures do not take account of the fact that the plaintiff was billed $724,753 for reinstatement of the camp by Atco, and not $461,498 which was the figure quoted by its subcontractor. There were additional costs paid by the plaintiff for rectification of problems with the new snow roof ($300,000) and a fine of $80,000 to the union because the sub-contractor improperly used non-union labour. The plaintiff submits that these adjustments militate in favour of using the Crellin figures without the deduction suggested.

**114**  The plaintiff's submission is that an allowance for betterment on the basis that something must be assessed for the replacement of "old" for "new" buildings is analogous to the situation in *Penn West Petroleum v. Koch Oil Co.,* [*[1994] 4 W.W.R. 630*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9331-FBN1-24CK-00000-00&context=), per Fruman J., at para. 112:

The rebuilt facility is essentially the same as the old facility. It performs the same function. It is not more profitable. It is not more economic to operate. It is not more automated. With the exception of some safety features which have been deducted, it utilizes the same technology. The only betterment that the Plaintiff's have received is that they have replaced new for old. However the evidence clearly indicated that the old Misty Lake Battery would have lasted for the life of the Misty Lake field.

Whether that life might be further twenty or 30 years or more, it was a sweet facility, corrosion was not a problem and the battery was properly maintained. At the end of the life of the field, some pieces of equipment might be salvageable and might have some resale value depending on the economics and technologies at the time, but there can be no real expectation today that that will be the case in twenty or thirty years ....

\*\*\*

In this case it has not been demonstrated to me that the replacement of the prior facility with the new has increased the value of the property as a whole. The old battery was expected to last for the useful life of the field, as is the new. I find that the substitution of new for old in this case does not constitute betterment and therefore no depreciation should be charged against the Plaintiff's claim. (para. 115)

**115**  The plaintiff submits that there is no evidence before the court in this case that would lead to an allowance for betterment.

**116**  The plaintiff addressed a number of points relevant to the Northern Trailer bid as a comparator -- the $1,150,000 figure taken from Mr. Brown's evidence -- but I do not think it necessary to depart from what was actually spent on the reinstatement through the Atco bid, because I do not consider it unreasonable that the plaintiff accepted that bid.

**117**  Northern Trailer submitted that the Crellin estimate of construction costs ought to be reduced by 10% (excluding the snow roofs, a reduction of $43,698 ($756,304 - $319,315 = $436,989 x 10%). This would reduce construction costs to $712,606. With respect to building replacement, the submission is that the total costs set out in the Crellin estimate should be reduced by 10% or $69,636 ($656,500 + $39,865 = $696,365 x 10%).

**118**  The plaintiff submits that there is no case for betterment related to construction costs because the plaintiff had no option but to rebuild with new materials and no increase in value has been shown to the plaintiff. With respect to Northern Trailer's suggestion of a 10% discount on the building replacement costs, the plaintiff submits that this overlooks the fact that Mr. Crellin's estimate was on the basis of "old" for "old" so there can be no deduction for betterment on those figures.

**119**  The plaintiff also points out that the value of used stock, assuming it was available at all, would depend on several market factors that might have required the plaintiff to pay more than appraised value for it in any case. The plaintiff submits that it could not have reinstated the camp for the Crellin estimates owing to such considerations. The plaintiff points out that Northern Trailer's replacement quote was itself higher than Mr. Crellin's quote which, net of the betterment, would come to $967,360 or a total claim net of the agreed losses ($483,850) of $1,933,664.

**120**  The plaintiff's claim is essentially that they just wanted the camp reinstated, and if it cost more to accomplish that than the old camp was estimated to be worth that cost should fall to the defendants because no increase in value can be shown.

**121**  The calculations and considerations which counsel have submitted demonstrate the complexity of attempting to quantify "betterment", but assist in suggesting the parameters of the exercise. I do not think this case falls exactly within the reasoning in *Penn Petroleum* inasmuch as, there, it was apparently established as a fact that there was no demonstrable betterment in the extension of longevity, because the old Battery had a useful life that would in any case have outlasted the depletion of the oil field. That has not, strictly speaking, been demonstrated here, although the existing camp was expected to last another 20 years.

**122**  I think it somewhat telling that the kitchen/bakery part of the camp was in urgent need of renovation at the time the explosion occurred, and that its condition was somewhat worse than expected, given the "extras" that were required. While the burden of demonstrating betterment falls to the defendants, it is not a complete answer to suggest that there is no evidence that in the remote future the new camp will be worth more than the old camp would have been. That is not a matter susceptible of proof in any event. It stands to reason that the new camp will last longer than the old one and that, in the immediately future, it may be expected to be less expensive to maintain than the old camp would have been. While it was said to be in good shape there were clearly elements of it that had significantly deteriorated over time. There is therefore some betterment.

**123**  Taking what guidance I can from the factors presented and the considerations outlined by counsel I assess the plaintiff's loss, apart from the agreed damages of $483,850, at $1,750,000, plus interest at court order rates.

**XII**

**124**  Trapper makes one further submission respecting its management contract with the plaintiff. It stipulates that Trapper is obliged to carry $2,000,000 in liability insurance. Trapper submits that in reliance on the plaintiff's representation that this would be sufficient insurance against any liability Trapper might incur, it obtained that amount of insurance. It submits that the plaintiff is estopped from looking to Trapper for anything in excess of that figure.

**125**  There is no issue with respect to the basic principles. In order for estoppels to be established there must be:

1. An existing legal relationship between the parties at the time the statement on which the estoppels is founded was made;
2. There must be a clear promise or representation made by the party against whom estoppel is raised establishing his intent to be bound by what he has said (Case law establishes that by such representation, the party making it must have intended to affect his legal relations vis-à-vis the representee.); and
3. There must have been reliance by the party raising the estoppel upon the statement or conduct of the party against whom the estoppel was raised and the party to whom the representative was made must have acted upon it to his detriment. [emphasis added]

**126**  The onus is on the party who asserts that estoppel applies. In *Maracle v. Travellers Indemnity Co. of Canada*, [*[1991] 2 S.C.R. 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6038-00000-00&context=), at p. 10, the principle is states as follows:

The principles of promissory estoppels are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance that was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. [emphasis added]

**127**  The specific stipulation in the contract is as follows:

9.1 Coverage and Policy

The Consultant will, during the Term, maintain comprehensive general liability insurance and statutory motor vehicle insurance as described in Schedule A. The Consultant's insurance will be on terms and with insurers satisfactory to the Company, and will be endorsed to require 10 days' notice to the Company of alteration, cancellation or expiration. The Consultant will provide the Company with copies of its insurance policies if requested by the Company.

**128**  Schedule "A", to the extent it is applicable, reads:

1. Minimum Limits for all insurance will be $2,000,000 inclusive, for loss or damage resulting in bodily injury or death to one or more persons, or for loss or damage to property, except for fire fighting expense and suppression liability, which will be $1,000,000.

**129**  Apart from these terms, no competent (or any) extrinsic evidence was led qualifying or supplementing the plain meaning of the contract.

**130**  There is nothing elsewhere in the contract itself which can be construed as an express limitation of liability.

**131**  Two million dollars was the minimum that Trapper was obliged by the contact to carry. While this may have reflected both parties estimate of a reasonable amount of coverage at the time the contract was signed, its plain meaning does not support the inference that, somehow, this amounted to a representation that the plaintiff would absorb any losses incurred as a result of the plaintiff's insurable activities over and above $2,000,000. Trapper has not established that estoppel applies.

**132**  In summary, I find as facts:

1. The explosion and subsequent fire at the Munro camp, on April 18, 2002 was caused by a propane leak originating at the "Christmas tree" in the alcove complex of the kitchen/bakery/dining complex of the camp;
2. The Christmas tree was broken when the bucket of the CAT 980 loader struck it overnight;
3. That happened because Trapper's owner Arden Smith, and its employee and operator, Daryl Zimmerman parked the loader where it's bucket could come in contact with the Christmas tree;
4. Loss of hydraulic pressure was the probable cause of the rotation and/or descent of the loader bucket onto the Christmas tree;
5. Dimas Carvalho's disconnection of the propane lines was not a source of the propane leak;
6. The activities of the demolition crew were not a source of the propane leak.

**133**  I make the following rulings:

1. The disconnection of the propane lines inside the kitchen/bakery/dining complex was not an "alteration" of the system such as to require the engagement of a pipe-fitter for that task;
2. There was, therefore, no statutory breach by Northern Trailer;
3. Northern Trailer had no duty to cap the flow of propane at the riser or the riser stem;
4. Mr. Carvalho's failure to do so was, in any event, outside the chain of causation;
5. Northern Trailer was not in breach of its contract with the plaintiff;
6. Northern Trailer was not jointly liable for the discrete event (the parking of the loader) that led to the explosion and fire;
7. Trapper's use of the loader was within the range of activities contemplated in its contract with the plaintiff.

**134**  I have concluded that:

1. Trapper's ***negligence*** was the sole cause of the explosion and fire;
2. The plaintiff was not contributorily negligent;
3. The plaintiff is not estopped by its contract with Trapper from seeking damages over $2,000,000;
4. The plaintiff's damages are assessed at $1,750,000 plus the $483,850 agreed between the parties;
5. The plaintiff's claim against the defendant, Rhodes, is dismissed;
6. Court order interest shall be applied.

**135**  There shall be liberty to apply respecting costs if counsel are unable to agree as to the appropriate disposition.

T.M. McEWAN J.

**End of Document**

[***Talarico v. Northern Rockies (Regional District), [2008] B.C.J. No. 1252***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G361-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

C. Lynn Smith J.

Heard: April 28-30, 2008.

Judgment: July 2, 2008.

Docket: 0423657

Registry: Prince George

**[2008] B.C.J. No. 1252** | [*2008 BCSC 861*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2DM-00000-00&context=) | [*47 M.P.L.R. (4th) 242*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2DM-00000-00&context=) | [*2008 CarswellBC 1394*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2DM-00000-00&context=) | [*169 A.C.W.S. (3d) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2DM-00000-00&context=)

Between Bonnie Talarico, Plaintiff, and Northern Rockies Regional District and Town of Fort Nelson, Defendants

(95 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Action in nuisance and *negligence* for damages for injuries suffered when the plaintiff slipped and fell on ice on a roadway — Plaintiff argued that the town owed a duty of care either under the Occupiers Liability Act or the common law — Section 3(1) of the Occupiers Liability Act did not create a duty of care on Fort Nelson because the area where the accident occurred fell within an exception — Town did not owe a common law duty of care to the plaintiff because the decisions leading to the plaintiff's were ones of policy, not operations.**

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| Action in nuisance and ***negligence*** for damages for injuries suffered when the plaintiff slipped and fell on ice on a roadway. Defendant Fort Wilson admitted it had jurisdiction over the road, but denied liability for the plaintiff's losses. Defendant Northern Rockies Regional District argued it had no jurisdiction over the road. The plaintiff argued that the town owed a duty of care either under the Occupiers Liability Act or the common law. The defendant town argued it was exempt from the Act.  HELD: Action dismissed.  The plaintiff did not establish that the Town had or should have had the requisite knowledge and therefore failed to prove her claim in nuisance against Fort Nelson. Section 3(1) of the Occupiers Liability Act did not create a duty of care on Fort Nelson because the area where the accident occurred fell within the exception provided under s. 8(2)(b). The Town did not owe a common law duty of care to the plaintiff because the decisions leading to the plaintiff's were ones of policy, not operations. |

**Statutes, Regulations and Rules Cited:**

Local Government Act, RSBC 1996, CHAPTER 323, s. 286, s. 288(b)

Occupiers Liability Act, [*RSBC 1996, CHAPTER 337, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P7-00000-00&context=)(1), s. 8(1), s. 8(2)

**Counsel**

Counsel for Plaintiff: P.S. Boles.

Counsel for Defendants: L.E.W. Barrett.

**Reasons for Judgment**

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| **C.L. SMITH J.** |

**INTRODUCTION**

**1**  Bonnie Talarico was injured on Christmas Eve, 2003, when she slipped and fell on a patch of ice under fresh snow on the side of the road in the Town of Fort Nelson. She seeks damages for her injuries from the two defendants, Northern Rockies Regional District and the Town of Fort Nelson (Fort Nelson).

**2**  Fort Nelson agrees that it had jurisdiction over the road where the accident occurred but denies liability for the plaintiff's losses.

**3**  Northern Rockies Regional District says it had no jurisdiction over the road in question. No evidence was adduced showing any involvement of that defendant in the ownership or control of the road; accordingly, the action will be dismissed against it.

**4**  Fort Nelson did not adduce evidence in support of its pleading that the plaintiff was contributorily negligent, and it did not rely upon its defence pleaded under s. 286 of the ***Local Government Act***, *R.S.B.C. 1996, c. 323*. I will not address those matters in these reasons.

**EVIDENCE AND FINDINGS OF FACT**

**5**  Three witnesses gave evidence at the trial: the plaintiff Bonnie Talarico, her husband Terry Talarico, and Ralph Dennis Thomson, who is the Public Works Foreman for Fort Nelson. There was no significant dispute as to the basic facts, which I find to be as follows.

**The Accident**

**6**  The plaintiff is a 48 year old bank employee, the mother of two adult children, and has lived in Fort Nelson for 17 years. On December 24, 2003 she slipped and fell on a patch of ice under fresh snow. She broke her ankle and required surgery in Grande Prairie, Alberta a few days later. She underwent further surgery to remove "hardware" from her ankle in December 2006.

**7**  The accident occurred on 41st Street in Fort Nelson. It is a quiet residential street near the outskirts of town.

**8**  The plaintiff had gone to visit her sister on 41st Street on Christmas Eve in the late afternoon, parking on the west side of the street under a street lamp. There is no sidewalk on that side of the street.

**9**  It had been warm in the previous few days and the streets were relatively clear of snow. However, the temperature fell on December 24 and it had been snowing that day. Most of the roads in the area were snow-covered and had not yet been ploughed or sanded.

**10**  It is common for pedestrians to walk on the road in Fort Nelson since some streets do not have sidewalks, a number of the sidewalks are not cleared of snow, and sometimes cars park across the sidewalk.

**11**  When Ms. Talarico left her sister's house she headed toward her car. She was wearing footwear with a good grip and was paying proper attention. However, she slipped with her left foot just at the roadway, fell and broke her ankle. She screamed with pain and was heard by her husband, who was nearby. Ms. Talarico saw smooth ice all around where she had fallen. She testified that when her sister and her niece's fiancé came out to help pick her up they had trouble with their footing because of the ice. However, they finally got her in the truck and her husband, Terry Talarico, took her to the Fort Nelson Hospital.

**12**  Mr. Talarico later went back to pick up his wife's vehicle and saw that the road was icy, appearing to have frozen puddles with snow on top. The following morning at around 9:00 a.m. he returned again to 41st Street. He said he saw what appeared to be ice from a water break about 200 feet in length and from three to six feet wide on the west side of the road. He did not call the Town or notify anyone of the presence of this ice at any time. He explained that he was fully occupied with taking care of his wife, their family, Christmas dinner, and then driving his wife to Grande Prairie for surgery.

**13**  Mr. Thomson, who was called by the defendants, testified that, as the Town of Fort Nelson Public Works Foreman, he received a call one evening in early January 2004 from a man (whose name he does not recall) regarding a lady who had fallen and slipped on ice from a water break on Christmas Eve. He went to 41st Street and met the caller there. Although initially Mr. Thomson could not see any ice, when the man took him over to the side of the road and Mr. Thomson kicked away some of the snow, he found a small patch of ice on the shoulder. He followed the ice patch to a driveway nearby, then up the driveway to a mobile home. He knocked at the door of the mobile home and spoke to a woman who said that they had had a water break under the trailer but had had it fixed. Mr. Thomson testified that it appeared to him that a broken water line from the trailer had caused water to go down the driveway onto the road. (I note that what Mr. Thomson was told about the cause of the ice patch was hearsay.) The ice he observed was smooth and clear, and stretched for 100 to 120 feet.

**14**  Mr. Thomson said that he did not consider the ice to be a safety factor at that point because there was a snowpack on it. He said that if it had been exposed he would have got a crew in and scraped and sanded.

**15**  Mr. Thomson produced records showing that Fort Nelson crew members worked on snow removal on December 22, 23 and 24, 2003.

**16**  Mr. Thomson had received no previous notice of ice in the location where the plaintiff fell.

**17**  In summary, I find that the plaintiff fell on ice on the road probably caused by water escaping from a mobile home on 41st Street. Fresh snow had fallen that day and covered the ice, making walking quite hazardous in that area. I find that Fort Nelson had no knowledge of the existence of the patch of ice, which was probably over 100 feet long, until some time after the accident occurred, when Mr. Thomson received the call he said he received in early January 2004.

**The Town's Policies and Procedures**

**18**  I turn to the evidence regarding the Town's policies and procedures with respect to snow and ice removal.

**19**  Mr. Thomson has been employed by Fort Nelson for 20 years and by December 2003 had been the Public Works Foreman for 10 years. His evidence regarding Fort Nelson's snow removal procedures was uncontradicted, and I accept it. Mr. Thomson's duties were to assign work to the Public Works crew, to inspect and supervise work and occasionally to pitch in and do some work himself.

**20**  Mr. Thomson produced a document setting out Fort Nelson's annual budget for roads and grounds for the years 2000 to 2004. He also produced a document called "Town of Fort Nelson Snow Removal Procedures" which was essentially a handout for citizens. He did not know specifically when the document was created but he testified that it was the policy and it had been in place for as long as he had been the Public Works Foreman.

**21**  The document describing the Town's snow removal procedures includes the following:

**TOWN OF FORT NELSON**

**SNOW REMOVAL PROCEDURES**

**What Kind of Equipment Does the Town Use for Snow Removal?**

The Town's snow removal equipment consists of:

1 - grader, equipped with a wing

2 - tandem trucks, each equipped with sanders and front plough

1 - tractor backhoe, equipped with a front-end loader

1 - industrial tractor, equipped with a blade for sidewalk snow removal

The Town equipment is augmented with contract equipment as required. Snow removal at Town Square.

**When Does Snow Clearing Get Started & When Will My Street Be Done?**

1. When the snow starts flying, one tandem truck is dispatched to plough the snow off the streets and apply a sand/calcium chloride mixture -- to maintain safe driving conditions.
2. If one truck cannot keep up, the second tandem truck is dispatched and if necessary, so is the grader.
3. Snow removal is done on a PRIORITY basis -- SEE the following map.

**FIRST PRIORITY** is given to streets serving as major access routes to the hospital, ambulance and schools, and, to sidewalks in residential areas that have been identified in the "Safest Route to School" program. The sidewalks are cleared by Public Works crew members during daytime hours.

**What Else Should I Know?**

1. Urban traffic speeds and our climate doesn't allow removal of compact snow or ice to bare asphalt. So, the grader is used to remove this on a regular basis and compact snow depths on our streets seldom exceed 2 inches.
2. When the grader IS used on snow removal operations, the front-end loader is also used to clear the windrow left in front of drive ways by the grader.
3. The front-end loader DOES NOT clear snow windrows left by the tandem trucks -- it couldn't possibly keep up!
4. Secondary Residential Sidewalks **WILL BE** cleared with the Holder Snow Blower.

**22**  A map of Fort Nelson called "The Fort Nelson Snow Removal Schedule" shows Priority No. 1, Priority No. 2 and Priority No. 3 roadways. The street where the accident occurred, 41st Street, is shown as a Priority No. 2 road.

**23**  The Town's practice is to send out trucks with ploughs or the grader (if the snow is heavy) when it first starts snowing. The crews start with the Priority No. 1 roads and move to the Priority No. 2 roads only if they have dealt with Priority No. 1 roads and the snow is not continuing to fall. That practice was in effect in December 2003.

**24**  Mr. Thomson testified that he does not recall the weather on December 24, 2003. He said that if it had started to snow and continued to snow throughout the day they would have stayed on the Priority No. 1 roads and would not have moved to the No. 2 ones. If the snow had continued into the evening, the Priority No. 2 roads would not have been cleared. I find that 41st Street was not cleared on December 24.

**25**  Mr. Thomson testified that the purpose of ploughing roads is to enhance the safety of travel with vehicles, by opening up the lanes of travel. Only when the grader is used do the sides of the road get cleared, and the grader is not deployed until there are at least two inches of snowpack on the streets.

**26**  The Town does not inspect for patches of ice. The Town has a 24-hour answering service and the policy is to check immediately if there is a complaint from a citizen about a patch of ice, and then to deal with it through applying sand, scraping it, or in some other appropriate manner. In addition, Fort Nelson crew members are instructed to "phone it in" if they see a patch of ice while out on the streets. There is no evidence of any call from the public or a crew member regarding the patch of ice on 41st Street prior to the call Mr. Thomson received in early January 2004.

**27**  With respect to water leaks from private residences, the Town's practice is to go and speak to the homeowner if such a leak is observed on private property, and to work on the road if a water leak problem is observed there. Mr. Thomson said that water or sewer leaks are high priority and they act right away. Mr. Thomson agreed that Fort Nelson did not have a system of inspection for water main breaks or for water leaks from private premises. He said that with respect to water main breaks they have an alarm system.

**28**  The Fort Nelson budget for snow removal and ice control in 2003 (set by the Director of Public Works) was $238,600 and that amount was not fully spent by the end of the year. Mr. Thomson said, however, that when safety is at stake they do not let the budget drive the decisions and if snow removal is needed they keep doing it.

**29**  Mr. Thomson agreed that pipes can burst in the winter and that his department is concerned about water going onto the streets because if it freezes, it can create a hazard. He agreed that the temperatures had been warm for a few days prior to December 24 and that ice might have started to thaw. He disagreed that thawing and refreezing might have caused the ice which he saw on 41st Street.

**30**  Mr. Thomson agreed that it would not have taken a lot to fix the ice patch on 41st Street, and that it would have been possible to put up hazard signs or use some treated sand.

**31**  Mr. Thomson testified that sidewalks are cleaned in the same priority as are roads, including the sidewalk on the east side of 41st Street.

**POSITIONS OF THE PARTIES**

**32**  The plaintiff's position is that the Town owed a duty of care to the plaintiff either under s. 3 of the ***Occupiers Liability Act***, *R.S.B.C. 1996, c. 337*, or under the common law. Ms. Boles for the plaintiff submitted that there was no policy decision disclosed in the evidence here. At most, she argued, there was evidence as to a set of practices under which Mr. Thomson made operational decisions. She submitted that the question is whether the Town's system was reasonable in all the circumstances and if so whether it was in operation on the day in question. Ms. Boles submitted that there was evidence that the defendant Fort Nelson knew that there was a risk that water leaks would develop, creating ice and a hazard to citizens who might walk on the road, and that a system of inspection for the ice would not have been inordinately expensive or difficult, and would have prevented the accident here.

**33**  Ms. Boles also submitted that the plaintiff should recover in nuisance. Ms. Boles argued that when the water which escaped from the private residence froze and created a layer of smooth ice under a fresh snowfall, it created a nuisance that Fort Nelson knew or ought to have known existed.

**34**  Fort Nelson's position is that because it was exempted by s. 8 of the ***Occupiers Liability Act*** it owed no duty of care to the plaintiff under that legislation and that s. 288 of the ***Local Government Act*** immunizes the Town from actions for nuisance in these circumstances.

**35**  Ms. Barrett for the defendants submitted in the alternative that the claim in nuisance must fail because the Town did not own the property, create the hazard or have any knowledge of the ice that formed on 41st Street prior to January 2004.

**36**  With respect to the ***negligence*** claimed, Ms. Barrett submitted that the Town had made policy decisions as to its standard procedures, dictated by the availability of manpower, equipment and resources. She submitted that the policy of not inspecting for ice on roadways is *bona fide* and rational. Alternatively, Ms. Barrett submitted that the defendant Town acted reasonably at all times in following its policies.

**ISSUES**

**37**  The issues I must decide are as follows:

1. Was the plaintiff injured on property owned and controlled by the Town of Fort Nelson?
2. Is the Town liable in nuisance?
3. Does s. 288(b) of the ***Local Government Act*** provide immunity to the Town?
4. Did the Town create a dangerous condition or fail to take reasonable steps to abate a dangerous condition when it knew or ought to have known of its existence?
5. Was the place where the fall occurred a public road such that s. 8(2)(b) of the ***Occupiers Liability Act*** applies, excluding the Town from owing a duty of care under s. 3(1) of the ***Occupiers Liability Act***?
6. Is the Town liable in ***negligence***?
7. Did the Town owe a duty of care to the plaintiff?
8. If so, did it take reasonable care in the circumstances?
9. If not, what losses of the plaintiff were caused by the Town's failure to take reasonable care and to what damages is the plaintiff entitled?

**ANALYSIS**

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|  | **(1)** |  | **Was the plaintiff injured on property owned or controlled by the Town of Fort Nelson?** |  |

**38**  The evidence clearly establishes that the plaintiff was injured when she slipped and fell on ice on a road within Fort Nelson. It was not disputed that Fort Nelson owns that property or controls its use.

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|  | **(2)** | **Is the Town liable in nuisance?** |  |

**39**  Section 288(b) of the ***Local Government Act*** provides:

288 A municipality, council, regional district, board or improvement district, or a greater board, is not liable in any action based on nuisance or on the rule in the *Rylands v. Fletcher* case if the damages arise, directly or indirectly, out of the breakdown or malfunction of

...

1. a water or drainage facility or system ...

**40**  I have found that the probable origin of the water which froze and created the hazardous ice was on private property. However, the evidence does not show on a balance of probabilities that the water resulted from the "breakdown or malfunction" of a "water or drainage facility or system". Mr. Talarico and Mr. Thomson both observed a large patch of ice, and Mr. Thomson followed it along to a trailer. The evidence as to what the person in the trailer told him was hearsay and inadmissible to prove that the source of the ice was a water break. There was no other evidence as to the source of the water, aside from Mr. Talarico and Mr. Thomson both saying that the ice appeared to have resulted from a water break. There are many possible causes of leaking water. The evidence does not establish on a balance of probabilities that the cause of the patch of ice on 41st Street was one that would fall within the meaning of s. 288(b) of the ***Local Government Act***.

**41**  I find that s. 288(b) of the ***Local Government Act*** does not provide immunity to the Town.

**42**  I must then address the question whether the Town is liable in nuisance. The definition of nuisance in Dugdale, ed., ***Clerk v. Lindsell on Torts***, 18th ed. (London: Sweet & Maxwell, 2000) at 974 is:

Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, or other right used or enjoyed in connection with land, when it is a private nuisance.

**43**  Allen Linden and Bruce Feldthusen, ***Canadian Tort Law***, 8th ed. (Markham, Ont.: LexisNexis, 2008) describe nuisance in this way at 559:

Nuisance is a field of liability. It describes a type of harm that is suffered, rather than a kind of conduct that is forbidden. In general, a nuisance is an unreasonable interference with the use and enjoyment of land by its occupier or with the use and enjoyment of a public right to use and enjoy public rights of way. For the most part, whether the intrusion resulted from intentional, negligent or non-faulty conduct is of no consequence, as long as the harm can be categorized as a nuisance. ...

**44**  The test for liability in nuisance approved by the Court of Appeal for British Columbia in ***Ross v. Wall*** [*(1980), 23 B.C.L.R. 294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F361-M086-00000-00&context=) (C.A.), referring to ***Sedleigh-Denfield v. O'Callaghan***, [1940] AC 880 (U.K.H.L.), is whether the defendant created a dangerous condition or failed to take reasonable steps to abate a dangerous condition when the defendant knew or ought to have known of its existence. In ***Sedleigh-Denfield***, the owner of property was held responsible for damages caused by water overflowing from a pipe laid by a trespasser on that property.

**45**  Recently, in ***Railtrack plc v. Mayor & Burgesses of London Borough of Wandsworth***, [2001] EWJ 3440, the England and Wales Court of Appeal (Civil Division) considered a claim that the owner of a railway bridge was responsible for a public nuisance created by pigeon droppings on the sidewalk under the bridge. The court referred with approval to an academic article by Professor Goodhart on the subject of nuisance, at para. 9:

In an important article in 4 Cambridge Law Journal in 1930 Professor A.L. Goodhart considered liability for things naturally on the land. He therefore looked at both public and private nuisance, and at page 30 he said --

"The correct principle seems to be that an occupier of land is liable for a nuisance of which he knows, or ought to know, whether that nuisance is caused by himself, his predecessor in title, a third person or by nature. Whether a natural condition is or is not a nuisance is, of course, a question of fact. Is the injury caused by the natural condition more than a reasonable neighbour can be asked to bear under the rule of live and let live? In other words, the ordinary rules of nuisance apply in the case of natural conditions. As we must all bear with our neighbour's piano-playing so we must also submit to his thistle down. This does not mean that we have no remedy if he introduces a large orchestra, or if he allows his tree, even of natural growth, to remain in a dangerous condition along the highway."

**46**  Did the defendant Fort Nelson know that water had escaped from a homeowner's property, causing ice on the side of 41st Street? There was no evidence that anyone brought the patch of ice to the Town's attention until the first week in January 2004. The plaintiff has not established that the Town knew of the large patch of ice on 41st Street prior to the time the ice caused her to slip and fall.

**47**  Has the plaintiff established that Fort Nelson ought to have known of the ice? There is no evidence as to when the patch of ice came into existence. The Fort Nelson crews responsible for snow clearance did not have responsibility to inspect for ice, but they were expected to alert Mr. Thomson if they came across ice that would cause a hazard. As of December 24 at least, the ice was covered with snow and was on a Priority No. 2 street, which the crews were not likely to reach that day since it was still snowing. I do not find that the plaintiff has shown that the existence of the patch of ice ought to have been known to Fort Nelson.

**48**  As the plaintiff has not proved that the Town had or should have had the requisite knowledge, I find that the plaintiff has failed to prove her claim in nuisance against Fort Nelson.

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|  | **(3)** |  | **Does the *Occupiers Liability Act* create a duty of care?** |  |

**49**  The ***Occupiers Liability Act*** in s. 3(1) creates a duty of care on the occupier of premises:

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.

The Crown as an occupier of premises is in general subject to the legislation, but s. 8 of the ***Occupiers Liability Act*** provides an exception in the case of public roads:

8.(1) Except as otherwise provided in subsection (2), the Crown and its agencies are bound by this *Act*.

1. Despite subsection (1), this *Act* does not apply to the government or to the Crown in right of Canada or to a municipality if the government, the Crown in right of Canada or the municipality is the occupier of

...

1. a public road,

...

**50**  Ms. Boles for the plaintiff submitted that the location where Ms. Talarico was injured in her fall was being used for walking and was *de facto* a sidewalk. There was no sidewalk on that side of the road, and Ms. Boles pointed to the evidence that that part of the road was commonly used for walking in the winter in Fort Nelson, and to the absence of a definition of "road" in the ***Occupiers Liability Act***.

**51**  I am not persuaded that the location where the accident occurred was other than a public road. It was used for vehicular traffic and for parking. The fact there was no sidewalk on the west side of 41st Street and that people sometimes walked there does not make the public road a sidewalk.

**52**  I find that s. 3(1) of the ***Occupiers Liability Act*** does not create a duty of care on Fort Nelson in this case because the area where the accident occurred falls within the exception provided under s. 8(2)(b).

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|  | **(4)** | **Is the Town liable in *negligence*?** |  |

1. Inter-relationship between ***Occupiers Liability Act*** and common law duty of care

**53**  I have concluded, as set out above, that s. 8(2)(b) of the ***Occupiers Liability Act*** excluded the defendant Town from the duty of care otherwise created by s. 3(1) of that ***Act*** because the accident occurred on a public road.

**54**  The inter-relationship between the law of ***negligence*** and the ***Occupiers Liability Act*** with respect to highways was discussed in ***Brown v. British Columbia (Minister of Transportation and Highways)***, [*[1994] 1 S.C.R. 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CF-00000-00&context=). There, at 439-40, Cory J. addressed an argument that s. 8 of the ***Occupiers Liability Act*** and s. 3(2)(f) of the ***Crown Proceeding Act***, R.S.B.C. 1979, c. 86, exempted the Department of Highways from any liability. Cory J. wrote at 440:

Further, the *Occupiers Liability Act* simply has no place in a consideration of the obligations of the Department of Highways for the repair and maintenance of its highways. The enactment of occupiers' liability acts in common law provinces resulted from two legitimate concerns of the legislator. The first was the desire to do away with the medieval morass of "pigeon holing" and labelling that governed cases prior to the passage of the acts. The other was a concern for the increasing risk of liability for occupiers of property arising from accidents occasioned by snowmobilers running into wire fences or wire gates on farm and rural properties. I cannot believe that the *Occupiers Liability Act* of British Columbia was passed with a view to exempting the Department of Highways from liability for its negligent acts, whether they be acts of misfeasance or nonfeasance. To achieve that result a clear exemption would have to be found in the *Highway Act*. There is no such exemption here.

**55**  It is clear from those comments that s. 8(2)(b) does not exempt Fort Nelson from liability for ***negligence*** with respect to repair and maintenance of its roads if it has a duty of care at common law.

1. General principles governing duty of care

**56**  Did Fort Nelson owe a duty of care to Ms. Talarico?

**57**  The Supreme Court of Canada 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=), discussed comprehensively the circumstances in which there will be sufficient proximity to found a duty of care, stating at para. 36:

What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock (see, for example, *Alcock v. Chief Constable of the South Yorkshire Police*, [1991] 4 All E.R. 907 (H.L.)). Yet other categories are liability for negligent misstatement: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), and misfeasance in public office. A duty to warn of the risk of danger has been recognized: *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=). Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without ***negligence***: *Anns, supra*; *Kamloops, supra*. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: *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=), *Swinamer v. Nova Scotia (Attorney General)*, [*[1994] 1 S.C.R. 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CG-00000-00&context=), etc. Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: *Norsk, supra*; *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=). When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.

[emphasis added]

**58**  The Supreme Court of Canada held 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=), and ***Swinamer v. Nova Scotia (Attorney General)***, [*[1994] 1 S.C.R. 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CG-00000-00&context=), that once a government has made a policy decision to undertake some activity, such as road maintenance, it may have a duty of care to carry out the activity in a non-negligent manner. However, absent a policy decision to undertake an activity, the necessary proximity to found a duty of care may not exist, and policy decisions themselves are exempt from tortious claims.

**59**  Further elaboration upon these principles is found in ***Brown v. British Columbia (Minister of Transportation and Highways)***.

**60**  In ***Brown***, the plaintiff sued for injuries suffered when his truck hit black ice on the highway. The issue was whether the provincial Department of Highways was negligent in its maintenance of that highway.

**61**  Cory J. for the majority first reviewed the general principles set out in ***Just v. British Columbia***. There, the court had distinguished between policy and operational decisions, drawing that line in order to distinguish between those areas in which there should be Crown immunity to govern and make true policy decisions without being subject to tort liability as a result of those decisions, from those areas in which governments should bear responsibility to implement their decisions in a non-negligent way. The Supreme Court of Canada in ***Just*** stated at pp. 1240-41:

True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.

**62**  While the distinction between policy and operational factors is not easy to formulate, the Supreme Court of Canada approved of the explanation of the distinction given by Mason J., speaking for himself and one other member of the Australian High Court, in ***Sutherland Shire Council v. Heyman*** (1985), 60 A.L.R. 1 (Aust. H.C.), that "the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints" (at 1242).

**63**  In ***Brown*** at 435, Cory J. commented on whether it is necessary to determine whether a policy was *bona fide* and reasonable or rational, stating that generally such consideration will not be necessary. However, he said, in rare cases government decisions may be attacked where a policy decision was made in bad faith or in circumstances where it is so patently unreasonable that it exceeds governmental discretion. The court referred to the statement in ***Just*** at 1243:

Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of *bona fide* discretion based, for example, upon the availability of funds.

**64**  Posing the question before it as whether a duty of care is owed by the Department of Highways to those who use the provincial roads, the court again referred to ***Just*** for the proposition that a duty of care is owed by the province to those who use its highways and that duty of care would extend ordinarily to reasonable maintenance of those roads. At 439 in ***Brown*** the court said that the duty to maintain would extend to the prevention of injury to users of the road by icy conditions. However, the court added:

... the Department is only responsible for taking reasonable steps to prevent injury. Ice is a natural hazard of Canadian winters. It can form quickly and unexpectedly. Although it is an expected hazard it is one that can never be completely prevented. Any attempt to do so would be prohibitively expensive. It can be expected that a Department of Highways will develop policies to cope with the hazards of ice.

**65**  Addressing whether the decision of the Department of Highways to maintain a particular schedule was one of policy or of operations, the court commented at 441:

True policy decisions involve social, political and economic factors. In such decisions, the authority attempts to strike a balance between efficiency and thrift, in the context of planning and predetermining the boundaries of its undertakings and of their actual performance. True policy decisions will usually be dictated by financial, economic, social and political factors or constraints.

The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy. Operational decisions will usually be made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

**66**  The court concluded in ***Brown*** that the decision to maintain a summer schedule was a policy decision and could not be reviewed on a private law standard of reasonableness.

**67**  Where a government has made a policy decision to undertake an activity, choices made in carrying out that activity may also qualify as policy decisions that are shielded from liability. In ***Gobin (Guardian ad litem of) v. British Columbia***, [*2002 BCCA 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2RB-00000-00&context=), [*2 B.C.L.R. (4th) 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2RB-00000-00&context=), Braidwood J.A., writing for the majority, noted at paras. 11-13 and 52:

It is clear that a true policy decision may shield the government from liability. In the decision of *Just v. R. in Right of British Columbia* [*(1989), 64 D.L.R. (4th) 689*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=) at p. 705, the following appears:

... True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political, or economic factors.

At the same time, however, "complete Crown immunity should not be restored by having every government decision designated as one of policy" (*Just, supra*, at p. 704). Courts must weigh the particular circumstances of any given case in order to distinguish between policy and operation.

The analysis does not end here, however. Even where contested decisions are clearly ones of policy, the operational implementation of a policy decision may still leave government susceptible to a tort claim, as the matter essentially "reverts" to an operational one. Courts may therefore be required to assess whether policy matters under review are manifestations of the operational implementation of a policy choice. Where, ultimately, the contested decision is operational, the standard tort analysis applies, and the requisite standard of care is one of reasonableness. Where, in comparison, the decision at issue is one of policy, liability may be imposed only for decisions that are made in bad faith or that are so irrational or unreasonable that they cannot be said to constitute a proper exercise of discretion: *Kamloops (City of) v. Nielsen*, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=).

...

It has been confirmed in prior cases that "lower level" choices may qualify as policy decisions. In *Just*, the Court held that a "lower level" policy decision to spot check manufactured items rather than check each item individually (a choice based on the lack of both trained personnel and funds) could very well qualify as a policy decision. Cory J. held (at p. 707) as follows:

Thus, a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.

...

In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy decision-making is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.

[emphasis in original]

**68**  From ***Gobin*** it follows that where the government has made a policy decision to undertake an activity, and a further "lower level" decision made in respect of that activity is said to have caused damage to a person, the government may still escape liability if the lower level decision was a policy decision. ***Gobin*** also says that the court's focus should be on the "contested decision", that is, on the decision that is causally linked to the plaintiff's injury.

1. Cases referred to by counsel

**69**  Counsel for the parties brought a number of slip and fall cases to my attention. Counsel for the plaintiff referred to ***Cullinane v. Prince George (City)***, [*2002 BCCA 523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-604D-00000-00&context=), [*6 B.C.L.R. (4th) 325*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-604D-00000-00&context=), and ***Cullinane v. Prince George (City)***, [*2000 BCSC 1089*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22HR-00000-00&context=), ***Potozny v. Burnaby (City)***, [*2001 BCSC 837*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63ST-00000-00&context=), ***Mainardi v. Shannon***, [*2005 BCSC 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0VK-00000-00&context=), and ***Watt v. R.P. Johnson Construction Ltd.*** (June 28, 1995), Kamloops Registry No. 20371. Counsel for the defendants referred to ***Knodell v. New Westminster (City)***, [*2005 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1HS-00000-00&context=), [*14 M.P.L.R. (4th) 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1HS-00000-00&context=), ***Short v. New Westminster Rotary et al.***, (March 20, 1995), Vancouver Registry No. S011935 (B.C.S.C.), and ***Nabholtz v. Kimberley (City)***, [*2002 BCSC 174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61P8-00000-00&context=).

**70**  An issue which does not arise before me (but which affects the relevance of cases cited by counsel) is whether, if the ***Occupiers Liability Act*** does apply, it is still necessary to undertake the policy/operational analysis required to determine whether a common law duty of care exists. In ***Knodell v. New Westminster (City)***, Joyce J. specifically addressed this issue. Referring to ***Brown*** at para. 2, ***Gobin (Guardian of) v. British Columbia***, and ***Kennedy v. Waterloo County Board of Education*** [*(1999), 175 D.L.R. (4th) 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JJYN-B4H3-00000-00&context=) (Ont. C.A.), he stated at para. 25:

I should have thought that where a statutory duty of care exists the policy/operational analysis simply does not arise. The policy defence, if it applies, negates a common law duty of care. That was the view taken by Sopinka J. in his concurring judgment in *Brown* ...

Joyce J. then referred to ***Fox v. Vancouver (City)***, [*2003 BCSC 1492*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B06B-00000-00&context=), [*22 B.C.L.R. (4th) 126*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B06B-00000-00&context=), where the policy immunity defence was upheld in an action involving a slip and fall on a sidewalk. The claim was based on the ***Occupiers Liability Act*** and there was no common law claim in ***negligence***. Joyce J. concluded in ***Knodell*** that since the decision in ***Fox*** was a considered decision in which the relevant case law was reviewed, he was bound to follow it.

**71**  All of the slip and fall cases cited by counsel involved claims under the ***Occupiers Liability Act***. They are therefore of limited assistance in deciding whether a duty of care exists in this case, though they do assist in determining whether Fort Nelson took reasonable care if it did owe a duty of care to the plaintiff.

**72**  ***Nabholtz v. Kimberley*** concerned a slip and fall in an outdoor pedestrian shopping area. The plaintiff in that case slipped on ice covered by fresh snow. The location of the accident was regularly inspected, cleared and sanded pursuant to the defendant municipality's policy, but had not been inspected, cleared or sanded before the plaintiff fell. The court found there was a duty of care under the ***Occupiers Liability Act***, and that the defendant had met the standard of care.

**73**  In ***Cullinane v. Prince George (City)***, the plaintiff fell on a sidewalk owned and maintained by the City of Prince George. At trial she alleged that her fall was caused by an unusual build-up of ice, and that the City was negligent and in breach of its obligation under the ***Occupiers Liability Act***. The court referred to the City's comprehensive policy and procedure for snow and ice removal on sidewalks. However, the court found that ice conditions in the area where the plaintiff fell were both very unusual and very hazardous, that there was no sand or abrasive material applied to them, and that the build-up of ice should have been obvious to the City workers. The court concluded that the City owed a duty to pedestrians to ensure the sidewalk was reasonably safe and had failed in that duty, and that, as occupier of the sidewalk, the City was liable to the plaintiff. The trial decision was upheld on appeal.

**74**  ***Potozny v. Burnaby (City)*** again was a case under the ***Occupiers Liability Act***. The court concluded in the end that the City, which operated a skating arena, was under an obligation to make it reasonably safe and that it had failed in that duty. The court commented that while it may have been prepared to find that the City had a reasonable maintenance system in place, it could not find that the system was followed on the day of the accident.

**75**  Similarly, ***Mainardi v. Shannon*** and ***Watt v. R.P. Johnson Construction Ltd.*** were cases in which a duty of care existed under the ***Occupiers Liability Act***. In those cases, the defendants were not municipalities or arms of government. In both cases, the court found that the defendants knew or ought to have known of the dangerous conditions that caused injury to the plaintiffs, and did not take reasonable steps to abate those conditions.

1. Application to this case

**76**  The Town's policy was to maintain its roads in winter. It had decided to do so by removing snow from the lanes of vehicular traffic, following a system of priorities set according to the nature of the road and the amount of traffic to be expected, and by scraping roads with a grader when there was sufficient packed snow. The Town had decided not to inspect for ice or water leaks, but to respond if problems were brought to its attention. These latter decisions, as to the ways and means of maintaining the roads, could be called "secondary" decisions.

**77**  The Town's decision to maintain the roads in winter undoubtedly was a policy decision. The question is whether the secondary decisions (as to the ways in which this would be done) were also policy decisions.

**78**  The Supreme Court of Canada has said that in distinguishing between policy and operational decisions the essential question is whether the decisions involved social, political or economic factors, and attempts by the government to balance efficiency and thrift in planning and predetermining the boundaries of its undertakings and of their actual performance -- or, on the other hand, whether the decisions involved the practical implementation of formulated policies, based on administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

**79**  The evidence as to the history of the formulation of the Town's decisions was sparse, and the documentation of those decisions slight. However, I do not find that absence of records or clear documentation to be determinative, in the context of a small community such as Fort Nelson.

**80**  Fort Nelson operated within a budget, part of which was an annual allocation for snow removal and ice control. The evidence was that Fort Nelson did not cease snow removal activities even if the budget for those activities for the year had been exceeded. Although counsel for the plaintiff submitted that I should find, therefore, that budgetary considerations did not enter into the formulation of snow removal procedures, I do not draw that inference. I find that budgetary considerations inevitably were involved in the decisions as to what activities the Town would undertake.

**81**  The evidence was that the snow removal procedures and the annual budget were developed by persons at a senior level while the day-to-day implementation of the Town's snow removal activities was delegated to Mr. Thomson. The level of seniority of the decision-maker is not conclusive of whether a decision is a policy decision, though "it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency": ***Just*** at 1245.

**82**  Ms. Boles submitted that the decisions that led to the existence of the patch of ice and to the plaintiff's injuries were: to give 41st Street Priority No. 2 designation; to plough only the lanes of travel; and not to inspect for ice or for water breaks.

**83**  In my view, through those decisions the Town planned and predetermined the boundaries of its undertakings and of their actual performance. All were policy decisions establishing a set of general procedures for snow removal and ice control, against a backdrop of economic and political considerations. No specific operational decision by Mr. Thomson or by anyone else as to the implementation of those general decisions was at issue in this case.

**84**  I find that the Town did not owe a duty of care to the plaintiff because the decisions leading to the plaintiff's very unfortunate injury were ones of policy, not operations.

1. Breach of duty if there was a duty of care

**85**  If the decisions at issue were operational and if Fort Nelson did owe Ms. Talarico a duty of care, I would find that the Town fulfilled that duty and took reasonable care in the circumstances in carrying out its overall policy decision to repair and maintain the roads. It was reasonable for the Town to clear the lanes of traffic according to a system of priorities, to scrape the roads with a grader when snow had built up, and not to inspect for ice or water leaks. Further, there is no evidence that the Town was aware or ought to have been aware of the existence of the particular patch of ice that caused the accident. The Town did deploy crew members to remove snow on December 24 as required by its procedures. I find that there was no breach of duty on the part of the Town, if such a duty of care existed.

1. Damages if there was a breach of duty

**86**  Finally, in case I am wrong and Fort Nelson did breach a duty of care to the plaintiff, I will address the question of damages.

**87**  I find that the injuries suffered by the plaintiff as a result of her fall on the ice were relatively serious. She suffered considerable pain, and the injury has disabled her from doing a number of things the same way she was able to before the accident, including riding all-terrain vehicles, hiking, and camping, as well as laundry and housework. She underwent two surgeries and was told that if she was allergic to the metal that was to be inserted, she might die as a result. She was understandably highly anxious about the initial surgery. Pain continued after the first surgery, leading to the need for the second surgery to remove the metal three years later. Ms. Talarico has suffered some psychological issues since the accident, finding herself unable to handle stress as she could before. She has been diagnosed with depression. I find that the injuries suffered in the accident were a contributing cause to those psychological issues, although there were also other stresses in the plaintiff's life which may have led to the psychological issues in any event.

**88**  Ms. Boles submitted that $60,000 in non-pecuniary damages is warranted in this case. She referred to cases which she said were comparable: ***Nicoll v. The Owners of Strata Plan 1611 et al.***, [*2005 BCSC 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X0ND-00000-00&context=) ($100,000 in non-pecuniary damages for injuries involving the tibia and fibula as well as the ankle, ongoing deformity and leg length discrepancy, and more severe ongoing physical disability than in this case); and ***Pipe v. Dusome***, [*2007 BCSC 1066*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1K3-00000-00&context=) ($35,000 in non-pecuniary damages for an ankle injury where there was a significant pre-existing knee injury and asymptomatic arthritis of the ankle before the accident).

**89**  Ms. Barrett submitted that if there were to be an award for non-pecuniary damages it should be in the range of $40,000 to $50,000. She referred to a number of cases: ***Forsyth v. Pender Harbour Golf Club Society***, [*2006 BCSC 1108*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G377-00000-00&context=); ***Emerson v. Insurance Corporation of British Columbia***, [*2003 BCSC 1086*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22GX-00000-00&context=); ***Leweke v. Saanich School District No. 63***, [*2004 BCSC 1251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2Y7-00000-00&context=); and ***Ruckheim v. Robinson*** [*(1995), 1 B.C.L.R. (3d) 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0XT-00000-00&context=) (C.A.), which involved awards in that range in what she argued were comparable circumstances.

**90**  I find that the appropriate award for non-pecuniary damages in this case would be $55,000, given the multiple surgeries, ongoing pain, and contribution to psychological issues.

**91**  As for income loss, the plaintiff's position is that she lost $3,150 because she did not receive a bonus in 2007 and received a lower bonus in the previous year. There was evidence that the work the plaintiff missed in 2007, leading to a lower bonus, was caused both by unrelated oral surgery and by the second surgery on her ankle. I find that she would be entitled to $1,700 in lost income to the date of trial.

**92**  Ms. Boles argued for $50,000 as damages for lost earning capacity; Ms. Barrett submitted that the steady increase in Ms. Talarico's income since the accident shows that she has not suffered any lost earning capacity as a result of her injuries. I agree with Ms. Barrett and find that there is no basis for an award for lost earning capacity.

**93**  Similarly, I do not find on the evidence a basis for an award for the cost of future care.

**94**  Special damages were agreed at $3,040.

**CONCLUSION**

**95**  The plaintiff's claim against both defendants is dismissed. I am unaware of any reason why the defendants should not have their costs, but counsel may speak to the question of costs if they wish to do so.

C.L. SMITH J.

**End of Document**

[***Abokasem v. Benjamin, [2015] B.C.J. No. 2712***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HMS-TBK1-JFSV-G51G-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W.G. Baker J.

Heard: April 16, June 19, 2015.

Judgment: December 9, 2015.

Docket: S137828

Registry: Vancouver

**[2015] B.C.J. No. 2712** | 2015 BCSC 2300

Between Mohamed Abokasem, Sujoy Majumdar, Madhumita Sakar, Anil Mital, Krihna Shankar, Radhika Shankar, Vinay Dilawri, Krishna Kundadak Kudva, Vidya Krishna Kudva, Archana Krishna Kudva- Pelly, Rathnakumar Badhan, Manonmani Thangapandian, Indrajit Roy, Sushma Kaul Roy, Rnjit Mair, Jiji Ranjit Nair, Ajith Nair, Radhika Nair, Ravinder Prakash, Hemant Prakash, Dhiraj Tyagi and Jyoti Tyagi, Plaintiffs, and Manoj Benjamin, Ravi Benjamin, Collins Benjamin, Anjula Benjamin, Maya Benjamin and Sherri Benjamin, Defendants

(67 paras.)

**Case Summary**

**Conflicts of law — Jurisdiction — Submission to — Form of submission or election — Attornment — Application by plaintiffs for order registering, recognizing and enforcing California District Court judgment for $3,068,137 made against defendants allowed — Plaintiffs commenced action in California claiming breach of contract and fiduciary duty, unjust enrichment and *negligence* — Two defendants attorned to jurisdiction of court in filing defences, and one was served by substitutional service and chose not to defend — Defendants were served with judgment and did not pursue appeal — In dismissing defendants' challenge to jurisdiction of California court, it reviewed evidence of substantial connection in detail — Defendants did not establish fraud or breach of procedural fairness.**

**Conflicts of law — Foreign judgments — Action on foreign judgment — Enforcement — Recognition of judgments of foreign state or territory — Application by plaintiffs for order registering, recognizing and enforcing California District Court judgment for $3,068,137 made against defendants allowed — Plaintiffs commenced action in California claiming breach of contract and fiduciary duty, unjust enrichment and *negligence* — Two defendants attorned to jurisdiction of court in filing defences, and one was served by substitutional service and chose not to defend — Defendants were served with judgment and did not pursue appeal — In dismissing defendants' challenge to jurisdiction of California court, it reviewed evidence of substantial connection in detail — Defendants did not establish fraud or breach of procedural fairness.**

**Conflict of laws — Conflicts by legal area — Contracts — Choice of law — Jurisdiction with most substantial connection — Specific contract types — Sale of land — Application by plaintiffs for order registering, recognizing and enforcing California District Court judgment for $3,068,137 made against defendants allowed — Plaintiffs commenced action in California claiming breach of contract and fiduciary duty, unjust enrichment and *negligence* — Two defendants attorned to jurisdiction of court in filing defences, and one was served by substitutional service and chose not to defend — Defendants were served with judgment and did not pursue appeal — In dismissing defendants' challenge to jurisdiction of California court, it reviewed evidence of substantial connection in detail — Defendants did not establish fraud or breach of procedural fairness.**

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| --- |
| Application by the plaintiffs for an order registering, recognizing and enforcing the $3,068,137 judgment made against the defendants by the California District Court. The plaintiffs were residents of Canada and the United States who entered into booking agreements with the defendants and paid deposits and down payments for units in a development in India. The agreements provided that, if development approval was not obtained within a specified period of time, the plaintiffs could demand their money back. The plaintiffs alleged approvals were not obtained and the defendants did not return their money. The plaintiffs commenced an action against the defendants in California claiming breach of contract, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. Two of the defendants' pleadings were struck by the California court after they failed to explain their failure to attend the case management conference. The third defendant was served through alternative service but filed no answer. He claimed he was in India and knew about the action generally but not the details. However, it was highly improbable his brother, who was also a defendant, did not discuss the litigation with him. The third defendant knew he was a defendant in the action and chose not to respond. Default judgment was granted against all defendants.  HELD: Application allowed.  Two of the defendant attorned to the jurisdiction of the California court when they filed answers equivalent to a statement of defence after their application challenging jurisdiction was dismissed. There was a real and substantial connection between the California court and all three defendants. The defendants carried on business and conducted marketing in California, and interacted with the plaintiffs there. The California court reviewed in detail the evidence of real and substantial connection when it dismissed the defendants' application challenging its jurisdiction, and the evidence of the connection applied equally to the third defendant. The defendants provided no evidence or convincing argument that anything done by the California court was contrary to Canadian morality or public policy. All of the facts the defendants relied on to assert fraud were known to the California court at the time of the proceedings. Substitutional service was permitted by the Rules and commonly used in British Columbia, and the third defendant knew he was named, had the opportunity to respond and chose not to. The evidence indicated the defendants were served with the judgment of the California court and took no steps to appeal it or have it set aside. The judgment was to be registered, recognized and enforced as a judgment of the British Columbia Supreme Court, and the plaintiffs were granted judgment against the defendants. |

**Statutes, Regulations and Rules Cited:**

Rules of Court,

**Counsel**

Counsel for the Plaintiffs/Applicants: David A. Crerar and J. Finn.

Manoj Benjamin, Ravi Benjamin and Anjula Benjamin: Self-represented.

**Reasons for Judgment**

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| **W.G. BAKER J.** |

**1**   The Plaintiffs seek orders registering a California District Court judgment ("the California Judgment") against each of the Defendants Manoj, Anjula and Ravi Benjamin, as a judgment of this Court; judgment against each of the three named Defendants in the terms of the California Judgment; and an order declaring that the California Judgment is enforceable in the same manner as a judgment or order of this Court.

**2**  Although in the Notice of Application filed by the Plaintiffs on February 6, 2014, the Defendants Sherri Lea Benjamin and Maya Marian Benjamin are also named as Respondents, counsel for the Plaintiffs advised the Defendants and the Court at the outset of the hearing that the Plaintiffs were proceeding only against the Defendants Manoj, Anjula and Ravi Benjamin ("the Defendants/Respondents"). Counsel John Drove, who represents Maya Benjamin, was present for part of the hearing. He spoke briefly at the conclusion of the first day of hearing, indicating that in his view the Plaintiffs should also proceed against the Defendant Maya Benjamin at this time, but he had filed no Notice of Application and I declined to order the Plaintiffs to expand their application.

**FACTS**

**3**  On December 12, 2012, the United States District Court for the Northern District of California in *Mohamed Abokasem et al v. Royal Indian Raj International Corp. et al*, Court No. CV-10-1781 MMC granted judgment against the Defendants Manoj, Anjula and Ravi Benjamin, and others, for damages in the amount of U.S. $3,068,137.21. It is this California Judgment that the Plaintiffs seek to register and enforce in British Columbia.

**4**  The history of the transactions between the plaintiffs and the defendants; and the history of the litigation in California are both relatively complex and I shall endeavour to avoid a lengthy recitation here as in my view the issues that arise are straightforward and fall to be resolved by application of the principles set out in *Beals v. Saldanha*, [*[2003] 3 S.C.R. 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B101-00000-00&context=).

**5**  For context, I provide the following summary of the facts giving rise to the action in California ("the California action"). The plaintiffs are all residents of Canada or the United States of America who signed "booking agreements" and paid deposits or down payments towards the purchase of units in a real estate development project in India known as the Royal Gardens Villa & Resort Project ("RGVR Project").

**6**  The RGVR Project was the first component in what was advertised to be the construction of a $3 billion European-style sub-city development named Royal Garden City, located near Bangalore, the capital of the Indian State of Karnataka in southern India. In Press releases issued by Royal Indian Raj International Corp. ("RIRIC"), a Nevada corporation that was also a defendant in the California action, RIRIC stated that Royal Garden City would eventually accommodate 300,000 to 600,000 people.

**7**  RIRIC had its headquarters at Suite 610, 375 Water Street in Vancouver, B.C. There are other related corporations that were defendants in the California action, including Royal Garden City Enterprises Private Ltd. ("RGCEPL"), incorporated under the laws of India; Royal Indian Raj International Holdings Corp., ("RIRIHC"), a British Columbia corporation; Royal Indian Raj International Real Estate Fund Ltd. ("RIRIREF"), a British Columbia Corporation; and Royal Gardens Villas Resort Corp. ("RGVRC"), also a British Columbia Corporation.

**8**  The booking agreements signed by the Plaintiffs give each Plaintiff the right to demand a full refund of their payments if the RGVR Project did not receive the necessary clearances from the Bangalore International Airport Area Planning Authority ("the BIAAPA) within a specified period of time.

**9**  In the California action, the Plaintiffs alleged that the necessary clearances were not obtained within the time frame specified by any of the booking agreements signed by the Plaintiffs; and had not received the necessary clearances by the time the California action was commenced on April 26, 2010. The plaintiffs alleged that the entire scheme was fraudulent and that when they demanded the return of their deposits the funds were not forthcoming.

**10**  The California action was commenced by the filing of a "Complaint" -- the equivalent to a Statement of Claim in British Columbia. On June 7, 2010, prior to the service of the Complaint on any defendant in the California action, the plaintiffs there filed a First Amended Complaint ("the FAC").

**11**  In the California action, the Plaintiffs claimed against the Defendants/Respondents and others for damages for breach of contract, ***negligence***, breach of fiduciary duty, fraud, negligent misrepresentation, and unjust enrichment.

**HISTORY OF THE PROCEEDINGS AGAINST MANOJ BENJAMIN AND ANJULA BENJAMIN**

**12**  Manoj Benjamin, Anjula Benjamin and Ravi Benjamin are the adult children of Maya Benjamin and Collins Benjamin. Manoj Benjamin resides in Vancouver. He was, and quite probably still is Chairman of the Board and Chief Executive Officer of RIRIC; a director and officer of RGCEPL; and the sole director and officer of RIRIHC, RIRIREF, and RGVRC. Manoj Benjamin was personally served with the First Amended Complaint at a Petro Canada service station in New Westminster, British Columbia after attempts to serve him at a residence in Vancouver proved futile.

**13**  Anjula Benjamin resided in Vancouver in the past, but now resides in Alberta. On the corporate records of RIRIC, Anjula Benjamin appeared as "Secretary" of RIRIC. Anjula Benjamin did not file an affidavit in response to this application, but she filed an Application Response, and also provided the Court at the hearing with a written submission titled "The Arguments of Anjula Benjamin". She also made oral submissions.

**14**  Anjula Benjamin stated in her written submission that she was employed by "Royal Indian Raj" for three to four years.

**15**  Anjula Benjamin was not personally served with the First Amended Complaint but she told this Court, and stated in her written submission, that she was told about the California action by her brother, Manoj Benjamin, and she agreed with his suggestion that she should "submit" to the California court. She stated that Manoj Benjamin told her that he would retain counsel on his own behalf, and on her behalf, to challenge the jurisdiction of the California court.

**16**  Manoj Benjamin and Anjula Benjamin retained counsel in the United States -- Diane McFadin and Minal Belani -- to represent them in the California action. On September 7, 2010 and September 8, 2010, Ms. McFadin and Ms. Belani filed Notices of Appearance on behalf of Manoj Benjamin and Anjula Benjamin, as well as several of the related corporations that were defendants in the California action, including RIRIC.

**17**  On October 12, 2010, Manoj Benjamin and Anjula Benjamin brought a motion to dismiss the claims brought against them in the California action, challenging the jurisdiction of the California court and also alleging the pleadings did not set out claims against certain of the defendants.

**18**  Manoj Benjamin and Anjula Benjamin each swore affidavits that were filed in the California action, in support of their applications for dismissal of the action. The applicants argued that California lacked jurisdiction over them; and also that California was not the appropriate forum -- that a clause in the booking agreements required any action to be brought in Bangalore.

**19**  On February 11, 2011, the Honourable United States District Judge Maxine M. Chesney ("Judge Chesney") found that the California court had personal jurisdiction over Manoj Benjamin and Anjula Benjamin on the basis that they had purposefully availed themselves of the benefits and protections of California's laws, and had sufficient contacts with the State of California. Judge Chesney also rejected the defendants' argument that the forum selection clause in the booking agreements required disputes to be adjudicated in Bangalore. She dismissed the defendants' application to stay the California action, brought on the grounds "*forum non conveniens*".

**20**  On February 26, 2011, the plaintiffs in the California action filed a "Second Amended Complaint" revising allegations against Anjula Benjamin as to the fraud and negligent misrepresentation claims.

**21**  On March 29, 2011, Manoj Benjamin and Anjula Benjamin (among other defendants in the California action), through their counsel, filed a "Joint Case Management Statement" that had been formulated in consultation with plaintiffs' counsel in the California action.

**22**  On April 1, 2011, counsel for Manoj Benjamin and Anjula Benamin, as well as RIRIC and some other defendants in the California action filed an "Answer" to the Second Amended Complaint. The "Answer" is the equivalent to a Statement of Defence" in British Columbia. The filing of the Answer clearly indicates that Manoj and Anjula Benjamin attorned to the jurisdiction of the District Court in California.

**23**  Within the following six weeks, Ms. McFadin and Ms. Belani, the two counsel representing Manoj and Anjula Benjamin, filed applications with the Judge Chesney seeking to withdraw as counsel for those defendants (and others) citing as grounds a breakdown in communications between counsel and the defendants; Ms. McFadin's impending retirement; and Ms. Belani's change of employment.

**24**  Ms. McFadin told Judge Chesney that Manoj Benjamin had told her that the defendants would hire new counsel, but had not done so; that the defendants were no longer responding to her communications, including multiple phone calls and messages; and that she had repeatedly asked the defendants for addresses for service, but they had not provided the requested addresses.

**25**  On May 13, 2011 and May 18, 2011, Judge Chesney dismissed the applications to withdraw, based on lack of proper service of the motions on their clients; and other procedural deficiencies.

**26**  On June 29, 2011, Judge Chesney granted the motions to withdraw as counsel. Judge Chesney's Reasons indicate that Ms. McFadin and Ms. Belani told the Court that as early as April 29, 2011 the defendants had informed them that they had obtained other counsel, although those counsel had not yet been formally retained. The Court refused to stay the action for 60 days as requested by the defendants, but adjourned a Case Management Conference scheduled for July 1, 2011 to August 5, 2011 to give the defendants "...additional time to either retain new counsel or to arrange to appear in person before the Court." Judge Chesney ordered that the defendants appear at the Case Management Conference either by new counsel or in person. She also specified an address for delivery in Vancouver for all the RIRIC defendants, including Manoj and Anjula Benjamin; and an e-mail address manojbenjamin@hotmail.com.

**27**  It is clear that Manoj Benjamin (and, I infer, Anjula Benjamin) knew about the order made on June 29, 2011 and the scheduling of the Case Management Conference for August 5, 2011 because a Vancouver lawyer instructed by Manoj Benjamin was given a copy of the order and makes reference to it in a letter he wrote to Judge Chesney's "Courtroom Deputy", sometime in July 2011. In his letter, the lawyer Ronald Klassen, wrote that he had received a copy of the Order and he specifically referred to the August 5, 2011 Case Management Conference. He wrote that he had not yet been provided with funds to retain a California attorney. Mr. Klassen did not file an appearance or notification of change of solicitor in the California court.

**28**  On August 5, 2011, Manoj and Anjula Benjamin (as well as RIRIC and the other related corporations) failed to appear at the Case Management Conference. Judge Chesney ordered the defendants to show cause, in writing, on or before August 19, 2011, why they had failed to appear; and why they should be not be held to be in contempt, and sanctioned.

**29**  Manoj and Anjula Benjamin failed to comply with the August 19, 2011 deadline. On August 24, 2011, Judge Chesney found Manoj and Anjula Benjamin in contempt of court and ordered them to show cause in writing by September 9, 2011, why their Answers should not be stricken and default entered as a sanction.

**30**  Neither Manoj nor Anjula Benjamin filed a response.

**31**  On September 14, 2012, Judge Chesney granted a motion by the plaintiffs in the California action to strike the Answers of Manoj and Anjula Benjamin and on September 17, 2012 default judgment was granted. On December 12, 2012, final judgment was granted against the defendants Manoj Benjamin, Anjula Benjamin, Ravi Benjamin and other defendants, in the California action.

**32**  It appears to be the practise in the California court that the clerk of the court serves defendants with a copy of a final judgment. Tracy Lucero, Deputy Clerk of the United States District Court for the Northern District of California sent the California Judgment to the defendants on December 12, 2012. The appeal period expired in January 2013. None of the defendants appealed.

**HISTORY OF THE PROCEEDINGS AGAINST RAVI BENJAMIN**

**33**  Ravi Benjamin lives in Vancouver with his wife, Sherri Benjamin. According to the corporate records of RIRIC, Ravi Benjamin was the Treasurer and Vice-President of Research and Development of RIRIC. In submissions before me, Ravi Benjamin confirmed that he held the office of "Treasurer" of RIRIC. Ravi Benjamin deposed in his affidavit sworn April 13, 2015 that his wife Sherri Benjamin was also an employee or RIRIC.

**34**  Ravi Benjamin was named as a defendant in the Complaint, the First Amended Complaint and the Second Amended Complaint in the California action. After the corporate defendants and Manoj and Anjula Benjamin entered appearances in the California action, plaintiffs' counsel in the California action, Jonathan M. Reymann, learned that Ravi Benjamin was in India "...for an extended period of time". On April 20, 2011 the plaintiffs filed a motion seeking authorization to serve Ravi Benjamin by "alternative service" in accordance with *Rules of Court* in the District Court. On May 18, 2011, Judge Chesney granted the motion for alternative service and directed that service be made by electronic delivery to two e-mail accounts and by private mail courier to two residences owned by Ravi Benjamin and his wife Sherri Benjamin, in Vancouver and Burnaby, B.C.

**35**  The two e-mail accounts were known to be accounts of Ravi Benjamin as he had used those accounts in communicating with two of the plaintiffs. One of the two residences - 2704 Gravely Street - was the principal residence of Ravi and Sherri Benjamin, according to their joint affidavit, from 2007 to February 2010, was rented to a tenant from March 2010 until July 2011; and was again the principal residence of Ravi and Sherri Benjamin from August 2011 until May 2012. They also owned 5488 Smith Avenue in Burnaby, B.C. Ravi and Sherri Benjamin deposed that they had tenants in this property during the relevant period.

**36**  Ravi Benjamin told this Court in submissions that while he and his wife were temporarily residing in India from March 2010 until July 2011 Anjula Benjamin was picking up rent cheques from the tenants in the two properties owned by Ravi and Sherri Benjamin. I consider it to be probable that the tenants would also have delivered to Anjula Benjamin any mail that had been received addressed to Ravi Benjamin.

**37**  Alternative service on Ravi Benjamin was carried out on June 3, 2011 in accordance with Judge Chesney's order, as verified by the affidavit of paralegal Wendy Harvey, sworn in Vancouver on June 16, 2011. Although Ravi Benjamin has deposed that he "...was never duly served in the California case", he has not deposed that the Second Amended Claim was not served in conformity with the order for alternative service.

**38**  Ravi Benjamin did not file an Answer in the California action and on August 1, 2011, the plaintiffs applied for Default Judgment. Default Judgment was granted on August 3, 2011. Final Judgment was granted against Ravi Benjamin in the California action on December 12, 2012.

**39**  Mr. Reymann has deposed in his affidavit sworn October 11, 2013 that in August 2010 he discussed with Ms. McFadin whether she would be representing Raji Benjamin in the California action. On August 2, 2010 Ms. McFadin told Mr. Reymann that she did represent Sherri Benjamin, Ravi Benjamin's wife. Later Ms. McFadin told Mr. Reymann that Ravi and Sherri Benjamin had declined to be included in the group of defendants that she was representing because they had been told that their temporary presence in India would make it more difficult for the plaintiffs to effect service of process.

**40**  Mr. Reymann has also deposed that an e-mail was sent by Manoj Benjamin to Sherri Benjamin, among others, on June 25, 2010, making reference to the California action. Kenneth Corey, an employee who worked with Ravi Benjamin in sales and marketing, has deposed that Ravi Benjamin discussed with him various lawsuits that had been filed against the corporate defendants by unhappy purchasers.

**41**  Ravi Benjamin has deposed that he and his wife:

...were generally aware that an action had been taken in the California court. We however were not privy to the details of the action and did not seek them out.

**42**  Ravi Benjamin also deposed:

At the time of the California action I had just moved my family to India. All of our possessions had been put into storage, and our Vancouver residence had been rented out. Access to documentation, computers and personal files was not feasible at that time, and voluntarily submitting to the jurisdiction would have come at extreme hardship and logistical and financial duress as we did not have employment at that time.

**43**  I consider it highly improbable that Manoj Benjamin did not communicate with his brother Ravi about the California litigation and its status.

**44**  I am satisfied that Ravi Benjamin knew that he was a defendant in the California action and chose not to defend the action there.

**THE LAW**

**45**  In *Beals v. Saldanha*, [*[2003] 3 S.C.R. 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B101-00000-00&context=), [*[2003] S.C.J. No. 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-F5KY-B55B-00000-00&context=), [*2003 SCC 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B101-00000-00&context=), the Supreme Court of Canada were asked to decide whether the "real and substantial connection" test for enforcing interprovincial judgments, adopted by the court in *Morguard Investments Ltd. v. DeSavoye*, [*[1990] 3 S.C.R. 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601H-00000-00&context=), should be extended to foreign judgments, and if so, what is the scope of the defences available to a domestic defendant seeking to have a Canadian court refuse enforcement of a foreign judgment.

**46**  The Court held that in the absence of unfairness or other equally compelling reasons, no distinction may be drawn between a judgment after trial in a foreign court; and a default judgment. The Court offered clear guidance on the "real and substantial connection test". At para. 32, Justice Major, speaking for the majority, wrote:

The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

**47**  Even where defendants have failed to take a required step in the foreign jurisdiction, relying upon negligent legal advice, that ***negligence*** cannot be a bar to the enforcement of the foreign judgment. (at para. 36).

**48**  In *Beals v. Saldanha*, the Court discussed available defences to the enforcement of foreign judgments. A foreign judgment will not be enforced if obtained by fraud, but only fraud that goes to the jurisdiction of the issuing court -- fraud that misled the foreign court into believing it had jurisdiction; or fraud established by:

...'proof of new and material facts' that, not being available at the time of trial, were not before the issuing court and demonstrate that the judgment sought to be enforced was obtained by fraud. (at para. 47).

**49**  To further clarify the scope of the defence of fraud, the Court stated that the only admissible evidence of alleged fraud was evidence that could not have been discovered through the exercise of reasonable diligence and brought to the attention of the foreign court.

**50**  A defendant may also challenge enforcement of a foreign judgment by establishing that the foreign proceedings were contrary to Canadian notions of fundamental justice, or that the legal system from which the judgment originates is not a fair one. The burden of alleging and proving unfairness in the foreign legal system rests with the defendant.

**51**  The third and final potential defence discussed in *Beals v. Saldanha* is that of public policy. Courts in Canada may decline to enforce a foreign judgment which is contrary to the Canadian concept of justice, or based on a foreign law that is contrary to the Canadian view of basic morality. (at para. 71).

**APPLICATION OF THE LAW AND ANALYSIS**

**Real and Substantial Connection**

**52**  As discussed, Manoj and Anjula Benjamin attorned to the jurisdiction of the California Court by filing Answers -- the equivalent of a Statement of Defence -- after their application to have the California court deny jurisdiction was dismissed. I am also satisfied that there was a real and substantial connection between the U.S. court and all three of the Defendants/Respondents. As the Court stated in *Beals v. Saldanha*, individuals who carry on business in a foreign jurisdiction are reasonably expected to defend themselves there when an action is commenced against them in that foreign jurisdiction. A foreign court may exercise jurisdiction over a party accused of a tort or breach of contract associated with marketing a product or service in that foreign jurisdiction. See also *Disney Enterprises Inc. v. Click Enterprises Inc.* [*(2006), 267 D.L.R. (4th) 291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-F7ND-G4TT-00000-00&context=) (ON SCJ).

**53**  In the case at bar, RIRIC and the Defendants/Respondents carried on business and conducted marketing in California through press releases, presentations, the distribution of printed materials, and through online marketing. In evidence are copies of some of the marketing materials available online and in print to potential purchasers in California and elsewhere within the jurisdiction of the U.S. Federal Court. In their roles as officers and employees of the corporations, each of Manoj, Ravi and Anjula Benjamin interacted with plaintiffs in California and elsewhere within the jurisdiction of the Federal United States District Court.

**54**  The California court reviewed in detail the evidence about real and substantial connection when it dismissed the application of Manoj and Anjula Benjamin challenging the jurisdiction of that court. The evidence of connection referred to in those Reasons applies equally to Ravi Benjamin.

**55**  Ravi Benjamin had communications with several plaintiffs resident in California concerning their demands for refunds; and he was the sales agent in relation to booking agreements entered into by other U.S. resident plaintiffs. The Second Amended Complaint includes extensive references to his involvement in sales and marketing activities.

**DEFENCES OF FRAUD, LACK OF NATURAL JUSTICE, AND PUBLIC POLICY**

**56**  None of the Defendants/Respondents provided convincing evidence or argument that anything done in or by the California court is contrary to Canadian morality or public policy.

**57**  The Defendants/Respondents did argue that the California Judgment had been obtained by fraud; and that there had been a lack of natural justice.

**58**  All of the facts on which the Defendants/Respondents seek to prove and rely upon, however, were known to the Defendants/Respondents at the time the proceedings were ongoing in the California court. Most of the submissions about fraud were made by Manoj Benjamin. He made oral submissions on both hearing days; and on the second hearing day filed a lengthy written submission. Without detailing those submissions, it is clear that they primarily consist of taking issue with the evidence that was received and accepted by the California court. He submits that the California court mistakenly believed and accepted the evidence of the plaintiffs and former employees of the defendant corporations who provided evidence on behalf of the plaintiffs.

**59**  None of the facts referred to in the submissions were unknown when the California action was ongoing. Manoj Benjamin complains, for example, that William Zack, a former employee, has pursued a campaign to vilify the Defendants/Respondents, but he also stated that this campaign began in 2008. Some of the defendants in the California action had already sued Mr. Zack in 2008 and the action had been settled in 2010. This is not the kind of evidence of fraud that *Beals v. Saldanha* indicates is permissible in defence of an enforcement application.

**60**  Finally, the Defendants/Respondents submit that there was a denial of natural justice. Ravi Benjamin submits that the fact he was served by alternative service rather than personally is a denial of natural justice. I note, however, that substitutional service is provided for by the *Rules of Court* of the Supreme Court of British Columbia and is commonly used. As stated earlier, I am also satisfied that the existence of the California action and the fact that he was named as a defendant did actually come to Ravi Benjamin's attention; that he had the opportunity to answer the allegations; and that he made a conscious choice not to defend the action in California.

**61**  The Defendants/Respondents also submit that there was a denial of natural justice and/or abuse of process because, they say, they did not receive a copy of the California Judgment.

**62**  The evidence before me indicates that the California Judgment was served in accordance with the usual practice in the California courts. In any event, the Defendants/ Respondents have certainly known about the judgment since this action was commenced but, on the evidence, took no steps to seek to set aside the California Judgment, or to obtain an extension of time to appeal.

**63**  In *Marx v. Balak*, [*2008 BCSC 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1KS-00000-00&context=), Justice Myers heard and decided an application for the enforcement of a judgment obtained in the state of Utah.

**64**  Although the defendant had been personally served with copies of the original Complaint, the Utah counsel who filed an appearance on his behalf subsequently withdrew from the record and the defendant claimed that he had not received any of the subsequent documents that were mailed to him.

**65**  Justice Myers concluded that if the defendant Balak had not been served with the documents, he should be required to bring that matter before the Utah court.

**CONCLUSION**

**66**  The relief sought by the Plaintiffs/Applicants is granted. In particular, the judgment issued by the United States District Court for the Northern District of California on December 12, 2012 in *Mohamed Abokasem et al. v. Royal Indian Raj International Corp. et al*, Court No. CV-10-1781 shall be registered, recognized and enforced as a judgment of the British Columbia Supreme Court. The Plaintiffs and each of them are granted judgment against the Defendants Manoj Benjamin, Anjula Benjamin and Ravi Benjamin in the terms of the California Judgment. The Defendants Manoj Benjamin, Anjula Benjamin and Ravi Benjamin shall each be liable to pay to the Plaintiffs the amount in Canadian currency necessary to purchase US $3,068,137.32 plus interest at the rate reflected in the California Judgment; from and after December 12, 2012 to the date of these Reasons, at a chartered bank located in British Columbia.

**COSTS**

**67**  The Plaintiffs shall have their costs, on the ordinary scale.

W.G. BAKER J.

**End of Document**

[***Arnold v. Cartwright Estate, [2007] B.C.J. No. 2375***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1VV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.B. Butler J.

Heard: June 18-21 and 25, 2007.

Judgment: November 2, 2007.

Docket: M034110

Registry: Vancouver

**[2007] B.C.J. No. 2375** | [*2007 BCSC 1602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20Y-00000-00&context=) | [*[2008] 4 W.W.R. 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20Y-00000-00&context=) | [*2007 CarswellBC 2631*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20Y-00000-00&context=) | [*165 A.C.W.S. (3d) 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20Y-00000-00&context=) | [*76 B.C.L.R. (4th) 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X20Y-00000-00&context=)

Between Nicholas John Arnold, Plaintiff, and Estate of William Ambrose Cartwright, Deceased, Defendant

(63 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty of care — Causation — Foreseeability and remoteness — Action by the plaintiff allowed — The plaintiff attended the scene of an accident caused by the defendant — He assisted the victims, three of whom died from their injuries — Eleven months later, the plaintiff suffered a panic attack and was diagnosed with post-traumatic stress and bipolar disorders — Lack of a pre-existing relationship with the accident victims was not a bar to the plaintiff's recovery — Post-traumatic stress disorder was reasonably foreseeable and was caused by the exposure of the plaintiff to the accident — The court awarded $10,000 in non-pecuniary damages.**

**Damages — Psychological injuries — Nervous shock — Post-traumatic stress disorder — Depression — Non-pecuniary award — $5,001 to $20,000 — Action by the plaintiff allowed — The plaintiff attended the scene of an accident caused by the defendant — He assisted the victims, three of whom died from their injuries — Eleven months later, the plaintiff suffered a panic attack and was diagnosed with post-traumatic stress and bipolar disorders — The latter rendered him unable to work for two years — The court awarded $10,000 in non-pecuniary damages — There was no basis to find that the bipolar disorder that disabled the plaintiff from working was caused by the accident-induced post-traumatic stress disorder.**

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| Action by the plaintiff, Arnold, against the defendant, the Cartwright Estate, for damages for nervous shock -- The defendant and another driver were involved in a high speed collision for which the defendant was at fault -- Both drivers and a passenger eventually died from injuries -- The plaintiff was nearly involved in the accident -- He phoned emergency personnel and spent approximately 90 minutes assisting the accident victims -- 11 months later, the plaintiff suffered a panic attack -- He was subsequently diagnosed with bipolar disorder and post-traumatic stress disorder -- The plaintiff missed the ensuing 2.5 years of work -- The plaintiff sought damages for nervous shock that arose from being a witness to the accident and its aftermath -- He told his psychiatrist that he saw one victim perish in a fire at the accident scene, while another died at the scene -- He described having blood on his arms and being unable to get rid of the smell of the perfume worn by one of the victims -- In the days after the accident, the plaintiff found his sleep patterns altered and frequently thought about the incident -- He agreed that his problems initially abated -- The plaintiff adduced evidence from witnesses that described adverse changes in his behaviour after the accident -- One month prior to the panic attack, the plaintiff's mother passed away -- He also experienced financial problems and work stress -- He did return to work with a rail company, but was unable to assume his former position -- The plaintiff claimed the difference between the two wages as damages -- HELD: Action allowed -- There was a sufficiently close relationship between the plaintiff and defendant to establish a duty of care -- Lack of a pre-existing relationship with the accident victims was not a bar to the plaintiff's recovery -- The development of post-traumatic stress disorder rather than the panic attack was the psychiatric injury suffered by the plaintiff -- Such injury was reasonably foreseeable and was caused by the exposure of the plaintiff to the accident -- However, there was no basis to find that the bipolar disorder that disabled the plaintiff from working was caused by the accident-induced post-traumatic stress disorder -- The plaintiff was awarded $10,000 for non-pecuniary damages, assessed as analogous to a non-disabling physical injury. |

**Counsel**

Counsel for the Plaintiff: Richard ter Borg.

Counsel for the Defendant: Peter Unruh and Tim Kushneryk.

[Editor's note: A corrigendum was released by the Court December 28, 2007. The corrections have been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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

**1**   On September 22, 2001, the plaintiff, Nicholas Arnold, was driving in a northbound direction on the Pattulo Bridge. He was driving from his home in Surrey to North Vancouver, where he worked as a Yardmaster for C.N. Rail. He noticed a vehicle approaching him from the rear at a very high rate of speed. The vehicle swerved to miss Mr. Arnold's car and travelled into the southbound lane. The vehicle struck a minivan head-on (the "Accident"). Mr. Arnold's car was not involved in the Accident but was very close to the minivan when it was struck. Mr. Arnold called 911 and spent approximately 1 1/2 hours at the accident scene attempting to assist the Accident victims. Both drivers involved in the Accident eventually died from injuries, as did one of the passengers in the minivan.

**2**  Approximately 11 months after the Accident, on August 17, 2002, Mr. Arnold suffered a panic attack while at work. He was subsequently diagnosed as suffering from bipolar disorder, as well as Post-Traumatic Stress Disorder ("PTSD"). He was off work for 2 1/2 years following the panic attack. He has brought this action against the Estate of William Ambrose Cartwright, the driver of the vehicle at fault for the Accident, alleging nervous shock arising from being a witness to the Accident and its aftermath.

**Nervous Shock**

**3**  Claims for damages for nervous shock are among the most difficult personal injury cases to assess. Where the plaintiff is not physically injured and does not come into contact with the defendant, the psychiatric injury alleged is an extra step removed from the ***negligence*** of the defendant. As a result, difficult questions of proximity and duty of care arise. Further, the difficulty in proving or disproving cases of psychiatric injury, makes it often difficult to determine when liability will be imposed: ***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=).

**4**  In ***Devji***, McEachern C.J. (as he then was) undertook a detailed examination of the evolution of the law relating to psychological injury claims. He concluded that at the present time in British Columbia, we are left with the "conventional approach" approved by the Supreme Court of Canada in ***Kamloops (City) v. Nielsen***, [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=). In nervous shock cases, what this means is that there are three requirements to consider in determining whether damages for psychological injury may be awarded. First, there must be reasonable foreseeability between the defendant's conduct and the plaintiff's psychological injury. Second, there must be a sufficiently close relationship between plaintiff and defendant to establish a duty of care. Third, the court must consider whether there are any public policy concerns that might negate that duty of care. As noted by McEachern C.J., this analysis requires "not merely foreseeability but also proximity and something more" (para. 67).

**5**  In ***Devji***, and in ***Rhodes v. Canadian National Railway Co.*** [*(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=) (C.A.), the British Columbia Court of Appeal was called upon to consider whether or not liability could be imposed where family members who were not present at the scene of an accident suffered psychological injury. In the present case, Mr. Arnold was at the scene of the Accident and experienced, first-hand, the collision and its aftermath. However, Mr. Arnold had no relationship with the Accident victims and he suffered his panic attack almost 11 months after the Accident. This case thus raises issues regarding proximity, both temporal and relational, as well as a serious issue regarding causation.

**6**  Lambert J.A., in his concurring reasons in ***Beecham v. Hughes*** [*(1988), 27 B.C.L.R. (2d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2B9-00000-00&context=) (C.A.), stated at 43:

The questions of foreseeability, proximity, causation and remoteness are interlocked. There are not four answers to four questions, but one composite answer to one composite question ....

...

... I would not put the entire emphasis on "causal proximity", to the exclusion of "temporal proximity", "geographical proximity" or "emotional proximity". I would try to balance them all.

The interconnection of these issues means that it is of critical importance in cases involving psychological injury, to look closely at the facts and the medical evidence. Accordingly, I will begin by examining the evidence regarding proximity and causation. Following an examination of the evidence, I will consider the four issues that arise in relation to the facts of this case. Those four issues are:

1. Was the psychological injury alleged reasonably foreseeable?
2. Is there a sufficiently close relationship between the plaintiff and defendant to establish a duty of care?
3. Are there any public policy concerns that would negate the existence of the duty of care?
4. Was the psychological injury alleged caused by the exposure of the plaintiff to the Accident?

**Facts**

**7**  Mr. Arnold described his time at the accident scene in some detail. Photographs of the defendant's vehicle and the minivan give some idea of the force of the impact. The front and engine compartments of both vehicles were damaged beyond recognition. After leaving his car and calling 911, Mr. Arnold saw that the passenger from the minivan was lying outside of the vehicle. The driver of the minivan was hanging out the driver's window. Mr. Arnold moved back and forth between the two drivers. Both were moving and still alive at the time. He spoke to the injured drivers, attempting to comfort them, and indicated that help was coming. At some point he saw flames that were extinguished by the fire department. He eventually went to the ambulance and found that he had blood on his arms. He could also smell on his hands the perfume worn by one of the victims.

**8**  Mr. Arnold later told his treating psychiatrist, Dr. Mallavarapu, that one of the victims perished in a fire at the Accident scene and that he saw one of the other victims die at the Accident scene. It is clear from the photographs that the fire must have been minor and did not involve the passenger compartments of either vehicle. The records produced by the defendant indicate that no one died at the scene of the Accident.

**9**  Following the Accident, Mr. Arnold continued on his way to work. When he arrived at work, he stayed in the parking lot and cried for a short while. During the course of the shift, he could not stop thinking about the Accident and could not get rid of the smell of perfume on his hands. He left work early before the end of his shift.

**10**  In the days that followed, he frequently thought about the Accident. He found that his sleep patterns altered such that he lay awake thinking about it. When he was in his car, he became angry at the stupidity of other drivers. For a while, he was not able to drive over the Pattulo Bridge.

**11**  In spite of these difficulties, Mr. Arnold was able to continue his work as a Yardmaster at C.N. Rail. The job of Yardmaster is not easy. It requires the ability to focus and set priorities. A Yardmaster must place all of the trains in the rail yard on the proper sidings in order to maximize the efficiency of the operation. Mr. Arnold was able to carry out the tasks required of him during the period following the Accident without any apparent difficulty.

**12**  He agreed in cross-examination that he experienced an abatement of his complaints within about a month following the Accident. He agreed that he was less prone to rage and experienced improved concentration and sleep as time passed.

**13**  After the Accident but prior to the panic attack, Mr. Arnold's mother died. She passed away on June 30, 2002 from breast cancer, which recurred in the early spring of that year. Mr. Arnold appears to have been very close to his mother. He visited her every day when she was at the Lions Gate Hospital. In the same timeframe, he also suffered through the death of his dog, of whom he was very fond.

**14**  During the entire period from September 22, 2001 to August 17, 2002, Mr. Arnold did not seek medical attention in relation to symptoms arising from having witnessed the Accident. On May 21, 2002, he attended at his new family physician, Dr. Seger, who performed a medical evaluation and report entitled "Periodic Medical Report -- Individual in Safety Critical Position". This was prepared for Mr. Arnold's employer. In that report Dr. Seger noted that Mr. Arnold was not suffering from, nor had he suffered from, "depression, anxiety, phobia, panic, psychosis, mania, attention-concentration-orientation-judgment-memory, or personality disorder."

**15**  Mr. Arnold called a number of independent witnesses who described the change in his behaviour following the Accident. These witnesses, including Ms. Wagener, Ms. Palic, and Mr. McClure, described how he became less spontaneous, more emotional, and more withdrawn. They indicated that his sense of humour was no longer readily evident. Ms. Palic said that she and her husband, who worked with Mr. Arnold, saw him less frequently after the Accident as he seemed to withdraw. He started to do more physical activities and spend less time with his friends. He then moved to North Vancouver and they saw him even less. Other than the evidence of Ms. Palic, the evidence of these witnesses regarding his behavioural changes was not time-specific. In other words, it was not clear from their evidence if these changes occurred primarily before or after August 17, 2002.

**16**  Mr. McClure did indicate that Mr. Arnold was frustrated at the scene of the Accident and that he felt guilty as he was not able to provide more assistance to the victims. While the frustration and guilt took place at the time of and shortly after the Accident, the personality changes noted above appear to have taken place after the panic attack of August 2002.

**17**  There was considerable evidence regarding changes made at C.N. Rail. The company was privatized in the late 1990s. Mr. Arnold admitted in cross-examination that in 2001 he was extremely unhappy with his job. The new management structure had resulted in cutbacks and layoffs. A number of employees had been terminated as a result of demerits that they had received on the job. Morale had decreased substantially. These issues came to a head for Mr. Arnold on August 17, 2002. On that date, he was required, for the first time, to work at the Lynnterm yard as the only Yardmaster on duty. Prior to that day there had always been two Yardmasters on duty at any time. It was on that day that he experienced the panic attack.

**18**  After the panic attack, Mr. Arnold was taken by ambulance to the Surrey Memorial Hospital. The crew report notes that Mr. Arnold "has had big time stress in his life recently", including the "loss of his mom". The emergency admission notes from the hospital record that the patient was "under stress ++, hates job, mother died 1 mth ago." The notes also indicate that Mr. Arnold was "having financial problems". These financial problems were the result of his decision to purchase his mother's house in North Vancouver. For a period of time, he had two houses and was responsible for three mortgages (two on his mother's house). There is nothing in either the crew report or the admission notes to indicate that the Accident was a cause of stress for Mr. Arnold, or a cause of the panic attack.

**19**  Mr. Arnold was discharged from the hospital after a few hours. He saw Dr. Seger on August 20, 2002. Dr. Seger's notes from that visit record the following:

Work stress lately @ CNR. Hard line employer. Mom died 6 wks ago. Executor of her will. Buying her house.

...

Low -- mood since Mom died

**20**  Dr. Seger diagnosed a major depression and started Mr. Arnold on medication for the depression. His next visit was a week later. At that visit, for the first time, one of the four stressors noted was that of being a witness to a traffic accident in September 2001.

**21**  Mr. Arnold did not go back to work after the panic attack. He was referred to a counsellor through his employment benefits. The notes from the counsellor, Ms. Armstrong, indicate that he did mention the Accident as a possible stressor at his first visit. However, aside from that one mention the notes do not indicate that the Accident was a significant issue to Mr. Arnold. On the other hand, his work situation did seem to be a very significant stress factor as is evident from the following notations:

August 26, 2002 -- "... very concerned/anxious/angry in new work environment."

October, 2002 -- "... he can't even think about work -- gets heart palpitations, dizziness ..."

October 29, 2002 -- "... still can't think about workplace -- gets very emotional ..."

**22**  Mr. Arnold subsequently attended a second counsellor, Ms. Goranson-Coleman, whom he continued to see for a lengthy period of time. He began his visits to her in late November 2002. Her notes from the first visit include a brief notation of the Accident, however, there is not another notation about the Accident until July 2003. During that time, Mr. Arnold attended numerous counselling sessions with her and she made over 50 pages of notes.

**23**  Other events of significance in Mr. Arnold's life after the Accident included the renovations he did at his Surrey home to prepare it for sale. He also did extensive renovations of his mother's North Vancouver home after the panic attack, although these apparently took a good deal of time to perform. In December 2002, after the panic attack, he became re-acquainted with Claire, a girlfriend from his youth. They started dating and were married in April 2003. In August 2004 they had a son.

**24**  Mr. Arnold went back to work with C.N. Rail in May 2005. However, he has not been able to perform the tasks required to fulfill the position of Yardmaster. Accordingly, he has worked as a Yardman. A Yardman does not have the same level of responsibility or pressure. The wage paid per shift is significantly less than that of a Yardmaster. Mr. Arnold hopes to work his way up to the position of switchman, but doubts that he can go back to being a Yardmaster. He claims the difference between the two wages as damages in this case.

**Medical Evidence**

**25**  Mr. Arnold has been seen by three psychiatrists. He was referred by his family physician to Dr. Mallavarapu. Since December 10, 2002, Dr. Mallavarapu has seen Mr. Arnold at regular intervals and has provided counselling and pharmacotherapy. In addition, he was seen by Dr. Schertzer on August 19, 2003 for an independent medical assessment for Great West Life, Mr. Arnold's disability insurer. He was also seen on one occasion by Dr. Smith, who performed an independent medical assessment for the defendant. The reports of all three doctors were entered in evidence, although Dr. Smith was not cross-examined by the plaintiff.

**26**  In his report, Dr. Mallavarapu sets out the information he obtained from Mr. Arnold regarding the Accident and the development of symptoms. He notes that Mr. Arnold witnessed the death of two people and that one of the cars "burst into flames leaving the driver burned to death". He described the progression of the symptoms in the following terms:

He started to become very emotional. He also felt scared and panicky. He started to have difficulty with his sleep. He could not concentrate anymore on what he was doing. With time, his ability to cope with stressful situations had diminished. He also mentioned that he was getting really forgetful. He started to have severe anxiety while driving in a car. Over a period of six to eight months, his symptoms of anxiety got out of control.

**27**  Dr. Mallavarapu concluded that Mr. Arnold is suffering from three psychiatric disorders: PTSD; bipolar disorder type II; and anxiety disorder. He concluded that the PTSD is a result of "witnessing the death of two people and the burning of one person" at the Accident.

**28**  He opines that Mr. Arnold's mood symptoms got worse after he was treated with antidepressant medications which could have induced rapid mood cycling. Further, the death of his mother and dog likely contributed to the worsening of his mood and anxiety symptoms. In addition, he likely had a vulnerability to bipolar disorder as there is a strong family history of depression and bipolar disorders. However, Dr. Mallavarapu believes that it was the "extreme experience of witnessing the death and burning of a human body following the accident" that precipitated the bipolar disorder.

**29**  Dr. Mallavarapu concluded that there is a 20% chance that Mr. Arnold can return to his position as a Yardmaster. He made a number of recommendations for a well structured and low stress work environment for Mr. Arnold, who has followed those recommendations. As a result, he does not work night shifts and does not take on more responsibility than he can handle. Effectively, these recommendations result in him continuing to work as a Yardman with a reduced income. His current Global Assessment of Functioning is 75, which, according to Dr. Mallavarapu, he attained as of February 2005. This means that he has a slight impairment in social or occupational functioning.

**30**  Dr. Schertzer has not seen Mr. Arnold since he prepared his report of August 28, 2003. He had no notes from his assessment and no records to review. At the time he prepared his report, he did have a consultation report from Dr. Mallavarapu. He concluded in 2003 that Mr. Arnold suffered from PTSD and bipolar disorder, and that his difficulties appear to have been precipitated by the Accident. He found that "in face of experiencing PTSD symptoms for several months his mood state began to come apart". He did note that Mr. Arnold became depressed after the death of his mother and that his mood symptoms grew more prominent with the use of the antidepressant medication. He found that Mr. Arnold had a "unique sensitivity" to antidepressants and that his response to them appeared to be "nearly catastrophic". He also noted that Mr. Arnold had a genetic predisposition to mental illness with one bipolar sibling and a mother and sibling who suffered from unipolar depression.

**31**  Dr. Smith diagnosed Mr. Arnold as suffering from PTSD, bipolar disorder and panic disorder, all of which were in remission at the time of his assessment. He found that Mr. Arnold developed low grade PTSD symptoms following the Accident, but that the symptoms were not impairing as he continued to work and function. He then had a grief reaction following the death of his mother followed by a panic attack, the causes of which are not entirely clear. Dr. Smith believes that the panic disorder may have aggravated the PTSD symptoms and that the bipolar disorder was unmasked through the use of the antidepressant medication. He also notes the family history of bipolar disorder and depression. He concludes that the panic attack "is not in any way related to the" Accident and further, that Mr. Arnold's disability at work was not related to PTSD but was the result of the panic attack and subsequent mood disturbance associated with the bipolar disorder.

**Discussion**

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| **Issue A.** |  | **Was the psychological injury alleged reasonably foreseeable?** |  |

**32**  The defendant's position is that simple foreseeability does not, by itself, lead to a duty of care. An ordinary motorist with the "usual fortitude" or customary phlegm should be able to withstand witnessing traffic accidents and injury to others (***Devji****, supra*, at para. 51). The defendant argues that proximity must inform foreseeability such that if there is insufficient proximity there cannot be foreseeability. The test is said to be that set forth by Lambert J.A. in ***Beecham****, supra*, at para. 42:

Would a reasonable person in the position of the defendant, at the time the defendant committed the allegedly negligent conduct, have had the risk of the type of injury that actually occurred, to the class of plaintiff who actually suffered it, in his or her mind?

**33**  Here, the defendant argues that taking all of the factors into account there is no foreseeability. The important factors include the relational proximity and the temporal proximity of the psychiatric injury to the time of the Accident. Here, Mr. Arnold was a stranger to the victims and further, the serious psychiatric injury did not occur until 11 months after the Accident.

**34**  While I accept that the test as set out in ***Beecham*** is to be applied, I find that the foreseeability test has been met in this case. In arriving at that decision, it is the development of PTSD, not the occurrence of the panic attack, that is the psychiatric injury suffered by Mr. Arnold. I do not consider the temporal issue raised by the defendant to be a factor at this stage of the analysis. All of the psychiatrists who examined the plaintiff were of the opinion that he did suffer from PTSD and that this disorder likely developed shortly after the Accident.

**35**  The fact that Mr. Arnold was a stranger to the victims is not a bar to recovery. In ***Chadwick v. British Transport Commission***, [1967] 2 All E.R. 945 (Q.B.), damages were awarded to a plaintiff who suffered psychological injury while acting as a rescuer at a horrific train crash. As noted by McEachern C.J. in ***Devji****, supra*, that decision is thought to be a "very special case". While it may be special, it is still possible for a plaintiff at the scene of a horrific accident who takes upon him or herself the task of providing some assistance to victims to recover for the resulting psychiatric injury. The crucial factor in such a case is whether or not the plaintiff was directly present at the scene of the accident and whether the accident was sufficiently horrific that a court could conclude that someone with the "usual fortitude" might suffer a psychological injury. In this regard, the courts do not merely accept a medical finding of a diagnosis of a psychological injury. The nature of the accident must be such that a person with the "usual fortitude" could be expected to be impacted psychologically as a result of his or her proximity to the accident and the nature of that accident.

**36**  In this case, there is no question that Mr. Arnold was sufficiently close to the Accident. Further, the Accident was horrific: a head-on collision that resulted in the deaths of three people. Like the plaintiff in ***Chadwick***, Mr. Arnold spent time at the accident scene in an attempt to provide assistance. There seems little doubt that the images, sounds and odours of that experience would remain with him and potentially have psychological or psychiatric ramifications. In these circumstances, a reasonable person in the position of the defendant would have had the risk of PTSD in mind if he or she had considered the situation of Mr. Arnold and the violence of the Accident.

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| **Issue B.** |  | **Is there a sufficiently close relationship between the plaintiff and defendant to establish a duty of care?** |  |

**37**  This issue requires consideration of all of the questions regarding proximity, including those that the defendant argued should be considered in relation to the issue of foreseeability. Indeed, it is difficult to separate the two concepts when considering a claim for nervous shock. Once again, the defendant argues that there are two shortcomings in Mr. Arnold's case: the lack of any pre-existing relationship with the victims of the Accident, and the lack of temporal proximity between the Accident and the panic attack and Mr. Arnold's subsequent inability to work or function effectively in his social environment.

**38**  The fact that Mr. Arnold was a stranger to the victims does not, as I found above, result in a conclusion that the injury was not foreseeable. Similarly, I find that the lack of relational proximity does not mean that the defendant did not owe a duty of care to Mr. Arnold. Most of the cases in British Columbia have not had to consider psychiatric injury where the plaintiff was a stranger to the victim. The exception is ***Falbo v. Coutts***, [*2000 BCSC 434*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05W-00000-00&context=). In that case the plaintiff's vehicle was struck by a motorcycle. The motorcyclist flew through the air and crashed to the ground. He died as a result of the impact. The plaintiff suffered physical injuries but also claimed for depression and PTSD. Warren J. found that she was entitled to succeed with the claim for psychiatric injuries both on a primary and secondary victim basis. A primary victim is one who sustains physical injuries as a result of impact with the defendant while a secondary victim is someone who is a "non-participant" in an accident.

**39**  While the decision on the secondary basis is likely *obiter*, the reasoning is applicable here. Warren J. noted that the requisite proximity relationship is made up of a combination of various factors. He found that the requisite proximity relationship was established even though the plaintiff was unrelated to the motorcyclist because the plaintiff was at the scene and observed the shocking event, and because there was a high degree of temporal proximity between the accident and the onset of the psychiatric illness.

**40**  In this case, I am also satisfied that the requisite proximity relationship is established because of Mr. Arnold's presence at the scene of the Accident and his attendance to the victims, as well as the fact that the onset of PTSD occurred immediately after the Accident. In arriving at this conclusion, I have not approached the temporal issue in the way that the defendant argues it should be approached. In my view, August 17, 2002, the date of the panic attack, is not the appropriate date to use for consideration of the temporal proximity issue. All three psychiatrists agreed that Mr. Arnold suffered symptoms of PTSD soon after the Accident. It is that psychiatric injury, not the panic attack, that provides the temporal proximity that leads me to conclude that the requisite proximity relationship exists in this case.

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| **Issue C.** |  | **Are there any public policy concerns that would negate the existence of the duty of care?** |  |

**41**  The defendant here has not raised any particular public policy concerns that might negate the existence of the duty of care other than the general observation that courts should be very careful in considering claims for nervous shock because of the risk of opening the floodgates of similar litigation. This was best expressed by McEachern C.J. in ***Devji****, supra*, at para. 47:

... I am not confident that the administration of justice is usually able to identify unmeritorious claims successfully. Fraudulent claims are sometimes uncovered but many claims are advanced by persons who genuinely believe they have suffered psychiatric injury when their real condition is grief or sorrow, and such claims are difficult to disprove. Recent experience shows it is naïve to believe that an expansion of any area of liability will not produce a volume if not a flood of both valid and invalid claims. This is particularly so when the line between grief and nervous shock is so difficult to ascertain, and proof of the latter depends so greatly upon the credibility of the claimants and their expert witnesses whose advocacy is often impossible to refute.

**42**  In my view, there are no public policy concerns that need to be considered in this case. The application of the concepts of proximity, foreseeability and causation effectively provide the necessary control mechanisms to prevent the creation of a volume or flood of valid and invalid nervous shock claims.

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| **Issue D.** |  | **Was the psychological injury alleged caused by the exposure of the plaintiff to the Accident?** |  |

**43**  All three of the psychiatrists concluded that Mr. Arnold suffered PTSD as a result of the nervous shock he suffered at the scene of the Accident. All three psychiatrists found that he exhibited symptoms of PTSD shortly after the Accident. Accordingly, the issue here is whether the psychiatric injuries that Mr. Arnold suffered at the time of and subsequent to the panic attack were caused by that same nervous shock. On this question the opinions of Dr. Smith and the other two psychiatrists, are diametrically opposed. In order to arrive at a decision regarding this issue, it is necessary to determine which of the psychiatric opinions should be preferred.

**44**  It is important to note that none of the psychiatrists had the benefit of treating Mr. Arnold during the period of time between the Accident and the panic attack. As a result, a key consideration is whether or not the psychiatrists have based their opinions on assumptions which are accurate and if not, what impact that has on their opinions.

**45**  The psychiatrists were all required to make assumptions regarding the nature and extent of PTSD symptoms suffered by Mr. Arnold between the date of the Accident and August 17, 2002. In addition, they made assumptions regarding his ability to function in that time period. These assumptions are very important to the conclusions they reached.

**46**  Dr. Mallavarapu based his opinion on the history taken from Mr. Arnold. He did not review the hospital records or the notes of Mr. Arnold's two counsellors, nor did he interview friends or family. He assumed that following the Accident, Mr. Arnold could not stop thinking about it, and that he became very emotional and began to have difficulty with sleep and concentration. His report describes what he understood took place:

With time, his ability to cope with stressful situations had diminished. He also mentioned that he was getting really forgetful. He started to have severe anxiety while traveling in a car. Over a period of six to eight months, his symptoms of anxiety got out of control.

[emphasis added]

**47**  In his examination in chief, Dr. Mallavarapu stated that Mr. Arnold functioned well until the Accident and then had problems putting his life together. While Dr. Mallavarapu recognized that there were other significant stressors in Mr. Arnold's life including the death of his mother and dog and the difficulties at work, he concluded that those stressors were not a major factor in the onset of the panic attack and the unmasking of the bipolar disorder that took place after August 17, 2002.

**48**  Dr. Schertzer received a copy of a consultation report from Dr. Mallavarapu. That report was not in evidence. He saw Mr. Arnold on one occasion and did not review clinical records or counsellors' notes. He obviously relied on the history obtained from Mr. Arnold and the information contained in the consultation report. He did not retain notes of his assessment and seemed to have a somewhat limited recollection of it. His report concludes:

All of his difficulties appear to have been precipitated by the motor vehicle accident which he witnessed in September 2001. Further, it seems that in face of experiencing PTSD symptoms for several months that his mood state began to come apart.

**49**  The difficulty with these opinions is that they are based on a false assumption. Mr. Arnold did not have symptoms of anxiety that got out of control over a period of six to eight months. His mood state did not come apart in the face of experiencing PTSD symptoms. Rather, as Mr. Arnold indicated in cross-examination, within a month after the Accident, the PTSD symptoms tapered off and he felt better. He could think about things other than the Accident. He entered a period of normalization. There is no question that he functioned well at work during this period of time. This was the case even on the occasion when he found a decomposing body at or near the rail yard. The medical assessment by Dr. Seger on May 21, 2002 is also significant. Dr. Seger found that Mr. Arnold was not suffering from "depression, anxiety, phobia, panic, psychosis, mania, attention-concentration-orientation-judgment-memory, or personality disorder." Neither Dr. Mallavarapu nor Dr. Schertzer were aware of this assessment.

**50**  As noted earlier, the evidence from Mr. Arnold's friends regarding observations of his psychological state were for the most part not time-specific. I conclude that the observations of marked change in his emotional state relate to the period of time after August 17, 2002.

**51**  I must also comment on Mr. Arnold's credibility as a witness. Drs. Mallavarapu and Schertzer based their assessments on the history taken from him. It is evident to me that this history was inaccurate. I had the benefit of hearing Mr. Arnold under cross-examination and of reviewing the clinical records and counsellors' notes which were placed before him in cross-examination. I found Mr. Arnold to be what would best be described as a manipulative witness. I do not know if that was done intentionally or otherwise. However, he constantly understated matters that were detrimental to his case and overstated those that supported his case. It is evident that he did the same thing with Dr. Mallavarapu.

**52**  Examples of his manipulation include:

1. He told Dr. Mallavarapu that he witnessed the death of two people and the burning of a human body. Neither of these statements was accurate. The victims did not die at the scene of the accident and nobody was burned in a fire.
2. He downplayed to the court and hid from his physicians his incestuous relationship with his sister, his conviction for incest and the effect of those events on his current relationship with his sister. Dr. Seger's records indicate that Mr. Arnold said that he had "no family history or personal history of sexual abuse ...". In fact, he and his brother were convicted in 1985 of committing incest with their younger sister and were sentenced to three years' imprisonment. The court in ***R. v. Arnold***, [*[1986] B.C.J. No. 313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-K0BB-S08K-00000-00&context=) (C.A.) (QL) noted the "devastating psychological damage done to their victim." As a sex offender Mr. Arnold did receive psychological or psychiatric counselling and yet he said on discovery that he had never received such counselling. He also told the psychiatrists that he had never received any such treatment. Mr. Arnold asserted that the issue with his sister was past history, but the notes of Ms. Goranson-Coleman are full of entries describing the ongoing stress and acrimony between the siblings.
3. While giving evidence in chief he cried on occasions when describing his PTSD symptoms. In cross-examination he had no difficulty in discussing his symptoms and indeed was unemotional and somewhat evasive.
4. In examination-in-chief he described his PTSD symptoms after the Accident in terms which made it appear as if the symptoms continued unabated. However, in cross-examination he admitted, as noted above, that the symptoms improved within a month and he felt better.
5. While he told the physicians that he had no history of sexual abuse, he advised Ms. Armstrong that he may have been sexually abused as a child.

**53**  Dr. Smith's opinion was not based on the assumption that Mr. Arnold had anxiety symptoms that went out of control from the time of the Accident until the date of the panic attack. Without that assumption, he came to the conclusion that when Mr. Arnold became depressed following the death of his mother, the antidepressant medications that were prescribed unmasked the bipolar disorder for which he had a predisposition. Mr. Arnold's disability at work was then caused by the bipolar disorder. I accept Dr. Smith's opinion regarding the cause of the bipolar disorder and the subsequent disability. His opinion was based on an assumption regarding Mr. Arnold's history which is accurate. Dr. Smith was not required to attend for cross-examination and so his opinion was not challenged.

**54**  In my view, Dr. Smith's opinion took a much more holistic view of the stressors in Mr. Arnold's life. Those included:

1. the recent death of his mother;
2. the financial stress of three mortgages;
3. anger and frustration with work and his employer;
4. ongoing stress arising from dysfunction within his family;
5. stress from having been a perpetrator and, perhaps a victim of sexual abuse; and
6. anxiety from having witnessed the Accident.

**55**  When Mr. Arnold had functioned so well for months prior to the panic attack, Dr. Smith's conclusion that the Accident (which occurred 11 months earlier) was unrelated to the panic attack must be preferred. As he indicated in his report of August 20, 2005, the other psychiatrists "have not given due weight to the other stressors and the genetic susceptibility ..." of Mr. Arnold's bipolar disorder. Given that genetic susceptibility and the acute sensitivity to antidepressant medications, there is no basis to find that the disabling bipolar disorder was caused by the Accident-induced PTSD.

**56**  I find support for this conclusion from the comments of Lambert J.A. in ***Beecham****, supra* referred to above. As he noted, the questions of foreseeability, proximity, causation and remoteness are interlocked so that there is "one composite answer to one composite question". The balancing of causal, temporal, geographical and emotional proximity in this case produces a composite answer that the defendant is responsible neither for the panic attack nor for the bipolar disorder and its disabling symptoms.

**Damages**

**57**  The conclusion that the Accident did not cause the disabling symptoms after the panic attack is not a complete defence to Mr. Arnold's claim. Mr. Arnold did suffer PTSD symptoms for a period of months after the Accident. Those symptoms reappeared after the panic attack as noted by Dr. Smith:

It does appear however that the symptoms of PTSD became much worse after he had a panic attack and he required both psychiatric treatment and counselling for PTSD.

**58**  By October 1, 2005, Dr. Smith found that Mr. Arnold's PTSD had significantly resolved and that he did not need any further psychological treatment aimed at those symptoms.

**59**  Accordingly, I must assess damages for the PTSD on that basis. However, in doing so, I must separate the symptoms of the bipolar disorder and anxiety disorder from the symptoms of PTSD. As stated by the Supreme Court of Canada in ***Blackwater v. Plint***, 2005 S.C.C. 58, [*[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. 74:

Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), at para. 32.

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| [emphasis in original] |  |

In the present case, the task is guided by the finding that Mr. Arnold's disability at work was not related to the PTSD but rather was a result of the bipolar disorder and, to a much lesser extent, of the anxiety disorder.

**60**  There are few similar cases where a plaintiff is compensated for PTSD symptoms but did not have physical injuries or the serious long term psychological injuries such as those suffered in sexual assault cases. In this case, the damage award is to be based on the finding that Mr. Arnold suffered relatively minor symptoms for a few months after the Accident. Those symptoms were not disabling in any way. In addition, he is to be compensated for symptoms that were somewhat more serious following the panic attack, but once again, were not disabling. The length of duration of those symptoms is in the range of 12 to 18 months. The symptoms that Mr. Arnold suffered from include anxiety while driving, flashbacks to the Accident and difficulties with sleeping. Some of the counselling (although not the majority of it) was directed at assisting him to manage his PTSD symptoms.

**61**  In my view, the best way to approach the quantification of the damages in the absence of precedent, is to use as an analogy, cases where there has been an assessment of damages for non-disabling physical injury, such as a minor soft tissue injury of similar duration. In addition, I have compared the injury in question to that suffered by a victim of serious sexual abuse such as in ***Curran v. MacDougall***, [*2006 BCSC 933*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1R2-00000-00&context=). Having made those comparisons, I find that Mr. Arnold is entitled to an award of $10,000 for non-pecuniary damages.

**62**  Mr. Arnold is also entitled to an award for a portion of the counselling and mileage charge that form the special damages claim. I award $1100 with respect to that claim. This is approximately 1/8 of the total of those claims, which represents a fair apportionment of those expenses to the PTSD counselling and assessment.

**63**  The plaintiff is also entitled to costs on Scale B.

G.B. BUTLER J.

\* \* \* \* \*

Corrigendum

Released: December 28, 2007

***Revised Judgment***

On the front page Tim Kushneryk has been added as Counsel for the Defendant.

**End of Document**

[***Benek v. Pugash, [2004] B.C.J. No. 2309***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0C5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.R.A. Edwards J.

Heard: October 28, 2004.

Judgment: November 5, 2004.

Vancouver Registry No. S022217

**[2004] B.C.J. No. 2309** | [*2004 BCSC 1452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DJ-00000-00&context=) | 5 C.P.C. (6th) 52 | [*134 A.C.W.S. (3d) 999*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JN6B-S1DJ-00000-00&context=)

Between Marlen Benek, plaintiff, and Dr. Eric Pugash and Dr. Eric Pugash, Inc., defendants

(42 paras.)

**Case Summary**

**Civil procedure — Trials — Juries — Verdicts — Judgments and orders — Tort law — *Negligence*.**

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| Application by the defendant, Pugash, for dismissal of the action by the plaintiff, Benek, or for a declaration of a mistrial and order for jury retrial. The jury found that Pugash breached the standard of care normally required by a specialist plastic surgeon during a liposuction procedure on Benek. The jury found that Pugash penetrated the abdominal wall and created bowel injuries, that Benek was not informed of all potential risks including bowl perforation, and that Pugash did not take Benek's central obesity into account during surgery. It was common ground that Benek did not plead failure to warn her of the risks of the surgery. There was no evidence that Pugash failed to obtain informed consent. Pugash requested a dismissal of the action on the basis that the jury verdict incorporated the irrelevant consideration of informed consent and this may have coloured its conclusion about the central obesity issue.  HELD: Application dismissed.  Judgment was entered for Benek on the basis of the jury's verdict. The verdict contained both a good and a bad reason for the jury's finding of liability. The jury's finding that Benek did not appear to be fully informed of the risks was totally unrealistic, unreasonable and unjust because lack of informed consent was not pleaded and there was no evidence to support the conclusion. The jury's answer about the central obesity issue did provide a basis for its finding that Pugash breached the standard of care. It would be wrong to go behind the language of the verdict and reject it based on speculation that the jurors were not unanimous on a sound basis for the finding of a breach of the standard of care, where one bad and one good reason for the finding were expressed in the jury's verdict. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 41(2).

**Counsel**

Counsel for the Plaintiff: R.D. Gibbens

Counsel for the Defendants: J.M. Lepp and A.W. Bruneau

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| **E.R.A. EDWARDS J.** |

**1**   In response to the plaintiff's application for judgment following a jury verdict in a medical malpractice case, the defendant applies for dismissal of the plaintiff's action or alternatively for a declaration of mistrial and an order for a retrial on the basis of the jury verdict cannot support a judgment.

**2**  The liability questions put to the jury and the jury's answers were as follows:

Liability

1. Did Pugash, in performing the liposuction procedure on Ms. Benek, breach the standard of care reasonably expected of a specialist plastic surgeon of normal skill and prudence?

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|  | [checkmark] Yes | No |  |

(If you answer "yes" proceed to Question #2. If you answer "no" you need not answer the remaining questions.)

1. If you have answered "yes" to Question #1, in what way or ways did Dr. Pugash's liposuction procedure breach the standard of care?

Dr. Pugash did penetrate the abdominal wall and as a result created bowel injuries. Ms. Benek didn't appear to have been fully informed of all potential risks i.e. bowel perforation. Dr. Pugash did not appear to take Ms. Benek's central obesity into account during surgery. Therefore we do not feel Dr. Pugash met the standard of care reasonably expected of a specialist plastic surgeon of normal skill and prudence.

**3**  It is common ground that the plaintiff did not formally plead, nor allege during the trial, that the defendant failed to properly inform the plaintiff of the risks of the liposuction procedure nor that he failed to obtain informed consent.

**4**  The only references to the issue of informed consent were in expert reports. There was no evidence that the defendant had failed to warn the plaintiff of the risks or failed to obtain her informed consent.

**5**  The plaintiff's counsel did not dispute that if the jury had based its finding of liability only on the defendant's failure to warn the plaintiff "of all potential risks" the verdict could not support a judgment in the plaintiff's favour since there was no evidence of such a failure.

**6**  The plaintiff's position is that where a jury provides two reasons for its finding of liability, one of which is "bad" and the other "good", the verdict supports judgment for the plaintiff.

**7**  In this context "bad" means unsupportable on the pleadings and evidence and "good" means supportable, or open to a finding by the jury, on the pleadings, evidence and instructions to the jury.

**8**  The defendant's counsel did not argue that the jury's finding that the defendant did not "take ... central obesity into account" and therefore breached the standard of care was unsupported by any evidence. As I understand the defendant's position it is that this inference was against the weight of the evidence and therefore unreasonable, leading to a "perverse" verdict.

**9**  According to G.P. Fraser & J.W. Horn, Conduct of Civil Litigation in British Columbia, looseleaf (Markham: Butterworths, 1978) vol. 2, at para. 46.19, p. 1786-1787.1 ("Fraser and Horn"), a trial judge may decline to enter judgment and order a new trial under Rule 41(2) only where a jury verdict is "inconclusive", whereas "perverse" jury verdicts, which include those against the weight of the evidence, may be overturned only by the Court of Appeal.

**10**  The defendant's counsel relied on Chorney v. Campbell [*[1985] B.C.J. No. 1616*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F5T5-M1JD-00000-00&context=) in which Macdonald J. cited with approval the Law Reform Commission of British Columbia ("LRCBC") report Review of Civil Jury Awards, Working Paper No. 14. It states, at p. 25. that: "A trial judge may also direct a new trial if the verdict is perverse. Usually there will be some evidence to go to the Jury and very seldom can it be established that reasonable men could not have come to the verdict the Jury reached. Consequently an unjust verdict will usually be the subject of an appeal."

**11**  The LRCBC report defines neither "perverse verdict" nor "unjust verdict". If the terms are synonymous and include a verdict which is contrary to the weight of the evidence, then there is a conflict between Fraser and Horn and the LRCBC on this point. That may be because the LRCBC report canvasses the law across Canada while Fraser and Horn refers only to British Columbia authority.

**12**  In any event, defendant's counsel did not ask for a dismissal of the action or mistrial in this case because the jury verdict was contrary to the weight of the evidence. The basis for the defendant's application is that because the jury verdict "incorporates" the irrelevant consideration of informed consent this "may well have coloured its conclusion with respect to the central obesity issue."

**13**  In this case, the verdict contains both a "bad" (failure to warn) and a "good" (failure to deal with the central obesity risk factor) reason for the jury's finding of liability.

**14**  The defendant's position is that the "bad" contaminated the "good" and therefore the verdict cannot support judgment for the plaintiff, so the action should be dismissed or alternatively a mistrial ordered to avoid a miscarriage of justice.

**15**  The plaintiff's position is that the court must strive to construe a jury verdict so as to give effect to the verdict, therefore the two reasons must be considered disjunctively so the "good" reason expressed in the verdict supports judgment for the plaintiff.

**16**  The first proposition in this position is clear from Kraus v. Woodward Stores Ltd. [*(1953) 10 W.W.R. (NS) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F06F-221N-00000-00&context=):

If it is possible to support the jury's verdict by any reasonable construction, it should be done: Jamieson v. Harris [*(1905), 35 S.C.R. 625*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-K0BB-S0CS-00000-00&context=), and cf. Dobie v. C.P.R. [*[1931] S.C.R. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F81W-229K-00000-00&context=) (reversing [*[1930] 1 W.W.R. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F4GK-M0JK-00000-00&context=), [*42 BCR 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-F4GK-M0JK-00000-00&context=)). A court ought not to ascribe to the jury an intention to travel outside the record or an intention to find ***negligence*** for which there is no evidence: Follick v. Wabash Ry. Co. [*(1920) 60 SCR 375*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G16P-00000-00&context=), at 384. The findings of the jury ought not to be interpreted in their purely verbal aspect. The court ought not to construe too narrowly and too critically the language of the jury in answers they give to questions: Warren v. Grinnell Co. [*[1937] SCR 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1FX-00000-00&context=) (affirming [*[1936] 2 WWR 600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JW09-M0HS-00000-00&context=), [*50 BCR 512*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JW09-M0HS-00000-00&context=)). Every presumption should be made in order to uphold the jury's verdict: See, inter alia, Pronek v. Wpg., Selkirk & Lake Wpg. Ry. Co. [1932] 3 WWR 440, [1933] AC 61, 102 LJPC 12, and Fick v. B.C. Elec. Ry. Co. [1951] 1 DLR 81, at 84 (reversing [*[1950] 1 WWR 728*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1VV-00000-00&context=)). [Kraus at p. 398]

**17**  However, counsel for the defendant points to the immediately preceding paragraph in the Kraus judgment which indicates jury answers to questions must be construed in the light of the pleadings, evidence and instructions to the jury.

It is fundamental that the interpretation of questions to the jury and of their answers thereto is not circumscribed by the mere words in which they are couched. Words are vehicles of meaning and not self-contained things. A jury's verdict may be taken by reasonable intendment even though the words may be imperfect. Anglin J. (later C.J.C.) said in Dunphy v. B.C. Elec. Ry. Co. [*[1919] 3 WWR 1076*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X01S-00000-00&context=), at 1081, [*59 SCR 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X01S-00000-00&context=), at 271, the jury's findings must always be read and construed in the light of the issues raised in the pleadings, the evidence adduced at the trial and the trial judge's charge to the jury. It is to these antecedents the court must look in order to learn what the jury mean by the words or expressions they use in answering questions. [Kraus at p. 397-398]

**18**  The leading case relied on by both parties is LeBlanc v. Penticton [*(1981) 28 B.C.L.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-DY89-M2PX-00000-00&context=) where at p. 184 Taggart J.A. for the majority stated "that a trial judge may refuse to accept the verdict of a jury only where he concludes that there is no evidence to support the findings of the jury; or where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment."

**19**  In Leblanc, the jury found the plaintiff (who had dived into a lake breaking his neck) failed to take reasonable care for his own safety and answered the question "in what way or ways did the Plaintiff fail to take care?" as follows:

The plaintiff consumed a glass of wine previous to entering the water. He made a careless plunge from the raft into the water without first checking the depth of the water or jumping in feet first. [LeBlanc at p. 198]

**20**  The trial judge rejected the jury finding that the plaintiff had not taken care for his own safety on the following basis:

The answer of the jury can only be considered unreasonable and unjust when it ascribes to the plaintiff a failure to take care in the consumption of a glass of wine. I was asked to regard this part of the answer as mere narrative. As a narrative it is accurate. The jury, however, was answering a question of the way or ways the plaintiff failed to take care. Its answer can only mean that the judgment or physical abilities of the plaintiff were impaired by the glass of wine. There is no evidence to support such a finding. [LeBlanc at p. 201]

**21**  The trial judge, in rejecting the jury's overall finding that the plaintiff had failed to take care for his own safety, apparently concluded the jury had reasoned that because the plaintiff consumed wine he must have been impaired and was therefore careless, but since there was no evidence he was impaired by the wine that chain of reasoning was impermissible and the verdict therefore invalid.

**22**  Carrothers J.A., at p. 314, expressed the view "the trial judge was in error in rejecting the first part of the jury's answer ... and, because of its probable impact and influence on the second part, in rejecting the whole answer."

**23**  Carrothers J.A., at p. 202, agreed there was no evidence the plaintiff was impaired by the wine, but did not "agree that the jury's answer ought to be construed as a finding of impairment". Instead he concluded the jury could "reasonably and justly consider" drinking the wine evidence of the plaintiff's "somewhat cavalier, unconcerned and reckless attitude" "indicating a lack of normal concern and caution" and a "lack of normal interest in and attention to his own safety" which was "something a reasonable and prudent man would not do."

**24**  Nevertheless, Carrothers J.A. did not consider the first part of the jury's answer to be "fundamental" to the second part and concluded that even if the jury were "quite wrong in the first part of their answer" "that part of their answer does not have the necessary quality of inconstancy, inconsistency, incompatibility or repugnancy to be conflicting within the purview of R. 41(2)."

**25**  Carrothers J.A., at p. 202-203, elaborated that "two answers or two parts of a single answer, in order to be conflicting, must be interdependent, in the sense that they have a logical or causal connection, a common denominator which admits of a conflict."

**26**  Carrothers J.A., at p. 200, could "see no basis upon which the trial judge could conclude that part of one of the four answers relating to liability was totally unrealistic, unreasonable and unjust, let alone fouled the entire verdict on issues of liability and rendered it impossible upon which to give judgment."

**27**  Taggart J.A. (with whom Lambert J.A. expressly concurred) at p. 192, agreed with Carrothers J.A. that the jury could conclude that drinking of the wine "was evidence of an unconcerned attitude" without ascribing fault to the plaintiff, as the trial judge concluded the jury had erred in doing.

**28**  Taggart J.A. expressly disagreed with Carrothers J.A. not on this aspect of the case, but with respect to the latter's agreement with the trial judge that the jury verdict was "conflicting" within the meaning of Rule 41(2) in so far as the jury found the defendant liable (albeit only 5%), yet made no award of damages for "initial outlay" or cost of future care.

**29**  Taggart J.A. found it was not a "conflict" in the jury's verdict to find liability and fail to award damages for each head of damages advanced by the plaintiff, stating at p. 191:

Even if there is a conflict of the kind described by the trial judge, can it be said that judgment cannot be pronounced on the findings of the jury? The word "cannot" seems to have been used deliberately. I do not think the word "should" or its equivalent can be used in place of "cannot" so as to enlarge the discretion of the court. Here the jury has answered each of the questions, though it appears that two of them have been answered incorrectly. But the answers are clear and unequivocal and judgment can be entered in accordance with them.

**30**  The conclusion of Carrothers J.A. that there was no conflict between the two reasons the jury expressed on the liability issue, although not expressly adopted, must have been implicitly approved by the majority. Mr. Justice Carrothers' conclusion cannot be obiter dicta because the Court of Appeal had to find there was no "conflict" in the jury's answers on liability in order to allow the appeal and overturn the trial judge's rejection of the verdict and his order that the case be retried. I am therefore bound to apply the reasoning of Carrothers J.A. in this case.

**31**  Here, however, the situation is different in one significant respect. The jury's finding that the plaintiff "didn't appear to have been fully informed of all potential risks" was, to adopt the words of Carrothers J.A., "totally unrealistic, unreasonable and unjust" because lack of informed consent was not pleaded and there was no evidence to support the jury's conclusion.

**32**  This contrasts with the situation in LeBlanc, where all three judges of the Court of Appeal agreed that the jury was justified in finding the plaintiff's consumption of wine reflected his carelessness for his own safety, even if there was no basis for a finding that he was impaired.

**33**  Carrothers J.A. rejected the trial judge's finding that absent proof of impairment the jury could not base a finding of liability on the "bad" reason of wine consumption and the "good" reasons of failure to check the depth of water or jump in feet first. I interpret the reasons of Carrothers J.A. to mean that where two (or more) reasons are given by the jury, one of which could not be a basis for liability, but is not wrong in the sense that it is "inconstant, inconsistent, incompatible or repugnant" with another reason upon which liability could be found, there is no conflict and the jury verdict may not be rejected by the trial judge.

**34**  This is consistent with the broader principle articulated in the reasons of Taggart J.A., quoted above, to the effect that were the jury gives clear, unequivocal answers, they must be accepted as the verdict, even if they are "incorrect".

**35**  The jury's first answer that the plaintiff did not appear to have been informed of all potential risks is both clear and incorrect. It could not be a proper basis for a finding of liability against the defendant. However, as in LeBlanc, here the jury's second answer did provide a basis for its finding that the defendant breached the standard of care.

**36**  Defendant's counsel submitted that the jury may have misinterpreted the expert evidence of Dr. Clugston to conclude that because, as the jury found, the defendant did not take central obesity into account it could be inferred that the defendant had not explained that risk factor to the plaintiff, so the jury may have thought they were giving only one answer on the standard of care issue.

**37**  While this is a possible interpretation of the verdict, it is a speculative one. It would be contrary to the principle expressed in Kraus to reject the jury's verdict on the basis of such an interpretation to its response to question 2.

**38**  Defendant's counsel also submitted that it is possible that some jurors found liability based only on the "bad" reason and others only on the "good" reason so the verdict was not unanimous on the basis upon which a breach of the standard of care was found. Again, that is a possible, but speculative explanation or interpretation of the jury's verdict, which might have been substantiated as correct had the jury been polled as to their verdict.

**39**  With the benefit of hindsight, polling might have been an advisable course. It was not done. The jurors were asked to stand to signify their verdict was unanimous and did so.

**40**  It would be contrary to the Kraus principle to go behind the language of a verdict and reject it based on speculation that the jurors were not unanimous on a sound basis for their finding of a breach of the standard of care, where one "bad" and one "good" reason for that finding are expressed in the jury's verdict.

**41**  In the result, I dismiss the defendant's motions for dismissal of the action or a retrial. Judgment will be entered in favour of the plaintiff in accordance with the jury verdict.

**42**  The plaintiff will have costs of the motion on Scale 3.

E.R.A. EDWARDS J.

**End of Document**

[***Bhandal v. Charlebois, [2015] B.C.J. No. 2725***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.A. Warren J.

Heard: March 16-20, 23-26, 2015.

Judgment: December 10, 2015.

Docket: M124091

Registry: Vancouver

**[2015] B.C.J. No. 2725** | [*2015 BCSC 2315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81T1-JYYX-6214-00000-00&context=)

Between Satvinder Singh Bhandal, Plaintiff, and Daniel Kane Charlebois, Defendant

(174 paras.)

**Case Summary**

**Torts — *Negligence* — Causation — Causal connection — Action by Bhandal for damages for personal injuries sustained in a motor vehicle accident allowed — Bhandal experienced moderate soft tissue injuries to his neck, back and shoulders in accident that initially resulted in significant pain and disability, but which largely resolved within about one year of accident. Bhandal developed occipital neuralgia as result of accident, which caused him some ongoing pain in back of his head and pain and stiffness in his neck at base of the skull — There was no evidence that Bhandal experienced material exacerbation of his mood disorder since accident.**

**Damages — Physical and psychological injuries — Head injuries — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Action by Bhandal for damages for personal injuries sustained in a motor vehicle accident allowed — Bhandal was awarded non-pecuniary damages of $60,000, past loss of income earning capacity of $90,000, future loss of income earning capacity of $150,000, cost of future care of $1,000, and special damages $7,033 for a total of $311,033 — There was realistic possibility that Bhandal's ongoing head pain had rendered him less capable overall from earning income from all types of employment.**

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| Action by Bhandal for damages for personal injuries sustained in a motor vehicle accident. Bhandal was in his vehicle waiting or starting to turn left into a mall parking lot, when he was rear-ended by a vehicle driven by Charlebois. Bhandal claimed that he suffered soft tissue injuries to his neck, back, and shoulders in the accident that caused pain in these areas, as well as jaw pain and headaches. The soft tissue injuries, frontal headaches and pain in the back, shoulders and jaw resolved within about a year. Bhandal claimed he was left with debilitating and chronic pain in the occipital area of his head and in his upper neck, which has exacerbated a pre-existing mood disorder. He claimed his ongoing symptoms were almost completely disabling and have negatively affected every aspect of his life. Bhandal was 35 years old at the time of the accident. In September 2009, about 20 months prior to the accident, Bhandal obtained a job with Crown Packaging as a labourer. About eight months prior to the accident he obtained a realtor's licence. Bhandal testified that his plan was to continue to work at Crown until retirement, and to sell real estate on the side. Since the accident, he did not return to work at Crown and had not pursued his real estate career. He claimed he has been rendered permanently, competitively unemployable. Bhandal sought damages for pain and suffering, loss of past and future income earning capacity, loss of housekeeping capacity, cost of future care, and special damages. Charlebois disputed the nature and extent of the injuries Bhandal claimed to have suffered, and the effects that he says those injuries had on his life.  HELD: Action allowed.  Bhandal was awarded non-pecuniary damages of $60,000, past loss of income earning capacity of $90,000, future loss of income earning capacity of $150,000, cost of future care of $1,000, and special damages $7,033 for a total of $311,033. Some aspects of Bhandal's evidence were unreasonable and vague, and he demonstrated a tendency to exaggerate and embellish. Regarding causation, it was concluded that Bhandal experienced moderate soft tissue injuries to his neck, back and shoulders in the accident that initially resulted in significant pain and disability, but which largely resolved within about one year of the accident. Bhandal developed occipital neuralgia as a result of the accident, which caused him some ongoing pain in the back of his head and pain and stiffness in his neck at the base of the skull. There was no evidence that Bhandal experienced material exacerbation of his mood disorder since the accident. Charlebois failed to establish that Bhandal failed to mitigate. But for the injuries he sustained in the accident, Bhandal would have continued to work at Crown and very likely would have worked overtime to the extent he worked overtime in the year prior to the accident. There was a realistic possibility that his ongoing head pain had rendered him less capable overall from earning income from all types of employment because it may require him to take more unpaid time off work than would otherwise have been the case. This would make Bhandal less marketable in comparison to applicants who did not require any accommodation and, as such, there was a realistic possibility that he had lost the ability to take advantage of all job opportunities that might otherwise have been open to him. The reliable evidence did not establish a significant, permanent loss of ability to perform routine housekeeping tasks. The evidence established that the monthly cost of prescriptions was about $80. In these circumstances, an award of $1,000 for the cost of future prescriptions was reasonable. |

**Counsel**

Counsel for the Plaintiff: Etienne A. Orr-Ewing, Richard J. Chang.

Counsel for the Defendant: Greg Christofferson, Ian Whitaker.

**Reasons for Judgment**

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| **L.A. WARREN J.** |

**Overview**

**1**  Satvinder Singh Bhandal claims damages for personal injuries he suffered in a car accident on April 29, 2011. Mr. Bhandal was in his vehicle in the left northbound lane on No. 3 Road in Richmond just south of the intersection with Williams Road, waiting or starting to turn left into a mall parking lot, when he was rear-ended by a vehicle driven by the defendant, Daniel Kane Charlebois.

**2**  There were some differences in the accounts of Mr. Bhandal and the defendant with respect to what happened immediately after the accident. However, nothing turns on those differences and I attributed them to the stress both drivers must have experienced in the immediate aftermath of the collision. What is important is that both drivers testified that the defendant's vehicle hit Mr. Bhandal's vehicle from behind while Mr. Bhandal was stopped waiting to turn left, or just commencing his turn, into the parking lot. In these circumstances the onus is on the defendant to show that the collision was not caused by his fault: *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; and *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. Although liability was not formally admitted, in final submissions counsel for the defendant conceded that the defendant had not discharged this onus. In the result, I find the defendant liable.

**3**  Mr. Bhandal claims that he suffered soft tissue injuries to his neck, back, and shoulders in the accident that caused pain in these areas, as well as jaw pain and headaches. The soft tissue injuries, frontal headaches and pain in the back, shoulders and jaw resolved within about a year. However, Mr. Bhandal says he has been left with debilitating and chronic pain in the occipital area of his head and in his upper neck, which has exacerbated a pre-existing mood disorder. He says his ongoing symptoms are almost completely disabling and have negatively affected every aspect of his life.

**4**  Mr. Bhandal was 35 years old at the time of the accident. In September 2009, about 20 months prior to the accident, he obtained a job with Crown Packaging as a labourer. About eight months prior to the accident he obtained a realtor's licence. He testified that his plan was to continue to work at Crown until retirement, and to sell real estate on the side. He has not returned to work at Crown since the accident and he has not pursued his real estate career. He says he has been rendered permanently, competitively unemployable.

**5**  Mr. Bhandal seeks damages for pain and suffering, loss of past and future income earning capacity, loss of housekeeping capacity, cost of future care, special damages and costs.

**6**  The defendant disputes the nature and extent of the injuries Mr. Bhandal claims to have suffered, and the effects that he says those injuries have had on his life. The defendant asserts that Mr. Bhandal's claim depends on the credibility of his subjective reports of pain and that he is not credible. The defendant also challenges the credibility of the lay witnesses who testified in support of Mr. Bhandal. The defendant says that Mr. Bhandal failed to mitigate by failing to attempt to return to some form of employment, not consulting a chronic pain specialist, and resisting recommended medication. The defendant disputes the quantum of damages Mr. Bhandal seeks under all heads except special damages, which are agreed at $7,033.27.

**7**  The critical questions are what injuries were actually caused to Mr. Bhandal by the accident and what effect those injuries have had on his life. As submitted by the defendant, the answers depend very significantly on the credibility and reliability of the evidence led by Mr. Bhandal and, in particular, on his own credibility.

**8**  In addition to his own testimony, Mr. Bhandal relied upon the expert evidence of his family doctor, Dr. Cheryl Nagle; his treating neurologist, Dr. Gordon Mackie; and a psychiatrist, Dr. Lee Rasmusen, who conducted an independent medical examination of Mr. Bhandal at the request of his counsel. He also called his treating chiropractor, Dr. Leslie Taylor-Hughes. In addition, he relied on the expert evidence of Mr. Derek Nordin, a psychologist and certified vocational evaluator, who conducted a vocational assessment of Mr. Bhandal, and the expert evidence of Curtis Peever, an economist who provided estimates of earnings from employment and estimates of the values of non-wage benefits. Finally, he called three lay witnesses: his cousin's husband Mr. Bhupinder Sall; his cousin Mr. Guvinder Aujla; and his brother Mr. Gurinder Bhandal.

**9**  The defendant testified and also relied on the expert evidence of Dr. George Medvedev, a neurologist who conducted an independent medical examination of Mr. Bhandal at the request of his counsel, and a lay witness, Mr. Gordon Speers, who is a supervisor at Crown.

**Background**

**Before the Accident**

**10**  Mr. Bhandal was born in 1975 in the United Kingdom, in a suburb of East London. He has two older brothers, Gurinder and Jagvinder. His father worked on a Ford assembly line and at a bakery. His mother worked as a seamstress.

**11**  Mr. Bhandal's passion, growing up, was football (the sport known as soccer in North America). He played football and was a big supporter of the Liverpool Football Club. He played cricket as well, and participated in martial arts and kickboxing.

**12**  Mr. Bhandal graduated from high school, attended a community college, and then attended university in England. He graduated with a bachelor of arts in combined studies in 1997. His focus at university was on marketing and accounting.

**13**  After graduating from university, Mr. Bhandal worked for about three years in a marketing position with a firm of chartered accountants. He left that job in 2000, completed a web marketing course, and then obtained employment with an online recruitment start-up, where he worked in marketing and advertising until 2004.

**14**  Mr. Bhandal immigrated to Canada with his parents in 2004. They settled in Richmond where many members of his mother's extended family have resided for decades. In 2005, Mr. Bhandal's father purchased a property on Lindsay Road in Richmond and, over the subsequent six months, a new home was built there. Mr. Bhandal moved into that home with his parents. Eventually, his brother, Gurinder, and Gurinder's wife and children also moved in.

**15**  Mr. Bhandal was unemployed for about four years after moving to Canada. He did not even seek employment until about 2007. He testified that he then tried to get back into marketing but the job market was competitive, his English qualifications were different from the qualifications of those he was competing with for jobs, and he was not successful. He spent his time playing soccer, socializing, participating in martial arts, mountain biking, and overseeing the construction of his parents' home on Lindsay Road.

**16**  In 2008, Mr. Bhandal got his first job in Canada. It was a labouring job at a warehouse. He did not like the job and he quit after six months. Later in 2008, he got a job with an online marketing company in a marketing position. He was let go after two months, in January 2009.

**17**  In September 2009, Mr. Bhandal secured a job as a labourer with Crown Packaging. Crown manufactures products such as cardboard boxes from raw paper. Several of Mr. Bhandal's relatives work at Crown Packaging and one of them, Mr. Bhupinder Sall, helped Mr. Bhandal get a job there.

**18**  Mr. Bhandal worked in a few positions at Crown and eventually he secured the job of unitizer operator. The unitizer operator is responsible for operating a machine that packages the products made in the mill. The duties of the unitizer operator include shrouding and wrapping products in preparation for delivery to customers. This is a fairly physical job that requires repetitive squatting, twisting and lifting of plywood caps that must be placed on top of certain products. There was some dispute about just how physical the job is, but there is no doubt that it involves some degree of physicality and demands that the operator remain attentive and alert. There are conveyor belts on the unitizer machine and the operator must walk on the metal rollers of the conveyor belts from time to time, which requires balance and coordination. Mr. Bhandal said that prior to the accident he performed these job duties without any problem.

**19**  Mr. Bhandal's job with Crown was a union position with benefits and a pension plan. It was the best paying and most steady job he had secured since moving to Canada. He testified he planned to work there until retirement at age 60 to 65.

**20**  In the summer of 2010 a property on No. 1 Road in Richmond was purchased by Mr. Bhandal's brother, Gurinder, for a family project. The plan was to subdivide the property and build two houses on it, one for Mr. Bhandal and his parents and the other for Gurinder and his immediate family.

**21**  In August 2010, Mr. Bhandal completed a real estate course through UBC and obtained a realtor's licence. He said that because he worked shifts at Crown, he thought he would be able to maintain his job at Crown and develop a real estate business on the side. He said he knows several Crown employees who are able to operate side businesses by taking advantage of the flexibility of the shifts at Crown. He also said there was a possibility that Crown would be moving to a schedule of three, 12-hour shifts per week, which he thought would make a side business even more viable.

**22**  In September 2010, Mr. Bhandal became an independent realtor with Macdonald Realty in Richmond. However, in the roughly seven months between then and the accident, his only listing was his father's house on Lindsay Road. He listed that house for sale in January 2011 and it sold, after the accident, in August 2011. He also acted as purchasing realtor on the purchase of his own house in the Steveston area of Richmond. He recorded commissions of approximately $30,000 from those two transactions.

**23**  Mr. Bhandal is single and has no children. At the time of the accident he was living with his parents, Gurinder, and Gurinder's wife and children, in the Lindsay Road home. He was responsible for outdoor maintenance such as cutting the grass and seasonal cleaning of the gutters. He was working full time at Crown. He was active and outgoing. Soccer remained his passion. He played regularly and watched professional matches at home, and with friends and family members at the pub. He enjoyed kickboxing, which he did at home with a bag hung in his garage. He had a bicycle that he rode often. He enjoyed socializing with his large extended family.

**The Accident**

**24**  The accident occurred on April 29, 2011 at about 10:30 p.m. Mr. Bhandal had finished his afternoon shift at Crown. He planned to stop at a cold beer and wine store on his way home. He drove north on No. 3 Road, in the right lane. As he approached Williams Road, he entered the left northbound lane and slowed to a stop, waiting, with his left turn indicator on and his wheels slightly turned to the left, for the southbound traffic to clear so that he could turn left into the mall parking lot. He was then struck by the defendant's vehicle from the rear. The defendant testified that he looked down at the clock in his car and then, when he looked up again, it was too late and he struck Mr. Bhandal's vehicle.

**25**  The impact of the collision was significant. Mr. Bhandal testified that he heard glass shattering and he recalls his upper body moving backward and forward and his head hitting the headrest one or two times. He testified that he felt immediate pain in his neck. The damage to both vehicles was considerable. The impact caused nearly $11,000 in damage to the defendant's vehicle and it was rendered a total loss. Mr. Bhandal's vehicle sustained approximately $5,500 in damage.

**26**  Notwithstanding the damage to his vehicle, Mr. Bhandal was able to drive it home. He testified that he started to feel pain in his back, shoulders and jaw. He also had a frontal headache. He left a message at Crown saying he would not be coming in to work the following morning and would update them after seeing his doctor. He testified that he had a couple of shots of whiskey to calm his nerves and went to bed.

**After the Accident**

**27**  When Mr. Bhandal woke up the morning after the accident he was very sore in the back, chest, jaw and neck areas. He asked his father to drive him to Richmond Hospital because he was worried he might have fractured his neck. X-rays were taken and confirmed there was no fracture.

**28**  On May 2, 2011, Mr. Bhandal saw his family physician, Dr. Cheryl Nagle. He complained of pain across his neck in between his shoulder blades, frontal headaches and bilateral jaw pain. Dr. Nagle noted that he had full range of motion in his neck with pain on the extremes of motion. There was no palpable spasm in his neck; however, there was pain on palpation. She diagnosed soft tissue injuries and advised him to apply ice and attend physiotherapy. She prescribed an anti-inflammatory medication, advised him to remain off work, and to be reassessed by her in one week.

**29**  Mr. Bhandal testified that in the week following the accident he felt sore and stiff. His shoulders and back were swollen and he continued to have frontal headaches. He went to physiotherapy but he testified that he was in too much pain to do anything but ultrasound. He went back to see Dr. Nagle about a week after the accident complaining of worsened pain and frontal headaches. She told him to stay off work for another week. He applied for and started to receive short-term disability benefits.

**30**  Later in May 2011, Dr. Nagle referred Mr. Bhandal to Dr. Quirke, a physician with expertise in musculoskeletal disorders. She also recommended that Mr. Bhandal remain off work.

**31**  Mr. Bhandal was treated by Dr. Quirke between June and November 2011. He referred Mr. Bhandal to Dr. Leslie Taylor-Hughes, a chiropractor. He also referred Mr. Bhandal to a physiotherapist for IMS treatments. At the end of June he recommended that Mr. Bhandal remain off work for a further four weeks. At the end of July he recommended that Mr. Bhandal remain off work until at least September 2011.

**32**  Dr. Taylor Hughes provided 33 treatment sessions to Mr. Bhandal, over four months between June and October 2011. Her treatment was funded by an ICBC program and she provided reports to ICBC on her findings, treatment plan, prognosis and progress. She also reported to Dr. Quirke.

**33**  In her initial report to ICBC dated June 24, 2011, Dr. Taylor-Hughes noted that Mr. Bhandal reported tenderness in the cervical spine and the right thoracic spine. She noted limitations in his range of motion in the cervical spine, particularly on extension. She diagnosed a Grade II Whiplash and cervicogenic headache, which she explained, at trial, was a headache originating in the neck. She reported that Mr. Bhandal could not manage physical labour but that he could work at sedentary tasks.

**34**  Three weeks after commencing treatment, Dr. Taylor-Hughes noted that some of the spasm and swelling had improved but the headaches persisted. Nevertheless, at the time, she thought Mr. Bhandal's prognosis was good. By September 2011, she reduced her prognosis to "fair" because of the persistence of the headaches. In October 2011, she told Dr. Quirke that Mr. Bhandal had complained of severe headaches intermittently and wondered whether further investigation was warranted. By November 2011, Dr. Taylor-Hughes concluded that the headaches were not responding to her treatment. She advised ICBC, in her discharge report, that her prognosis was guarded because of the unrelenting headaches.

**35**  As already noted, in August 2011, the Lindsay Road home sold. Mr. Bhandal testified that he then purchased a house in Steveston and he and his parents moved there.

**36**  ICBC asked Mr. Bhandal to attend Karp Rehabilitation. He attended treatments there from October 2011 to March 2012, working with Wilson, a physiotherapist, on developing a program to get back to work.

**37**  In November 2011, Dr. Quirke referred Mr. Bhandal for an MRI. No abnormalities were noted. Dr. Quirke told Mr. Bhandal there was nothing more he could do for him. Also in November 2011, Dr. Nagle diagnosed Mr. Bhandal as suffering from chronic occipital pain secondary to the accident. She prescribed medication for pain and to help him sleep.

**38**  In December 2011, Dr. Nagle referred Mr. Bhandal to Dr. Gordon Mackie, a neurologist. She also recommended that Mr. Bhandal try returning to work in January 2012 on a graduated basis and on light duties. At trial, she said she always recommends that injured patients try returning to work in order to re-establish some normalcy in their lives. She said that she did not know whether he would be able to work but she wanted him to try.

**39**  Dr. Mackie first saw Mr. Bhandal on December 20, 2011, nearly eight months after the accident. He noted that Mr. Bhandal "presented with persisting pain in the back of his head since [the] motor vehicle accident" that "tended to be located in the occipital areas bilaterally and spread into his neck and scalp". Dr. Mackie conducted a physical examination of Mr. Bhandal, which was "unremarkable apart from tenderness over the greater occipital nerve areas bilaterally". He noted that Mr. Bhandal's "neurological examination was ... found to be within normal limits".

**40**  Dr. Mackie's "presumptive diagnosis" was occipital neuralgia. At trial, he explained that occipital neuralgia is pain attributable to irritation or damage to the occipital nerves arising from the upper cervical spine and spreading across the back of the skull. He said that when irritated, these nerves cause pain in the distribution of the nerve up, from the base of the skull, over the back of the head. He recommended ice massage and a topical anti-inflammatory ointment called diclofenac. He advised Mr. Bhandal to take a "graded" return to work. At trial he said that when he first sees a patient who has been off work he always suggests they try returning to work. He said that this was early on in his treatment of Mr. Bhandal and he was more optimistic at that time.

**41**  Mr. Bhandal was next seen by Dr. Mackie on January 11, 2012. At that time, according to Dr. Mackie, he reported continued pain despite the ice massage and topical diclofenac. Dr. Mackie recommended that Mr. Bhandal undergo an injection of Depo-Medrol with lidocaine into the affected areas. Dr. Mackie explained that Depo-Medrol is a cortical steroid that acts as an anti-inflammatory agent and lidocaine is a short lasting local anesthetic that acts as a nerve block.

**42**  Mr. Bhandal saw Dr. Nagle on January 16, 2012. She continued to recommend that he try to return to work. Her clinical records for that appointment indicate that Mr. Bhandal was very hesitant to do so. She acknowledged at trial that she "strongly recommended" that he return to work at least part time and that they "compromised" by agreeing that he would return to work after the Depo-Medrol injection. She acknowledged that at the time, on January 16, 2012, she and Mr. Bhandal had differing opinions as to whether he should return to work.

**43**  Mr. Bhandal received the injection of Depo-Medrol and lidocaine on January 26, 2012. He testified that his pain intensified for a few days after the injections but then it improved and he was pain-free for about a week. However, he said the pain gradually returned to its previous level.

**44**  Nevertheless, Mr. Bhandal testified that he was ready to proceed with the return-to-work program he had developed with Wilson from Karp. He testified that the soft tissue injuries had largely resolved and he was no longer suffering from back pain, jaw pain or frontal headaches. He said Crown then advised him that they could not accommodate a graduated return to work because they already had other employees on light duties. In the result, he remained on short-term disability benefits until July 2012 when he started receiving long-term disability benefits.

**45**  By February 2012, the No. 1 Road property had been subdivided and one of the lots was transferred into Mr. Bhandal's name. The other is registered in Gurinder Bhandal's name. Construction of the two houses began in June 2012.

**46**  Mr. Bhandal was next seen by Dr. Mackie on April 10, 2012. He told Dr. Mackie that he had some temporary pain relief following the Depo-Medrol injection. At trial, Dr. Mackie said that this temporary response from the injection "warrants consideration" because it suggests that there is "something locally active". However, he did not consider the treatment successful because the benefit was not sustained.

**47**  Over the next almost 2 1/2 years, between July 2012 and September 2014, Mr. Bhandal saw Dr. Mackie on approximately 11 occasions. Several treatments were tried to eliminate or reduce his occipital pain. Mr. Bhandal reported to Dr. Mackie that some of these treatments resulted in no benefit, some made things worse, and some resulted in some benefit but with intolerable side effects. These treatments included:

1. continued use of ice massage and the topical diclofenac, but according to Mr. Bhandal with limited benefit;
2. gabapentin (a medication first developed as an anti-convulsant medication but also used for neuropathic pain) which, according to Mr. Bhandal, resulted in limited benefit but also side effects including drowsiness, abdominal cramps and diarrhea;
3. Marcaine injections (another nerve block, similar to lidocaine, but without the cortical steroid) which, according to Mr. Bhandal, resulted in an initial but short-lived local anesthetic effect followed by worsened pain;
4. topiramate (another medication first developed as an anti-convulsive therapy but, according to Dr. Mackie, also proven to work with headache and neuropathic pain) which, according to Mr. Bhandal, resulted in some benefit but with side effects including loss of appetite and mental slowness;
5. Cymbalta (primarily an antidepressant medication but, according to Dr. Mackie, a drug that also has some efficacy as an neuropathic pain medication) which, according to Mr. Bhandal, resulted in side effects including constipation and blood in Mr. Bhandal's bowel movements;
6. tizanidine (a muscle relaxant medication) in gradually increasing doses which, according to Mr. Bhandal, resulted in sedation side effects; and
7. Botox injections (a neuromuscular blocking agent) which, Mr. Bhandal said, resulted in no meaningful benefit and, if anything, worse pain.

**48**  Mr. Bhandal had been smoking marijuana that he bought on the street. He said it helped with the pain. In about August 2012, he started smoking what he referred to as "medical" marijuana. He said he got a medical marijuana card and started buying his marijuana from a dispensary. In cross-examination he testified that he used Dr. Nagle's first report prepared for this litigation, dated May 31, 2012, to obtain the medical marijuana card. He acknowledged this was not done on Dr. Nagle's recommendation. Dr. Nagle testified that while he later advised her that he was smoking marijuana she was not involved in him obtaining the medical marijuana card. She testified that she does not prescribe marijuana but she was not adverse to him smoking it. Mr. Bhandal testified that he smokes marijuana every day, usually in the evenings. He says it helps with his appetite and with the head pain.

**49**  On April 4, 2013, Dr. Nagle suggested that Mr. Bhandal consult a chronic pain specialist. However, he was continuing to see Dr. Mackie and he did not want to see anyone else at that time. In cross-examination, Dr. Nagle said that she made the suggestion because Mr. Bhandal "was stuck" and she "wanted to try a different angle", but Mr. Bhandal was comfortable with Dr. Mackie and wanted to continue with Dr. Mackie's approach. In re-examination she said she considered this to be reasonable.

**50**  In October 2013, Mr. Bhandal stopped receiving long-term disability benefits. He testified that he would have to have been disabled from all occupations in order to continue to receive the benefits. He eventually initiated an appeal of the termination of his long-term disability benefits, but the outcome of the appeal was not known at the time of the trial.

**51**  Also in October 2013, the two houses on No. 1 Road were listed for sale with Mr. Bhandal. He testified that the plan had been for him and his family to live in the homes but by the time construction was complete he could not afford to hold both the Steveston house and one of the No. 1 Road houses. If he was not going to live at No. 1 Road then his brother did not want to live there either and they decided to sell both houses. He testified that he tried to sell them and did some showings but they did not sell. He said he struggled with keeping appointments and being upbeat and responsive with potential purchasers. Eventually the houses were taken off the market and, in February 2014, Gurinder and his wife and children moved into one of them and Mr. Bhandal and his parents moved into the other. Gurinder testified that Mr. Bhandal's poor performance in trying to sell the homes caused a rift between them. However, neither Mr. Bhandal nor his brother explained why, when Mr. Bhandal's efforts failed, they did not retain a different realtor to sell the homes.

**52**  In April 2014, Mr. Bhandal underwent a second MRI on Dr. Mackie's recommendation, as a precautionary step to ensure nothing had been missed. Again, no abnormalities were noted. Dr. Mackie explained that he was not expecting to see anything on the MRI reports as a result of the occipital neuralgia that he had diagnosed.

**53**  Mr. Bhandal testified that 2014 was the toughest year of his life. He said he had received "bad news, after bad news". Dr. Mackie's last suggestion of Botox had not worked. His long-term disability benefits had been terminated. He said the constant head pain was "chipping away" at him. He became frustrated and depressed. He also testified that looking back on his life he was probably depressed from the time he was a child. He suspected that he was bipolar. He said that since childhood he has experienced vacillating moods, with alternating periods of highs and lows. However, he said his psychological symptoms did not interfere with his ability to function until after the accident. By 2014 he said he was regularly breaking down and crying, getting angry, and fighting with his parents. By August 2014, he decided to talk to Dr. Nagle about these symptoms.

**54**  On September 10, 2014, Mr. Bhandal told Dr. Nagle about having symptoms of depression and mania dating back to his childhood. She said she was very concerned at the time about his mental health and referred him to a psychiatrist, Dr. Costin. She also suggested that he begin medication to address the mental health symptoms but Mr. Bhandal wanted to see the psychiatrist first. At trial, Dr. Nagle testified that she considered that response to be reasonable in the circumstances. In cross-examination, Dr. Nagle agreed that there was some delay in Mr. Bhandal seeing Dr. Costin but that was due to a lack of response by Dr. Costin's office. Mr. Bhandal testified had seen Dr. Costin couple of times prior to the trial and that they were discussing treatment options. He did not mention taking any medication for the psychological symptoms and Dr. Costin did not testify.

**55**  Also on September 10, 2014, Mr. Bhandal and Dr. Nagle discussed his continuing head pain. They discussed the various medications that he had tried on Dr. Mackie's advice and their resulting side effects. Mr. Bhandal told Dr. Nagle that he did not want to take further medications for pain. She considered this to be a reasonable response because of the side effects he said he was having. He also told her that he was using marijuana regularly for pain. She testified that she considered that to be reasonable.

**56**  During a visit on September 12, 2014, Dr. Mackie and Mr. Bhandal reviewed all the treatments that had been tried. Mr. Bhandal reported that the only one that offered any meaningful benefit was topiramate, although it did result in side effects. Nevertheless, Mr. Bhandal decided to try topiramate again, together with the topical diclofenac. However, he reported suffering the same kind of side effects again, including low appetite and mental slowness. At his last visit with Dr. Mackie in December 2014, it was decided that he would stop taking the topiramate due to the side effects. Dr. Mackie referred Mr. Bhandal to a pain clinic at St. Paul's Hospital. By the time of trial, Mr. Bhandal had not yet started attending the clinic.

**57**  Mr. Bhandal testified that in November 2014 he contacted Crown and advised that he wanted to try to return to work. He received a letter from Crown requesting current medical information in order to determine whether he had the ability to return to work and whether Crown would be in a position to accommodate any functional limitations. The letter stated that unless Crown was provided with a medical opinion that he was able to return to work on a regular basis in the foreseeable future with, or without, accommodation, his employment would be terminated on December 31, 2014.

**58**  Dr. Nagle then submitted some medical information to Crown indicating that Mr. Bhandal was unable to do his regular job and asking whether there was a more sedentary job. At the same time, Mr. Bhandal was appealing the termination of his long-term disability benefits. In order to do that he has to establish that he is unable to perform the essential duties of any occupation for which he is qualified or may reasonably become qualified. Crown pointed out that his request to return to work and Dr. Nagle's view that he might be able to work in a sedentary job, were inconsistent with his appeal. Crown also advised that it could not permanently accommodate him in a sedentary role. Nevertheless, Crown provided an extension and suggested that he undergo an independent medical examination at Crown's expense in order to determine whether he was likely to return to work on a regular basis in the foreseeable future with, or without, accommodation. He was asked to complete an authorization for release of information for the purpose of an independent medical examination. He did not testify as to whether he submitted that authorization or attended the independent medical examination. However, he maintained that he wants to return to work.

**59**  Mr. Bhandal testified that his head pain remains debilitating. He described it as feeling like the back of his skull is on fire. He said that while its intensity fluctuates, it is always present. He said he typically is at his best in the morning, but his pain worsens throughout the day. He said that any type of movement increases the pain. He goes for daily walks of approximately 45 minutes and to yoga, but finds that both activities worsen the pain. He said in the evenings the pain is at its peak and is sharp and stabbing, like an ice pick.

**60**  Mr. Bhandal testified that he continues to suffer significant mood symptoms in addition to the pain. He said he has been more consistently down since the accident, with greater time spent in depressive phases. He said his energy has declined, he has difficulty sleeping, he has a lower appetite, he is pessimistic, he has difficulty concentrating, he is socially withdrawn and he feels exhausted emotionally, mentally and physically. He said he is irritable, volatile, easily brought to anger, unreasonable, mentally slow and feels hopeless. He said his mood symptoms are worse when the pain is more intense.

**61**  Mr. Bhandal has tried a variety of medications for pain, some of which are also utilized in treating mood disorders. However, at the time of trial he had ceased taking all prescription medication, with the possible exception of the topical diclofenac, and was managing his pain with marijuana, which he smokes daily. He testified that he might try topiramate again in the future.

**62**  Mr. Bhandal testified that he can use a computer but that he has to take a break every hour or so to stretch his neck. He said that the maximum amount of time he could spend on the computer in a day is about three hours. However, he said that if he did that he would be in pain afterwards and would have to rest and not do anything else for the rest of the day. He testified that he can read but he has to shift positions periodically.

**63**  Mr. Bhandal testified that he no longer plays soccer. He said he tried to ride his bike but it hurts his head to wear a helmet. He cannot run or kickbox because the impact worsens his head pain. He said the back of his head is aggravated even by wearing hats, wearing sunglasses and having his hair cut. He continues to practice yoga as often as five times a week.

**64**  Mr. Bhandal testified that he can no longer perform outdoor house maintenance. He said he tried cutting the grass a couple of times in the summer 2012 but after 45 minutes he stopped because he was in too much pain. He hired someone to do the grass after that. He acknowledged that there is no grass to cut in the new house on No. 1 Road.

**65**  Mr. Bhandal testified that he no longer socializes much. He rarely drinks alcohol because he has been on medication and if he does have a drink he has to recover the next day. He testified that everything in his life has to be planned like a military operation. If he knows he has to go somewhere, he has to plan time to recover. If he knows he has to spend some time cleaning up the house because his parents are away, he forgoes a walk because he cannot do both. He said that although his mother does most of the indoor housework, when she is away he has to do some light cleaning such as emptying the dishwasher, cooking and vacuuming. He said he breaks the tasks down, with breaks in between, and compensates by not doing other things like yoga or a walk.

**Credibility and Reliability of the Evidence**

**66**  As I said in the introduction, the critical questions that need to be answered are what injuries were caused by the accident and what effect those injuries have had on Mr. Bhandal's life. As in most cases involving subjective complaints, the answers to these questions turn to a significant extent on Mr. Bhandal's credibility. It is particularly important to exercise caution and examine his evidence carefully: *Price v. Kostryba* [*(1982), 70 B.C.L.R. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6133-00000-00&context=) (S.C.) at 399.

**67**  While there was some objective evidence of Mr. Bhandal's soft tissue injuries, his subjective reports of ongoing occipital pain provide the foundation for the expert evidence relevant to the critical issues. This is true of all the medical opinions. Mr. Bhandal's subjective complaints also provide the foundation for the opinion of Derek Nordin who, after performing a vocational assessment, expressed the view that Mr. Bhandal is not competitively employable. That opinion was based on Mr. Bhandal's subjective reports of pain and psychological symptoms, and his results from a battery of tests that were also entirely subjective and did not assess the legitimacy of his effort. As such, Mr. Bhandal's credibility is the cornerstone of his claim. If his account is not convincing, the hypothesis upon which his expert evidence rests is undermined: *Samuel v. Chrysler Credit Canada Ltd.*, [*2007 BCCA 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X443-00000-00&context=) at paras. 15, 43-44.

**68**  I found Mr. Bhandal's evidence to have significant shortcomings.

**69**  Some aspects of Mr. Bhandal's evidence were unreasonable. This was the case with respect to his testimony concerning why he has not attempted to return to any form of employment. By late 2011, more than three years before trial, Dr. Nagle and Dr. Mackie were both recommending that he attempt to return to work in some capacity. Mr. Bhandal had been working with Wilson from Karp Physiotherapy on a return to work program since October 2011. He testified that he was ready to proceed with it in February 2012, but Crown could not accommodate light duties. He said he was frustrated by this because he had worked so hard with Wilson and he really wanted to try going back to work. However, this is inconsistent with Dr. Nagle's evidence. She testified that in January 2012, Mr. Bhandal was expressing great reluctance about returning to work. Mr. Bhandal did not explain why he was expressing great reluctance to Dr. Nagle in January and yet claimed to be ready, and even eager, to return to work in February.

**70**  Mr. Bhandal was receiving disability benefits until October 2013. While it is somewhat understandable that he chose not to look for alternative work while the disability benefits were being paid, he provided no rational explanation for his failure to attempt to return to some form of employment since then. On the one hand, he is pursuing an appeal of the termination of his long-term disability benefits, but that will require him to establish that he is disabled from all occupations which is unlikely given that his doctors have been recommending for years that he attempt to return to work. On the other hand, he said that he wants to "fight for his job at Crown", but fighting to return to Crown is entirely inconsistent with the appeal of his long-term disability benefits. Further, Crown told him that if he wants to try to return to work he must attend an independent medical examination and there is no evidence that he did that and no explanation of why he did not. In the absence of a rational explanation, the inference I draw is that Mr. Bhandal intentionally delayed a real trial of his ability to work because he thought that a true evaluation of his capacity might detract from the position he wished to advance in this case.

**71**  In addition to being unreasonable in some respects, I found Mr. Bhandal's evidence to be surprisingly vague on some important matters. He testified that, before the accident, he planned to develop his real estate business on the side while he continued to work at Crown. He had his realtor's licence for eight months before the accident and yet his evidence concerning his plans for developing the business and the steps he took to implement those plans during those eight months was very vague. He said only that he planned to target his family members who were in the construction field for listings and then branch out once he had some experience, but he gave no evidence of what specific efforts he made to target those family members. For example, he did not testify about any particular discussions or conversations that he had with any of them. He did not give the names of any of these family members or explain what actual involvement any of them have in the construction industry and, given that involvement, the potential volume of work he expected to receive from them.

**72**  It is clear that Mr. Bhandal played some role in the construction of the two houses on the No. 1 Road property, but he gave very little, if any, evidence on this topic. Mr. Bhandal's cousin, Mr. Guvinder Aujla, is in the residential home construction and landscaping business. He testified at the trial. I have concerns about his credibility, which I will address below. However, he said that Mr. Bhandal was directly involved in the construction of the two houses. The houses were built between June 2012 and September 2013, which is after the accident and during a time when Mr. Bhandal maintains he could not work. Mr. Aujla said Mr. Bhandal was responsible for navigating the subdivision application through the rezoning process with the city, and that he supervised the construction and organized the trades. Mr. Aujla claimed that Mr. Bhandal struggled with these tasks and that Mr. Aujla eventually had to take over the project, but given my concerns about his credibility generally, I place no weight on that evidence. The point is that Mr. Bhandal himself did not testify about his role in this significant project and the difficulties, if any, that he encountered with it. This is troubling, given Mr. Aujla's evidence that he played quite a central role and Mr. Bhandal's claim that he has been unable to work at all since the accident.

**73**  Mr. Bhandal testified that he tried to sell the two homes on No. 1 Road in the fall of 2013 but was unsuccessful. He implied that his injuries prevented him from marketing the properties effectively. However, he provided no explanation for why he did not retain a different realtor, if he felt he was not up to the task. Further, his evidence about why he decided, a few months later, not to sell the houses but rather to move into one of them was implausible. He said the original plan was to move into one of the houses on No. 1 Road but that, when construction was complete in October 2013, he could not afford to continue to own both the Steveston house and the No. 1 Road house and so decided to sell the latter. However, a few months later, in February 2014, he moved into one of the No. 1 Road houses and he kept the Steveston house as well. He did not explain what changed between October 2013, when he concluded he could not afford to keep both houses, and February 2014, when he decided to keep both.

**74**  Mr. Bhandal immigrated to Canada, in 2004 at age 29, and did not attempt to look for work for about three years. He provided no reasonable explanation for that, saying only that he was settling into Canada. Mr. Sall and Mr. Aujla both testified that they did not notice Mr. Bhandal to be having any difficulty adjusting to life in Canada.

**75**  Mr. Bhandal's tendency towards vagueness was commented upon by some of his own expert witnesses. Mr. Nordin noted in his report that he found Mr. Bhandal to be "a weak historian" and that he "tended to be tangential". Dr. Rasmusen acknowledged in cross-examination that he had a difficult time delineating facts that would allow him to determine whether Mr. Bhandal's psychological symptoms were worse after the accident as he could not determine the frequency and severity of the episodes prior to the accident. He agreed that Mr. Bhandal was a poor historian.

**76**  Mr. Bhandal also demonstrated a tendency to exaggerate and embellish. For example, in his direct evidence he described his job at Crown as "one of the most physically demanding jobs in the plant" and said it involved "lots of pushing, shoving, picking up pallets and running around". His evidence was interrupted in order to accommodate the testimony of Mr. Sall, who also works at Crown. Mr. Sall said that Mr. Bhandal's job was of a "mid-labour intensity". Later, when Mr. Bhandal continued his direct evidence, he backed down from his earlier assertions and said that his job was "one of the busiest jobs" but he did not know if it was "one of the most physical". The defendant called Mr. Gordon Speers, a senior production supervisor at Crown, who said the unitizer operator job is not one of the most physical jobs in the plant. He said there is not a lot of pushing and shoving involved in the unitizer operator job and not a lot of picking up pallets. He also said there is no running around in the plant.

**77**  Mr. Bhandal testified that the unitizer machine was the size of a "football pitch". In contrast, Mr. Sall testified that the unitizer machine was about 75 feet long and Mr. Speers said it is about 120 feet long.

**78**  Mr. Bhandal said that his job had "loads of overtime". However, in cross-examination, he agreed that the "loads of overtime" he spoke about in his direct examination applied only to an approximately two-month period during which the unitizer machine was being broken in and that otherwise overtime was available to him only about one shift every sixth Saturday.

**79**  Finally, I was troubled by Mr. Bhandal's poor performance on the academic achievement, aptitude and vocational interest tests administered by Mr. Nordin. As noted by Mr. Nordin numerous times in his report, Mr. Bhandal's results were significantly lower than expected given his academic achievements. For example, Mr. Bhandal tested at a grade 5.5 level in spelling and a grade 8.0 level in math computation, the latter of which is particularly striking given his university degree included a focus on accounting. He ranked in the 14th percentile in reading, which is very surprising given his academic accomplishments, including the completion of the course work, through UBC, to obtain his real estate licence. Further, while he was testifying he was asked, on a couple of occasions, to read portions of letters out loud and it was apparent that he had no difficulty.

**80**  Mr. Nordin also noted that Mr. Bhandal had a very weak aptitude profile. Mr. Bhandal's general learning ability score placed him in the lower one-third of the general working population -- a score that, in my view, is inconsistent with his actual academic achievement. His numerical aptitude score was in the bottom 10% of the population, which Mr. Nordin noted was lower than expected given his university degree as well as his average math computation results. Mr. Nordin also noted that his general learning ability result (at the 12th percentile) was lower than expected given his achievement of a four-year university degree. I noted that his verbal aptitude score was in the bottom 10% of the population, which was inconsistent with the excellent verbal ability he demonstrated on the witness stand.

**81**  Mr. Nordin also administered a personality questionnaire and concluded, among other things, that Mr. Bhandal's results may reflect "a deliberately negative self-presentation".

**82**  Mr. Nordin provided no opinion with respect to why Mr. Bhandal might have performed so poorly on the tests he administered. He confirmed that there is nothing in the test battery that measures whether the subject is using best efforts. I appreciate that Mr. Bhandal claims that his symptoms affect his ability to concentrate but he did not testify to having any particular difficulty completing this testing. Even accounting for some impairment in his ability to concentrate, his scores were far below what one would expect given his academic achievements and inconsistent with his verbal and reading abilities as demonstrated in the witness stand. Given the unusual results, the absence of any explanation for the unusual results, and the lack of any measure of effort, I am not prepared to place any weight on Mr. Nordin's report in assessing Mr. Bhandal's vocational capacity. In addition, the inconsistency of the results with Mr. Bhandal's actual academic achievement added to my concerns about Mr. Bhandal's credibility.

**83**  Mr. Bhandal was not assisted by the evidence of his brother, Gurinder Bhandal, or his cousin, Guvinder Aujla. I do not intend to refer to the evidence of either one of them in detail because I have concluded I cannot give it any weight. Both of them were deliberately misleading and this tainted their entire evidence.

**84**  In his direct evidence, Mr. Aujla testified that as a building contractor he builds between eight and ten single-family homes a year and then sells them. He spoke about his willingness to give Mr. Bhandal a chance to sell homes for him. He said if it were not for the impact Mr. Bhandal's injuries have had on his abilities, he would have tried Mr. Bhandal as a realtor on one or two homes and, if it went well, he would have continued to use him as a realtor. He said that given the changes in Mr. Bhandal since the accident, he would no longer be comfortable with him being the "face of a house" he was trying to sell. However, in cross-examination he admitted that he no longer builds his own homes to sell but rather works as a general contractor for others. The last time he built a home to sell was in 2010 or 2011. He tried to rehabilitate himself in redirect by saying that when building homes for others he has the opportunity to recommend realtors to the owners of the project, but this is very different from the impression he left by his direct evidence.

**85**  In addition and as already referred to, Mr. Aujla testified that Mr. Bhandal was initially responsible for the construction of the two houses on No. 1 Road, but he did such a poor job that Mr. Aujla had to take over the project. He emphasized that it took Mr. Bhandal two to three years to get the subdivision approved by the city and this aspect of a project usually takes only 18 months to two years to complete. However, Mr. Bhandal testified that the property on No. 1 Road was acquired in the summer of 2010 and one of the lots was transferred into his name in February 2012. By that time there were two lots and the subdivision must have been completed. Even if Mr. Bhandal started the subdivision process right after the property was acquired in the summer of 2010, it took no longer than about 18 months to complete.

**86**  Gurinder Bhandal's evidence was also concerning. He had a tendency to embellish. For example, he referred to Mr. Bhandal as having been "goal-oriented" before the accident, which is inconsistent with Mr. Bhandal's sporadic work history. When questioned about this in cross-examination, he said he meant that Mr. Bhandal got a university degree and accomplished a move from England to Canada; however, those events occurred long before and are insignificant in light of the subsequent three years during which Mr. Bhandal did not even attempt to find employment. Gurinder Bhandal also gave misleading evidence about Mr. Bhandal's attendance at Whitecaps games. He said that he and Mr. Bhandal have season tickets to the Whitecaps but that Mr. Bhandal misses many games. In his direct evidence, he clearly started to say that Mr. Bhandal did not miss Whitecaps games before the accident. He then tried to change his testimony when it was pointed out that they only started buying season tickets in 2011, which was the Whitecaps' first MLS season and also the year of the accident.

**87**  I have no reason to question the credibility of Mr. Sall. He testified in a responsive and consistent manner. I accept that he has observed a change in Mr. Bhandal's personality since the accident and, in particular, that Mr. Bhandal has become socially withdrawn.

**88**  For all the reasons I have outlined, I was left with a general concern that Mr. Bhandal's evidence was motivated more by his interest in the outcome of this case than the desire to be candid at all times. Nevertheless, Dr. Taylor-Hughes did testify to having observed objective symptoms of soft tissue injuries, Dr. Mackie testified that Mr. Bhandal's subjective reporting of occipital pain was consistent with the neurological anatomy, and Dr. Medvedev testified that Mr. Bhandal's complaints are consistent with the mechanism of a whiplash-type injury. Accordingly, despite my concerns about Mr. Bhandal's testimony, there is enough in Mr. Sall's evidence and the evidence of Drs. Taylor-Hughes, Mackie, and Medvedev that persuades me to accept the credibility of his core complaints related to his soft tissue injuries and the existence of some ongoing occipital pain. However, I also conclude that Mr. Bhandal's complaints about the occipital pain have been significantly exaggerated and that the occipital pain has not affected his functional abilities to the extent he claims.

**What injuries and conditions were caused or contributed to by the accident?**

**Legal Principles**

**89**  Mr. Bhandal must prove, on a balance of probabilities, that the accident caused his injuries. The test for causation, established in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at paras. 13-17, is the "but for" test. This requires Mr. Bhandal to establish that it is more likely than not that but for the accident he would not have suffered the injuries underlying his claim.

**90**  Mr. Bhandal does not have to establish that the accident is the sole cause of the injuries. So long as a plaintiff proves that a defendant's ***negligence*** is part of the cause of an injury, beyond the "*de minimus*" range, the defendant will be fully liable for the harm suffered, even if other causal factors, which the defendant is not responsible for, contributed to the harm: *Athey*; *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=); *Resurfice Corp. v. Hanke*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=); *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=); *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=).

**Causation Findings**

**91**  Mr. Bhandal's complaints are grouped into three categories:

1. soft tissue injuries causing pain in the neck, back, and shoulders, jaw pain and frontal headaches;
2. chronic occipital pain; and
3. an exacerbation of his pre-existing psychological symptoms.

***Soft tissue injuries***

**92**  Mr. Bhandal testified that in the immediate aftermath of the accident he suffered from significant pain in his neck, back, shoulders, and jaw. He also suffered from frontal headaches. He said the jaw pain and frontal headaches lasted four to six months. He testified that the pain in his upper back and shoulders had resolved by about March 2012, when he finished his course of treatment at Karp. The defendant did not take issue with much, if any, of this evidence.

**93**  Within days of the accident, Dr. Nagle noted pain on palpation and diagnosed soft tissue injuries. Soon after that, Dr. Taylor-Hughes noted limitations in Mr. Bhandal's range of motion, spasm and swelling. She diagnosed Grade II Whiplash and cervicogenic headaches. I am persuaded by this evidence that Mr. Bhandal's soft tissue injuries and the associated pain were caused by the accident.

***Occipital pain***

**94**  Mr. Bhandal testified at some length about his ongoing occipital pain. For the reasons already expressed, I accept that he suffers from ongoing occipital pain, but find that he has exaggerated the pain and the impact it has on his life. At this stage, the question is whether he has established that the ongoing pain I accept he does have was caused by the accident.

**95**  In her May 31, 2012 report, Dr. Nagle expressed an opinion as to causation of the ongoing occipital pain:

Based on Mr. Bhandal's account of having not had these symptoms before the motor vehicle accident and based on his description of them coming shortly following the accident, I attribute his ongoing occipital pain to effects of the April 29, 2011 accident.

**96**  Dr. Mackie is a neurologist licensed to practice in the province of British Columbia. He has been practicing as a neurologist since July 1993. He has a special interest in the area of epilepsy and headache disorders and is a past president of the Canadian Headache Society and a former member of the professional advisory board of epilepsy BC. As already noted, he has been treating Mr. Bhandal on referral from Dr. Nagle since December 2011. He prepared reports dated October 22, 2014 and March 2, 2015. No objection was made to Dr. Mackie's qualifications as a medical doctor with a specialty in neurology. No objections were made to the admissibility of any portion of his reports.

**97**  In his October 22, 2014 report, Dr. Mackie summarized his diagnosis, opinion as to causation, and treatment:

His diagnosis is posttraumatic headaches, as a result of the MVA related injury that occurred April 29, 2011, with localized discomfort in the occipital areas bilaterally suggestive of occipital neuralgia. Treatment was directed towards a combination of local and systemic treatment options. Despite multiple treatments with multiple agents minimal favorable response was ever achieved. No additional identified structural abnormality was present on repeat MRI imaging.

**98**  At trial, Dr. Mackie explained that his opinion as to causation was based on the history of the motor vehicle accident that, as described by Mr. Bhandal, "would probably have involved some impact of his head against the headrest", which, in turn, involved impact on the occipital nerves, giving rise to the symptoms. A question arose, as a result of a notation in Dr. Nagle's clinical records, about whether Mr. Bhandal actually struck his head on the headrest. It is not necessary for me to resolve that question because I accept Dr. Mackie's testimony at trial that his opinion does not depend on Mr. Bhandal having actually struck his head.

**99**  As already noted, Dr. Mackie prepared a second report dated March 2, 2015. This report specifically addressed Dr. Medvedev's report, as summarized below, in which he expressed doubt with respect to the diagnosis of occipital neuralgia due to the lack of a response to injections of an anesthetic with a steroid (the Depo-Medrol with lidocaine). In his March 2, 2015 report, Dr. Mackie expressed the view that while response to therapy has been included in the diagnostic criteria of occipital neuralgia, this is intended to guide management strategy, but does not mean that Mr. Bhandal did not have the clinical features of occipital neuralgia. In Dr. Mackie's view this simply means that he did not respond to the treatment. However, at trial, Dr. Mackie said that the temporary response from the Depo-Medrol and lidocaine injections supported his diagnosis of occipital neuralgia.

**100**  Dr. Medvedev is a neurologist, qualified as such by the Royal College of Physicians and Surgeons of Canada. He has been a practising neurologist in British Columbia since 2006. He was qualified as a medical doctor with expertise in neurology. At the request of defence counsel, Dr. Medvedev saw Mr. Bhandal for an independent medical examination on December 18, 2014. He prepared a report dated December 29, 2014 and testified at the trial. No objection was made to Dr. Medvedev's qualifications or to the admissibility of any portion of his report.

**101**  Dr. Medvedev interviewed Mr. Bhandal and reviewed a number of documents, including clinical records, in preparing his report. However, he had Dr. Mackie's records only for the period from December 20, 2011 to February 17, 2012 and he did not have Dr. Mackie's medical report of October 22, 2014. Mr. Bhandal told Dr. Medvedev that he tried a number of medications, including the Depo-Medrol and lidocaine injection, and "none of these treatments were helpful". Dr. Medvedev was unaware that in fact Mr. Bhandal experienced a week of relief from the occipital pain following the Depo-Medrol injection in January 2012. It was not until April 10, 2012, that Mr. Bhandal told Dr. Mackie that he had experienced this temporary relief and so this was not noted in the clinical records that Dr. Medvedev reviewed.

**102**  Dr. Medvedev diagnosed Mr. Bhandal with "chronic occipital pain". He explained that he considered this diagnosis to be more appropriate than "occipital nerve neuralgia". Dr. Medvedev acknowledged that the history of Mr. Bhandal's symptoms and the mechanism of his injury (that is, the forward and back motion associated with whiplash) are consistent with a diagnosis of occipital neuralgia. However, the lack of findings suggesting significant neurological dysfunction and his assumed lack of response to the Depo-Medrol injection were considered by him to be atypical. Thus, in his view, a "lack of a unifying diagnosis" allows for only the term "chronic occipital pain" to be used to describe his condition. However, in cross-examination, Dr. Medvedev agreed that it is possible that Mr. Bhandal has occipital neuralgia. Further, he confirmed that he had been unaware that Mr. Bhandal did experience a week of relief from the occipital pain following the Depo-Medrol injection. He agreed that one week of relief would be appropriately characterized as a response to the medication.

**103**  Dr. Medvedev expressed the view that the temporal relationship between Mr. Bhandal's occipital pain symptoms and the accident is "consistent with the accident as a cause" of those symptoms.

**104**  Thus, the medical experts agree that the occipital pain was caused by the accident. While their opinions are based on Mr. Bhandal's subjective reporting, I do accept that he has suffered from some ongoing occipital pain. It is the extent of the pain and the impact of it on his life that are complicated by my findings concerning his credibility. The dispute with respect to the occipital pain, other than its intensity, is whether the proper diagnosis is "occipital neuralgia" or the more generic "occipital pain".

**105**  I am inclined to prefer Dr. Mackie's diagnosis of occipital neuralgia. This is because Dr. Medvedev's opinion is based largely on the lack of response to the Depo-Medrol injection and he was unaware that Mr. Bhandal did have a temporary response. In addition, Dr. Medvedev acknowledged that the history of Mr. Bhandal's symptoms and the mechanism of his injury are consistent with a diagnosis of occipital neuralgia. Further, Dr. Mackie saw Mr. Bhandal not just once, for the purpose of preparing a report for litigation, but several times as his treating specialist. In my view he was in a better position to diagnose Mr. Bhandal's condition. In any event, the specific diagnosis does not make much difference in the analysis because the symptoms are the same whether the condition is called occipital neuralgia or occipital pain. The severity of the pain and its impact on Mr. Bhandal's life are subjective matters with respect to which the medical evidence is of little, if any, assistance.

***Psychological symptoms***

**106**  The defence did not take serious issue with Mr. Bhandal's claim to be suffering from psychological symptoms. Rather, the defence positon, as I understand it, was that Mr. Bhandal has not established that those symptoms were caused by the accident.

**107**  Mr. Bhandal relied on the opinion evidence of Dr. Rasmusen respecting the existence of, cause of and prognosis for the psychological injuries.

**108**  Dr. Rasmusen is a psychiatrist, qualified as such by the Royal College of Physicians and Surgeons of Canada. On November 18, 2014, Dr. Rasmusen assessed Mr. Bhandal at the request of Mr. Bhandal's counsel. He authored a report dated December 5, 2014. No objection was made to Dr. Rasmusen's qualifications as an expert in medicine with a specialty in psychiatry or the admissibility of any portion of his report.

**109**  Dr. Rasmusen diagnosed Mr. Bhandal as suffering from "other specified bipolar disorder". He explained that Mr. Bhandal meets all the DSM-V criteria for bipolar disorder-type II, except the time duration of "hypomanic" or "high" episodes, which, according to the DSM-V criteria, must last at least four consecutive days. Because Mr. Bhandal reported highs lasting only part of the day, Dr. Rasmussen opined that his diagnosis best fits "other specified bipolar disorder".

**110**  In Dr. Rasmusen's opinion, and based on Mr. Bhandal's self-report, Mr. Bhandal was likely suffering from other specified bipolar disorder prior to the accident. He said the mood disorder itself was not caused by the accident; however, in his opinion, "it is possible" that with Mr. Bhandal's chronic pain, which Mr. Bhandal said affects his sleep and his ability to exercise, the mood disorder has become more severe. As a result, it is Dr. Rasmusen's opinion that the accident increased the severity of Mr. Bhandal's mood disorder symptoms.

**111**  Dr. Rasmusen agreed that his opinion depends significantly on Mr. Bhandal's subjective reports of his symptoms and that it is necessary to know how frequently Mr. Bhandal suffered depressive episodes in the past in order to compare his condition before and after the accident. He said that Mr. Bhandal had difficulty "delineating" the change in his symptoms and was a "poor historian", meaning that he was unable to relate specifics about the change in his symptoms after the accident.

**112**  In her October 30, 2014 report, Dr. Nagle addressed Mr. Bhandal's mood symptoms. She said that she believes Mr. Bhandal has suffered from significant mental health issues for many years and "his long-standing mental health symptoms have been aggravated by the motor vehicle accident of April 29, 2011". She explained the basis for that opinion was:

Prior to the accident, he was coping. He was a productive member of society. However, the accident and subsequent chronic occipital pain he is experiencing have thrust his mental issues into the forefront. Of note, it has been difficult for Mr. Bhandal to express his mood to me. He is a very private person in this regard.

**113**  While the physicians are entitled to take Mr. Bhandal's complaints at face value, the court is required to take a more critical view. Dr. Nagle's opinion concerning the cause of Mr. Bhandal's mood symptoms is based entirely on Mr. Bhandal's subjective reporting and given my concerns about his credibility I am not prepared to give this aspect of her opinion any weight. Similarly, the subjective nature of the mood complaints and my concerns about Mr. Bhandal's credibility also significantly detract from the weight of Dr. Rasmusen's opinion. As a result, there is insufficient reliable evidence to persuade me that the injuries suffered by Mr. Bhandal have caused an exacerbation of his pre-existing mood disorder.

**114**  Further, Dr. Rasmusen acknowledged that it is necessary to know how frequently Mr. Bhandal suffered depressive episodes in the past in order to compare his condition before and after the accident and that Mr. Bhandal was unable to relate specifics about the change in his symptoms after the accident. While Mr. Bhandal claimed, at trial, that there has been a change, I was not persuaded by his testimony. In particular, his unexplained failure to seek any employment during the three years after he moved to Canada suggests he was not coping well prior to the accident. In all the circumstances, I am not persuaded that it is more likely than not that Mr. Bhandal has suffered any exacerbation of his pre-existing mood disorder but, if he has, I am not persuaded that this was caused by the accident.

***Conclusion on causation***

**115**  In summary, I make the following findings on causation and the current state of Mr. Bhandal's condition:

1. Mr. Bhandal suffered moderate soft tissue injuries to his neck, back and shoulders in the accident that initially resulted in significant pain and disability, but which largely resolved within about a year of the accident.
2. Mr. Bhandal developed occipital neuralgia as a result of the accident, which causes him some ongoing pain in the back of his head and pain and stiffness in his neck at the base of the skull. I will address the severity of that pain below, in the non-pecuniary damages section of this judgment.
3. Mr. Bhandal suffered from a pre-existing mood disorder that, more likely than not, is a bipolar disorder. I am not persuaded that he has suffered a material exacerbation of that mood disorder since the accident. However, if he has, I am not persuaded that the exacerbation was caused by the accident.

**Mitigation**

**116**  The defendant submits that Mr. Bhandal failed to mitigate by failing to take Dr. Nagle's advice to return to work in some capacity, by failing to take Dr. Nagle's advice to attend a pain specialist, and by his ongoing resistance to medication.

**117**  In order to establish that a plaintiff has failed to mitigate by not pursuing recommended treatment, the defendant must prove, on a balance of probabilities, that the plaintiff acted unreasonably and also the extent to which the plaintiff's damages would have been reduced had the plaintiff undergone the treatment in question: *Chiu v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=) at para. 57. In *Gregory v. ICBC*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=), Madam Justice Garson expressed the test at para. 56:

I would describe the mitigation test as a subjective/ objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any, to which the plaintiff's damages would have been reduced" by that treatment. [Emphasis in original.]

**118**  As I understood it, the defendant's submission concerning Mr. Bhandal's failure to return to work was founded upon Dr. Nagle's testimony to the effect that her recommendation that he try to return to work was a therapeutic one. She explained that she thought Mr. Bhandal's recovery might be enhanced if he could re-establish some normalcy in his life. It is clear that by late 2011, Dr. Nagle and Dr. Mackie were both of the view that Mr. Bhandal should attempt to return to work, at least in some sedentary role. I find that Mr. Bhandal failed, unreasonably, to take that advice. While that affects his loss of earning capacity claim, it is not sufficient to establish a failure to mitigate that would affect his claim more generally. As noted above, the defendant must also establish that Mr. Bhandal's damages would have been reduced had he attempted to return to work; in other words, that a return to work would have helped to lessen his symptoms. The evidence does not go that far.

**119**  On April 4, 2013, Mr. Bhandal advised Dr. Nagle that he was still experiencing occipital pain. He was continuing to see Dr. Mackie. Dr. Nagle suggested referral to a chronic pain specialist but Mr. Bhandal did not want to proceed with that at the time. In cross-examination Dr. Nagle said that she suggested the chronic pain specialist because Mr. Bhandal "was stuck" and she "wanted to try a different angle" but Mr. Bhandal was comfortable with Dr. Mackie and wanted to continue with Dr. Mackie's approach. In re-examination she confirmed that she considered this to be reasonable. The defendant led no contrary evidence. I am not persuaded that Mr. Bhandal acted unreasonably in this respect.

**120**  As already noted, on September 10, 2014 Mr. Bhandal told Dr. Nagle that he was continuing to experience occipital pain but that he did not want to take further medications as a result of the side effects. She said she considered this to be a reasonable decision because of the side effects he was experiencing from the various medications.

**121**  In cross-examination, Dr. Mackie was questioned about whether it was reasonable for Mr. Bhandal to terminate the use of the medications he had recommended. He explained that he considers Depo-Medrol a rarely performed treatment because of the side effects associated with the steroid. He said that it is unlikely that he would support using this treatment more than once. He said that as of December 2014, he was still encouraging Mr. Bhandal to continue to use the topical diclofencac and he stressed that he "doesn't like to give up". However, when Dr. Mackie's evidence is considered as a whole, it is apparent that he did not consider Mr. Bhandal's decisions regarding the termination of medications to be unreasonable. For example, he confirmed that he thought Mr. Bhandal's decision, in January 2014, to forgo all medications, at least for a period of time, was reasonable. He also said that Mr. Bhandal's symptoms had persisted despite Mr. Bhandal's "best efforts".

**122**  The defendant led no evidence that would support the proposition that Mr. Bhandal's decision to terminate the use of any medication or to forgo any treatment was unreasonable.

**123**  For the forgoing reasons I find that the defendant has not established that Mr. Bhandal failed to mitigate.

**Assessment of Damages**

**124**  Mr. Bhandal testified about the effect of his injuries on his life, but for the reasons I have already expressed I found his evidence to be exaggerated. I was also left with a general concern that his testimony was motivated more by his interest in the outcome of this case than the desire to be candid. Further, he is suffering from a pre-existing mood disorder that is having an impact on his life and I am not persuaded that this condition has been exacerbated by the injuries he suffered in the accident. In these circumstances, it very difficult to disentangle the web and assess specifically how his life has been impacted by the accident. I must do the best I can to award damages commensurate with the degree of injury I find was actually suffered by Mr. Bhandal as a result of the accident.

**Non-pecuniary damages**

**125**  An award of non-pecuniary damages is intended to compensate for pain and suffering, loss of enjoyment of life, and/or loss of amenities. In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46, leave to appeal ref'd [*[2006] 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=), the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle.

**126**  I have found that Mr. Bhandal suffered moderate soft tissue injuries to his neck, back and shoulders in the accident that initially resulted in significant pain and disability, but which had resolved within about a year, and that he developed occipital neuralgia as a result of the accident, which causes him ongoing pain in the back of his head and pain and stiffness in his neck at the base of the skull, to some extent.

**127**  Mr. Bhandal testified that he was healthy prior to the accident but he acknowledged that he now believes he has always had some element of a mood disorder. He has had a vacillating mood over the years, with highs and lows. He recalls having depressive episodes dating back to childhood. He testified that in the immediate aftermath of the accident he suffered from very significant pain in his neck, back, shoulders and jaw as well as frontal headaches but that these symptoms gradually resolved over about a year. He also testified that he has suffered from almost completely debilitating and constant pain in the occipital region of his skull, as well as stiffness and pain at the top of his neck, since the accident. I accept his account of the pain he suffered in the year following the accident, but for reasons already expressed I find that he has exaggerated the symptoms associated with the occipital neuralgia.

**128**  Mr. Bhandal was 35 years old when the accident occurred. Prior to the accident he was employed at Crown in a secure job and he had qualified as a real estate agent. He testified that he was socially and physically active, played soccer regularly, participated in kickboxing, and road his mountain bike regularly. He said he enjoyed spending time with his family, particularly his young nephews. He said he performed outside maintenance that included cutting the grass, cleaning gutters, and washing windows. He estimated he spent three to four hours per week performing household duties.

**129**  Mr. Bhandal testified that he no longer plays soccer. He said he tried to ride his bike but it hurts his head to wear a helmet. He said he cannot run or kick box because the impact worsens his head pain. He can still go for walks and do yoga. Mr. Bhandal testified that he can no longer perform outdoor house maintenance. Mr. Bhandal testified that he no longer socializes much. He said that although his mother does most of the indoor work, when she is away he has to do some light cleaning such as emptying the dishwasher, cooking and vacuuming. He said he breaks the tasks down, with breaks in between, and compensates by not doing other things like yoga or a walk.

**130**  There was no evidence expressly contradicting Mr. Bhandal's evidence of the specific impact of the injuries on his life. For example, there was no video surveillance showing him playing soccer or cleaning the gutters. However, as a result of the shortcomings in Mr. Bhandal's evidence, I do not accept his account and I find that he has exaggerated. It is clear that by June 2012 he was able to participate, to some extent, in the building of the two houses on No. 1 Road, and before that he was able to successfully navigate the subdivision application through the municipal rezoning process. While I accept that Mr. Bhandal continues to suffer from ongoing occipital pain, I was not persuaded that its frequency and intensity is such as to interfere significantly with his day-to-day activities, although it may, from time to time, prevent him from engaging in physical activities and activities requiring significant concentration. I also find that it may, from time to time, interfere with his ability to work as a unitizer operator at Crown or in a job of similar physicality.

**131**  I accept Mr. Sall's evidence that Mr. Bhandal has become more socially withdrawn. While I find that his existing mood disorder is likely the most significant cause, I accept that his lingering head pain has contributed to this to some extent.

**132**  Dr. Mackie's prognosis was stated by him to be "extremely guarded". He explained at trial that every reasonable treatment had been tried without benefit and in these circumstances it is his opinion that Mr. Bhandal's condition is not likely to resolve. In his report he stated that "in general terms the more prolonged the symptoms following injuries the more resistant to complete recovery". Dr. Medvedev's prognosis was much more optimistic; however, he explained that this was based on the lack of neurological dysfunction. He acknowledged that the presence of structural damage to the nerve would be associated with a greater likelihood of ongoing symptoms. I have found that Mr. Bhandal is suffering from occipital neuralgia, which Dr. Mackie explained is irritation or damage to the occipital nerves. In the circumstances, I prefer Dr. Mackie's prognosis, but I do not accept that the pain is as debilitating as Dr. Mackie assumed. Accordingly, I find it is likely that Mr. Bhandal will continue to suffer from ongoing occipital pain, but of an intensity and frequency that will not interfere significantly with his day-to-day activities and that there is a realistic possibility of some improvement.

**133**  Counsel for Mr. Bhandal and counsel for the defendants have provided me with a number of cases to assist in determining the appropriate award of non-pecuniary damages. Counsel for Mr. Bhandal submits that his authorities support an award in the range of $100,000 to $150,000. Counsel for the defendant submits that his authorities support an award in the range of $50,000 to $90,000.

**134**  The cases referred to by Mr. Bhandal's counsel concern plaintiffs who sustained more serious injuries and whose conditions impacted their lives to a greater extent than I have found is the case for Mr. Bhandal. In *Ward v. Klaus*, [*2010 BCSC 1211*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-216D-00000-00&context=), it was not challenged that the plaintiff's severe headaches left her practically helpless. Non-pecuniary damages of $150,000 were awarded. In *Lyn v. Weatherston*, [*1997 CanLII 2673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0XV-00000-00&context=) (B.C.S.C.), the plaintiff was found to have suffered debilitating regular headaches, chronic pain, and also severe emotional difficulties and cognitive deficits as a result of the accident. Non-pecuniary damages of $90,000 were awarded. In *Carr v. Simpson*, [*2010 BCSC 1511*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B31W-00000-00&context=), the court found much more significant injuries including ongoing soft tissue pain that was unlikely to improve, thoracic outlet syndrome with a poor prognosis, incapacitating headaches, an injury to the plaintiff's hand and wrist that required surgery, an injury to the plaintiff's knee that required surgery, low back and hip flexor pain that was likely permanent, and depression. Non-pecuniary damages of $100,000 were awarded. In *Carroll v. Hunter*, [*2014 BCSC 2193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G3H-VVF1-JSRM-62N4-00000-00&context=), the court found the plaintiff to have an abnormally heightened sensitivity to pain and to be suffering from chronic neck pain caused by soft tissue injuries and also an injury to the cervical facet joints, and occipital headaches that were practically constant. Non-pecuniary damages of $100,000 were awarded.

**135**  Of the authorities cited by the defendant, *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=), bears the most similarity to this case. The court in that case had very serious reservations about the plaintiff's credibility and concluded that little weight could be placed upon her evidence. Damages were assessed on the basis that she had suffered a soft tissue injury, some neck pain, a left recurrent shoulder injury, occasional migraine type headaches, stress, anxiety, fatigue and depression, some of which were ongoing for years after the accident. However the court also found she was capable of most activities of daily living. Non-pecuniary damages of $50,000 were awarded.

**136**  Awards of damages in other cases provide a guideline only. Ultimately, each case turns on its own facts. My findings with respect to the injuries suffered by Mr. Bhandal include ongoing head pain that is more significant than that suffered by the plaintiff in *Sharifi*, on my reading of that case. Considering the principles discussed in the cases referred to me and the criteria considered in the assessment of damages in *Stapley*, I assess Mr. Bhandal's non-pecuniary damages at $60,000.

**Past Loss of Income Earning Capacity**

**137**  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=), the Court of Appeal confirmed the approach to be taken in determining whether a plaintiff has established a claim to past loss of earning capacity. A plaintiff must prove on a balance of probabilities that an injury has caused an impairment to his earning capacity that has resulted in a pecuniary loss.

**138**  A claim for past loss of income earning capacity is based on the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30. A common method of assessing this value is to project the net income the plaintiff would have earned in the period between the accident and the trial had the accident not occurred, taking into account all realistic contingencies, and to award the difference between that projected net income and the actual net income the plaintiff did earn or was capable of earning during that period. Hypothetical events, including what the plaintiff would have earned in the absence of the accident and what the plaintiff was capable of earning given the accident, need not be proved on a balance of probabilities. When considering hypothetical events, provided the event was or is a realistic possibility, it will be given weight based on the likelihood of it occurring: *Smith* at para. 28 and 29.

**139**  Mr. Bhandal submits that had he not been injured in the accident he would have remained working full time at Crown and he would also have worked overtime to the extent that he worked overtime in the year prior to the accident. In the year prior to the accident, his gross income from Crown was $67,658.93. Based on that amount, Mr. Bhandal says he would have earned gross income of $262,825.52 in the time from the accident to the trial. Mr. Bhandal submits that to this amount should be added non-wage benefits that Mr. Peever valued at 10.3%. After deducting income tax at 19.5%, which, according to Mr. Peever is the average for an individual earning between $60,000 and $69,999, Mr. Bhandal says he should be awarded $233,366.72. Mr. Bhandal submits that there should be no deduction to account for any negative contingencies such as time spent out of the workforce by reason of sickness or injury, choice, or unemployment because any such negative contingencies are offset by the positive contingency that Mr. Bhandal would have earned additional income as a realtor.

**140**  In my view, there are two fundamental flaws in Mr. Bhandal's analysis.

**141**  First, in my view, there is no realistic possibility that Mr. Bhandal would have earned income as a realtor while also working full time at Crown. Given his sporadic work history during the roughly five years between his immigration to Canada and the commencement of his employment Crown, and his very limited efforts to establish a real estate career in the eight months prior to the accident, it is improbable that he would have succeeded in real estate to any material extent while also working full time at Crown. As such, the hypothetical prospect of Mr. Bhandal earning income from real estate prior to the trial is not a positive contingency that ought to be taken into account in assessing his past loss of income earning capacity.

**142**  Second, Mr. Bhandal's analysis fails entirely to address the very realistic possibility that he could have worked, at least in some capacity, had he followed the recommendation of his physicians that he try to do so.

**143**  I am satisfied that Mr. Bhandal's job as a unitizer operator at Crown was a physical one, even though it was not the most physical job in the plant. Further, the plant is large, noisy and full of activity. Employees must be alert and attentive at all times. I am satisfied that, as a result of his injuries, Mr. Bhandal was incapable of performing that job until at least early 2012, nearly a year after the accident. His income-earning capacity was impaired by the injuries he suffered in the accident until at least that date.

**144**  Dr. Nagle was strongly recommending that Mr. Bhandal attempt a graduated return to work in early 2012. I accept that he was not able to return immediately to his old job and that a graduated return, commencing with light duties, was appropriate. Crown was not able to accommodate light duties at that time and I find that it was reasonable for Mr. Bhandal to remain on disability benefits, for some time while waiting for Crown to be able to accommodate a graduated return to work. However, when that did not occur within a reasonable period, he ought to have attempted to obtain alternative employment. In my view a reasonable period was six months. In other words, he ought to have sought alternative employment by July 2012.

**145**  I do not give any weight to any of the expert opinions concerning Mr. Bhandal's functional abilities. This includes Mr. Nordin's opinion that he is not competitively employable. This is because all of those opinions were based on Mr. Bhandal's subjective reports of pain and other symptoms and, in the case of Mr. Nordin's opinion, the questionable vocational test results. The hypothesis upon which those opinions rest has been entirely undermined by my findings concerning Mr. Bhandal's credibility.

**146**  In my view, but for the injuries he sustained in the accident, Mr. Bhandal would have continued to work as a unitizer operator at Crown and very likely would have worked overtime to the extent he worked overtime in the year prior to the accident. In the year prior to the accident, his gross income from Crown was $67,658.93. I am satisfied that this is the appropriate starting point in assessing his damages for past loss of income earning capacity. Based on that amount, Mr. Bhandal says he would have earned gross income of $262,825.52 in the time from the accident to the trial. However, in my view, from this amount must be deducted an amount to reflect typical negative labor market contingencies. Mr. Peever values those contingencies at 19.5%. After deducting 19.5%, the total potential gross income is $211,574.55. I agree that, in accordance with Mr. Peever's analysis, to this amount should be added non-wage benefits valued at 10.3%, for a total of $233,266.73. An amount for income tax must then be deducted. I am satisfied from Mr. Peever's report that an appropriate income tax deduction would be approximately 19%. After deducting 19% for income tax, the total net income Mr. Bhandal would have earned in the period between the accident and the trial, had the accident not occurred, is $188,946.05. However, in assessing the value of the work he was unable to perform because of the injury, it is necessary to deduct the income he was capable of earning during that period.

**147**  It is difficult to determine what income Mr. Bhandal was capable of earning because he failed to try to return to work. For reasons I have already explained, Mr. Nordin's vocational assessment is of no value in attempting to determine Mr. Bhandal's residual employment capacity. I do know that in 2012 and 2013 he was capable of navigating the subdivision through the city's rezoning process and he was capable, at least to some extent, of overseeing the construction of the two houses on No. 1 Road. In my view, this indicates he had significant earning capacity.

**148**  Applying the same approach as outlined above in determining the total net income Mr. Bhandal would have earned in the period between the accident and the end of June 2012, after which I have found he ought to have attempted to return to work, yields a total potential net income up to the end of June 2012 of $57,082.58 (61 weeks x $1,301.12 per week less 19.5% for labour market contingencies plus 10.3% for non-wage benefits less 19% for income tax). The difference between that amount and his total potential net income up to the time of trial is $131,863.47. That is the total potential net income he could have earned at Crown between July 2012 and the trial, which is the period during which he ought to have been attempting to work. In my view, it is likely that had he attempted to work he could have done so, but it is difficult, on the evidence I consider reliable, to assess the likelihood with much precision. In the circumstances, it is my view that a deduction of approximately 75% from that amount would appropriately reflect this contingency. The mathematical result is $90,048.45 ($57,082.58 plus 25% of $131,863.47).

**149**  This is an assessment, not purely a mathematical calculation. In all the circumstances I consider an award to Mr. Bhandal for past loss of income earning capacity in the amount of $90,000 to be fair.

**Future Loss of Income Earning Capacity**

**150**  To establish a claim for future loss of income earning capacity, a plaintiff must first prove a real and substantial possibility of a future event leading to a loss of income, as opposed to a speculative loss: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. The onus on the plaintiff is not heavy but must nonetheless be met: *Kim v. Morier*, [*2014 BCCA 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MC-00000-00&context=) at para. 7.

**151**  If the plaintiff discharges that burden, then the loss must be assessed, taking into account all realistic positive and negative contingencies. The assessment may employ what has been referred to as an "earnings approach" or a "capital asset approach": *Schenker v. Scott*, [*2014 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2PW-00000-00&context=) at paras. 50-51; *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. 53; and *Perren* at para. 32.

**152**  The earnings approach is generally appropriate where the loss is more easily measurable, such as 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=) (C.A.) at para. 43; and *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 233.

**153**  The capital asset approach, which is typically used in cases where the loss is not as easily measurable, involves consideration of a number of factors including whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.) at para. 8; and *Morgan* at paras. 53 and 56. As stated recently by Justice Schultes in *Litt v. Guo*, [*2015 BCSC 2207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HJF-6CT1-JJK6-S1V8-00000-00&context=) at para. 388:

[These factors] must be addressed in the context of the facts of the case, and the trial judge must make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that lost me impact on the plaintiff's ability to earn income: *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=) (C.A.) at para. 24. In other words, while the capital asset approach is not the mathematical calculation, the trial judge must still make findings of fact on which to base the assessment: *Morgan* ... at para. 54.

**154**  Mr. Bhandal submits that he has established an impairment to his earning capacity. He relies on his own testimony concerning the nature and extent of his head pain as well as the expert opinions of Dr. Nagle, Dr. Mackie and Mr. Nordin concerning his functional abilities. He submits that his loss should be assessed using the earnings approach. In effect, he says that his loss should be assessed by multiplying the amount of his gross income earned in the 12 months prior to the accident by the number of years to retirement at either age 62 or 65, discounted only for the contingency that he will live until then, and adding 10.3% to reflect non-wage benefits. This would generate a total loss of future income of approximately $1.5 million. He submits that an award in the amount of $1.5 million would be appropriate under this head.

**155**  Mr. Bhandal submits that it would be inappropriate to consider any other negative contingencies because his job at Crown was a secure union position and he would not have left it by choice prior to retirement. He also submits, in the alternative, that any negative contingencies would be offset by the positive contingency that he would have earned income as a realtor in addition to the income he earned at Crown.

**156**  In my view, there are several fundamental flaws in Mr. Bhandal's analysis.

**157**  First, it depends to a significant extent on the opinion evidence concerning his functional abilities. For reasons already expressed, I do not place any weight on that evidence. The hypothesis upon which those opinions rest has been entirely undermined by my findings concerning Mr. Bhandal's credibility. I find that it is very likely Mr. Bhandal could work if he tried. He has never tried to return to his old job at Crown and accordingly one can only speculate as to his prospects for successfully returning to that position. Further, and as already noted, in 2012 and 2013 he was capable of navigating the subdivision of the No. 1 Road property through the city's rezoning process and he was capable, at least to some extent, of overseeing the construction of the two houses on No. 1 Road. In addition, he has acknowledged that he is able to work on the computer at least for a few hours a day, provided he takes regular breaks.

**158**  Second, Mr. Bhandal's analysis fails to reflect any negative contingencies because he says he would not have chosen not to work and he would have earned additional income as a realtor while also working at Crown. His assertion that he would not have chosen not to work is undermined by his sporadic work history and in particular the fact that he chose not to work for three years after immigrating to Canada. His assertion that he would have earned income as a realtor while also working at Crown is undermined by the fact that he made only extremely limited efforts to develop a real estate business even before the accident and virtually no efforts after. His past earning pattern, including his sporadic work history, is a factor that is appropriately taken into account in assessing his loss of earning capacity: *Vaillancourt v. Molnar Estate*, [*2002 BCCA 685*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3NP-00000-00&context=) at para. 72.

**159**  Third, this is not a case where the earnings approach is appropriate. As a result of my significant concerns about the credibility of Mr. Bhandal's testimony, the evidence giving rise to the assessment of future possibilities is too general and speculative to permit the use of that approach. Mr. Bhandal's situation can be most accurately assessed by viewing the extent of any impairment of his ability to earn income as a reduction in the value of that ability as a capital asset.

**160**  The findings of fact that bear on this issue are that Mr. Bhandal suffers from occipital neuralgia as a result of the accident, which causes him ongoing pain in the back of his head and pain and stiffness in his neck at the base of the skull. But the frequency and intensity of these symptoms are not such as to interfere significantly with his day-to-day activities, although they may, from time to time, prevent him from engaging in physical activities and activities requiring significant concentration. They may also, from time to time, interfere with his ability to work as a unitizer operator at Crown or in a job of similar physicality. I find there is a real and substantial possibility that his ongoing head pain will lead to a loss of income. However, there is also a real and substantial possibility the pain will resolve or lessen.

**161**  I am not satisfied on the evidence before me that Mr. Bhandal's head pain necessarily prevents him from returning to his work at Crown, although there is a realistic possibility it might. The problem is that without any attempt on his part to return to work and in light of the shortcomings in his evidence, making specific findings about his abilities is a somewhat speculative exercise. On his own evidence, he is able to do computer work, at least for a few hours a day; he is able to walk for as much as 45 minutes a day; and he is able to participate in yoga almost daily. He has a university degree in marketing and accounting, and is a licensed realtor. He has experience in residential home construction, having overseen the construction of his father's home on Lindsay Road before the accident and, at least to some extent, the construction of the two houses on No. 1 Road after the accident. All that said, an application of the *Brown* factors still leads me to finding that his future earning capacity as a capital asset has been diminished somewhat.

**162**  There is a realistic possibility that his ongoing head pain has rendered him less capable overall from earning income from all types of employment because it may require him to take more unpaid time off work than would otherwise have been the case. This is also a factor that will make him less marketable in comparison to applicants who do not require any accommodation and, as such, there is a realistic possibility that he has lost the ability to take advantage of all job opportunities that might otherwise have been open to him. In the circumstances, he has established an entitlement to compensation for those impairments, but nothing approaching the $1.5 million that he submitted was appropriate through application of the earnings approach. In my view, an award of $150,000 is appropriate under this heading. This represents $10,000 a year for 20 years, or approximately to age 60, less $50,000 to account for the realistic possibility that his ongoing head pain will lessen or resolve. In my view, given Mr. Bhandal's sporadic work history and unreasonable failure to attempt to return to some form of employment since the accident, it is unlikely that he would have worked beyond age 60.

**Loss of housekeeping capacity**

**163**  A loss of homemaking award is properly characterized as an award for loss of capacity, distinct from a cost of future care claim: *McTavish v. MacGillivray*, [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) at para. 63. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred: *Westbroek v. Brizuela*, [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=), at paras. 72-78. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss.

**164**  Mr. Bhandal is seeking an award of $25,000 under this head. He submits that he is been restricted in his ability to perform the outdoor maintenance tasks that he used to perform and that it is difficult for him to perform inside maintenance, which he is required to do when his parents are away. He submits that the loss of his ability to perform these tasks will likely be permanent.

**165**  In my view, the reliable evidence does not establish a significant, permanent loss of ability to perform routine housekeeping tasks in this case. I do accept that Mr. Bhandal's housekeeping capacity was impaired in the year following the accident and that his ability to perform housekeeping tasks might, from time to time, be impacted by his ongoing head pain. In the circumstances he has established an entitlement to compensation but primarily for his past loss of housekeeping capacity. In my view, an award of $3,000 as compensation for the impairment of his past housekeeping capacity as well as the possibility that his housekeeping capacity will continue to be impaired, to a limited extent, is fair.

**Cost of Future Care**

**166**  Mr. Bhandal is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition insofar as that is possible. The award is to be based on what is reasonably necessary on the medical evidence, to preserve and promote his mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at paras. 29-30.

**167**  The test for assessing an appropriate award for the cost of future care is an objective one based on the medical evidence. It is twofold: first, there must be a medical justification for the cost; and second, the claim must be reasonable: *Tsalamandris v. McLeod*, [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=) at paras. 62-63.

**168**  Mr. Bhandal seeks compensation for the costs of a yoga membership and topiramate and diclofenac prescriptions to age 65, as well as 10 to 20 sessions of psychotherapy to address the exacerbation of his mood symptoms. He calculates the total future costs of these items at between $50,750 and $54,000.

**169**  Dr. Nagle testified at trial that yoga was probably helpful; however, her testimony fell short of establishing that it was reasonably necessary to preserve or promote his health. Further, it was based on her understanding of Mr. Bhandal's condition which depended upon his subjective reporting and which I have concluded was not credible. I am not satisfied that there is a medical justification for the ongoing cost of yoga.

**170**  It was Dr. Mackie's view that Mr. Bhandal should continue to try topiramate and the topical diclofenac for his head pain. However, at the time of trial Mr. Bhandal had ceased taking all prescription medication, with the possible exception of the diclofenac ointment. He testified that he might try topiramate again in the future. He has demonstrated a reluctance to use prescription medication in the past. In the circumstances, it would be entirely unreasonable to award him the cost of these prescription medications to age 65. In my view, it is likely that he will use these prescriptions only very sporadically in the future. The evidence establishes that the monthly cost of topiramate and diclofenac is about $80. In the circumstances, an award of $1,000 for the cost of future prescriptions is reasonable.

**171**  For the reasons already expressed, I am not persuaded that the exacerbation of Mr. Bhandal's mood disorder was caused by the accident and as such I dismiss his claim for the future cost of psychotherapy sessions.

**Special Damages**

**172**  By the end of the trial, the parties had agreed on special damages of $7,033.27.

**Conclusion**

**173**  In summary, the damages awarded to Mr. Bhandal are:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary damages | $ 60,000.00 |  |
| Past loss of income earning capacity | $ 90,000.00 |  |
| Future loss of income earning capacity | $ 150,000.00 |  |
| Cost of future care | $ 1,000.00 |  |
| Special damages | $ 7,033.27 |  |
| **Total** | **$ 311,033.27** |  |

**174**  If the parties are unable to agree on costs, they may arrange to speak to that issue by contacting the registry.

L.A. WARREN J.

**End of Document**

[***BRZ Holdings Inc. v. JER Envirotech International Corp., [2011] B.C.J. No. 491***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1JP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J. (In Chambers)

Heard: March 18, 2011.

Judgment: March 23, 2011.

Docket: S091833

Registry: Vancouver

**[2011] B.C.J. No. 491** | 2011 BCSC 356 | 199 A.C.W.S. (3d) 734 | 2011 CarswellBC 632

Between BRZ Holdings Inc., Plaintiff, and JER Envirotech International Corp., J.E.R. Envirotech Ltd., JERTech Manufacturing B.C. Ltd., Rafael Angco Diego, Bijay Singh, Sokhie Puar, Ernesto Calica, Peeyush Varshney, and Praveen Varshney, Defendants

(41 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — To raise additional issues — Prejudice — Discovery — Examination for discovery — Attendance — Order to attend or re-attend — Production and inspection of documents — Privileged documents — Solicitor-client privilege — Application by plaintiff to amend Statement of Claim allowed in part — Cross-application by defendants to examine plaintiff's former solicitor and for further production allowed in part-- Plaintiff alleged it entered into joint venture in reliance on negligent and fraudulent misrepresentations — Proposed amendments added new particulars and necessarily referred to representations made to plaintiff's principal before plaintiff's incorporation — Amendments allowed expect for new allegations that defendant accountant was professionally negligent — Former solicitor was integral part of negotiations so examination appropriate — Legal advice redacted from documents could negate plaintiff's reliance on representations, so was ordered unredacted.**

|  |
| --- |
| Application by plaintiff to amend its Statement of Claim. Cross-application by defendants for leave to examine the plaintiff's former solicitor and for further production. The plaintiff corporation alleged that it was induced to enter a joint venture by the defendants' fraudulent and negligent misrepresentations. The plaintiff wanted to add 30 new paragraphs to its Statement of Claim. The plaintiff claimed the proposed amendments were based on facts that emerged through the discovery process. The defendants objected on the basis the proposed amendments related to representations made before the plaintiff existed, duties owed to the plaintiff's principal, who was not a party and on the basis the application was brought too close to the trial date. The defendants wanted redacted documents to be unredacted and a further and better list of documents.  HELD: Application and cross-application allowed in part.  The plaintiff alleged it entered into the joint venture agreement in reliance on misrepresentations made to its principal and prior to its incorporation, so the proposed amendments were not inappropriate. Most of the proposed amendments added new particulars, but not new allegations, and were not prejudicial. The amendments were allowed, except for those that raised new allegations of professional ***negligence*** against the defendant accountant. These amendments would cause delay and prejudice so were not allowed. The plaintiff's former solicitor was retained to advise the plaintiff on the joint venture and assist in negotiations. The production of the solicitor's file had already been ordered on the basis the plaintiff had put its state of mind into issue. Given the importance of the role played by the former solicitor, the defendants were entitled to examine him as the plaintiff's second representative. The plaintiff had provided redacted copies of emails between the solicitor and the plaintiff's other representative and the solicitor's handwritten notes about the negotiations. Legal advice was redacted. However, legal advice provided could negate the plaintiff's claim it relied on the defendants' representations, so unredacted documents were ordered produced. There was no basis for a blanket order for further production and a further and better list of documents. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 6-1*, Rule 7-2(5)(a)

**Counsel**

Counsel for the Plaintiff: H.R. Anderson & U. Radoja.

Counsel for the Defendants Bijay Singh, Sokhie Puar and Praveen Varshney: P.J. Sullivan.

Counsel for the Defendant R.A. Diego: M. Lithwick.

**Reasons for Judgment**

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

**1**   The plaintiff company alleges that it was induced to enter into a joint venture agreement by fraudulent and/or negligent misrepresentations. On this application, the plaintiff seeks leave to make extensive amendments to its statement of claim, while some of the defendants seek orders relating to document production and an order permitting them to examine for discovery a lawyer who acted for the plaintiff in negotiating the agreement.

**2**  These applications were argued on March 18, 2011-a little more than three weeks before the trial of this action is to begin and a few days before some follow up examinations for discovery are to take place. These reasons for judgment are therefore not as detailed as might otherwise be the case.

**3**  The joint venture agreement at issue involved a plan for the manufacture of wood/plastic compounds and panel boards made of those compounds, which were to be marketed as an alternative to plywood. The current pleadings say this contract was entered into on October 19, 2006, although counsel agree it was probably not signed by all parties until about a month later. October 19, 2006 is also the date that the plaintiff company was incorporated for the specific purpose of entering into the joint venture agreement.

**4**  The corporate defendants are unrepresented and the action has been or is in the process of being discontinued as against the defendants Ernesto Calica and Peeyush Varshney. The remaining defendants are said to have been directors and/or officers of one or more of the corporate defendants.

**Amendments to the Statement of Claim**

**5**  The plaintiff's claim is currently set out in an amended statement of claim filed in August, 2010 (the "current pleading"). That document is 18 pages long with 68 paragraphs. The plaintiff now seeks to file a second amended statement of claim (the "proposed pleading") that adds more that 30 new paragraphs (some of which include multiple subparagraphs) as well as amendments to some of the existing paragraphs. Most, although not all of these, amendments are opposed.

**6**  Amendments to pleadings are now governed by Rule 6-1 of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009* [*Rules*], which is similar to the former rule 24 in that amendments at this stage of the proceedings require leave of the court. Cases decided under the former rule make clear that amendments will usually be allowed unless the opposite party can demonstrate actual, as opposed to potential, prejudice, or unless the amendments would be useless: *Langret Investments S.A. v. McDonnell* [*(1996), 21 B.C.L.R. (3d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2FD-00000-00&context=) (C.A.) at paras. 34 and 43. The court's discretion is "completely unfettered and subject only to the general rule that all such discretion is to be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities" [emphasis added]: *Teal Cedar Products v. Dale Intermediaries Ltd.* [*(1996), 19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (C.A.) at para. 45. Nothing in the new *Rules* suggests any change in the court's approach.

**7**  The plaintiff says the proposed amendments allege facts that emerged through the discovery process and facts that have already been referred to in responses to demands for particulars.

**8**  The defendants object to some of the proposed amendments because they allege representations made to the plaintiff company before it existed or because they allege duties owed to Mr. Noshir Divecha, the principal of the plaintiff company, who is not a party to this action. The say the plaintiff company acquired no rights prior to the date of its incorporation and cannot allege reliance on representations made prior to that date.

**9**  The defendants rely on *Parmar v. Blenz the Canadian Coffee Company Ltd.*, [*2007 BCSC 1190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3VC-00000-00&context=) [*Parmar*]. In that case, the individual plaintiff had alleged that certain representations had been made to induce him to enter into a contract in his personal capacity. The court rejected amendments that would have alleged that those representations were also made to the corporate plaintiff, which did not exist at the time the representations were made.

**10**  The difference between this case and *Parmar* is that the corporate plaintiff in this case has, from the beginning, alleged that it entered into the joint venture agreement in reliance on representations made at dates prior to its incorporation. Paragraph 20 of the current pleading refers to representations, particularized in 12 subparagraphs, made "from about August of 2005 until October of 2006." As I read the proposed amendments, they appear to provide further details of the alleged representations, give more specific dates within that time period on which specific representations are alleged to have been made, and provide particulars of which representations are alleged to have been made by which defendants.

**11**  In order to accept the defendants' position on this application, I would have to rule that, as a matter of law, a company entering into a contract cannot rely on representations made to its principals prior to its incorporation. That is a central issue in this action and one that will be before the trial judge on the basis of the present pleadings, whether or not the proposed amendments are allowed. It would therefore be inappropriate for me to purport to decide or comment upon it.

**12**  Similarly, allegations of duties owed and representations made to someone not a party to the action would normally be irrelevant. However, in the context of this case, the representations allegedly made to Mr. Divecha are in most instances the very representations the company now says it was entitled to rely on. The factual and legal issues raised by the allegations of duties owed and representations made to Mr. Divecha are inextricably linked the issue of whether the company can rely on representations made before its incorporation. The matter should therefore be left to the trial judge.

**13**  There are a number of other amendments that the defendants concede the plaintiff would be entitled to make but for the fact that the application comes so close to the trial date. The proposed amendments do not, for example, purport to add a new cause of action after the expiry of a limitation period. However, the defendants say that if the amendments are allowed, they will need more time to consider the need for further evidence in response to them and possibly to conduct further examinations for discovery. They say this will necessitate an adjournment of the trial.

**14**  On the basis of what, in the circumstances, can only be a cursory review of the proposed amendments, I am not persuaded that they raise new allegations or prejudice the defendants. Like the allegations of pre-incorporation representations, they generally appear to add further particulars to the general allegations contained in the current pleading, sometimes incorporating facts that have previously been included in responses to demands for further and better particulars. It is arguable that, in many cases, the facts alleged in the proposed amendments would be admissible at trial on the basis of the current pleading, even if the amendments are not allowed.

**15**  There may well be some allegations that are entirely new and of which the defendants had no notice, but it is not the task of the court to perform a paragraph by paragraph comparison of the current and proposed pleadings, along with the separate particulars that have been provided, in order to determine if that is the case. It is for the defendants to give evidence of actual prejudice that may result if the amendments are granted and to identify the particular proposed amendments that they say give rise to the prejudice. In that regard, general statements of counsel to the effect that further investigation and discovery may be necessary amount to no more than an assertion of potential prejudice, which is not sufficient.

**16**  With the exception of one issue, there is a complete lack of evidence of actual prejudice. The defendant Sokhie Puar has sworn an affidavit stating that he is "particularly concerned about allegations of fraud," adding:

1. BRZ's allegations have the potential to not only tarnish my professional reputation, but make it impossible for me to continue to work in the public markets. In light of the serious nature of the allegations, I want an opportunity to explore additional evidence surrounding these allegations prior to a trial.

**17**  That would certainly be sufficient evidence of prejudice if allegations of fraud were being introduced for the first time, but that is not the case. The current pleading already includes allegations amounting to fraud, alleging that the defendants made representations that they knew to be false or with reckless disregard as to their accuracy. While I accept Mr. Puar's evidence that such allegations may be damaging to him in his professional capacity, he has failed to explain how the proposed amendments are any more damaging than what has already been alleged or why they cannot be answered on the basis of evidence already available.

**18**  There is only one point on which the defendants have given evidence of actual prejudice arising specifically from the proposed amendments. The current pleading includes an allegation that some of the misrepresentations were contained in certain financial statements and projections that were inaccurate and unrealistic. However, paragraph 33 of the proposed pleading expands on those allegations by setting out certain facts that were not included as "qualifications" in the financial statements. Paragraphs 82-85 and 88-89 then allege a duty to include those "qualifications" in the financial documents or to otherwise draw them to the plaintiff's attention.

**19**  One of the defendants, Praveen Varshney, says in an affidavit that he is a Chartered Account, although not in active practice as such. He says that he has not, until now, understood the plaintiff to be alleging that he was professionally negligent in the preparation of the financial statements and projections, adding:

1. I was not involved in preparing the Projections at issue in this Action, nor am I aware who prepared them. In light of my professional designation and my status as a Defendant herein, I am concerned about BRZ's new allegation that because the Projections did not contain the specific Qualifications, they were negligently prepared, and that therefore I failed in my professional duties.
2. The rules and regulations for accountants with respect to the preparation of financial statements and projections is changing all of the time. I am not aware what, if any, the professional standards were at the time that the Projections were prepared and if the standards have changed since that time. I would like the opportunity to develop and explore additional evidence surrounding the Projections in order to address the Plaintiffs allegations that they were negligently prepared.
3. BRZ's allegations directly challenge and have the potential to tarnish my professional reputation. In furtherance of my investigation, I wish to consult with and consider the prospect of retaining an expert to opine on the standard of care for including conditions, limitations and other qualifications in projections.

**20**  The plaintiff does not plead its case as one based on professional ***negligence***. The "qualifications" are a defined term in the pleading and are not alleged to arise from any professional standards governing the preparation of financial statements. The plaintiff apparently will not be calling any expert evidence.

**21**  Nevertheless, the proposed amendments allege that certain specific information should have been included in certain financial documents. The plaintiff may not be alleging professional ***negligence***, but if the defendants are able to adduce evidence that the documents were prepared in accordance with professional standards, that may go the question of whether they are a misrepresentation or to the reasonableness of the plaintiff's reliance upon them. If counsel for the plaintiff wishes this trial to proceed as scheduled, those paragraphs cannot be included in the second amended statement of claim.

**22**  I therefore allow the proposed amendments, with the exception of paragraphs 33, 82-85 and 88-89.

**Examination for Discovery of a Solicitor**

**23**  Mr. Brian Rudy is the former solicitor for the plaintiff company. He was retained to advise the plaintiff on the joint venture agreement and to assist in the negotiations. The defendants say that it was Mr. Rudy, not Mr. Divecha, who was most extensively involved in the negotiation of the specific terms of the joint venture agreement and Mr. Divecha has said on discovery that, at least in regard to some provisions, all of the discussions were between Mr. Rudy and the defendants. The defendants say some provisions of the agreement are inconsistent with allegations the plaintiff is now making.

**24**  On June 8, 2010 Master Baker ordered production of certain categories of documents from Mr. Rudy's file. The master said:

[12] I am satisfied that the plaintiff has put its state of mind in issue, and I am satisfied that the legal advice it received from Mr. Rudy bears significantly enough on that to make that material and relevant.

**25**  When Mr. Divecha was examined for discovery, counsel for the defendants made further requests for additional information and documents, including a number of matters on which Mr. Divecha was to inform himself through inquiries of Mr. Rudy. Counsel for the plaintiff subsequently provided answers to those questions and, although the answers are responsive, many of them are qualified with statements such as "this is all Mr. Rudy recalls in relation to this clause" or that Mr. Rudy has no specific recollection of certain details. Of course, many witnesses who are initially unable to recall the answer to a question can have their memory refreshed by further questions or by reference to other evidence.

**26**  Under the *Rules*, Rule 7-2 (5)(a) states:

Unless the court otherwise orders, if a party to be examined for discovery is not an individual,

1. the examining party may examine one representative of the party to be examined,

**27**  Before the court will grant leave for the examination of a second representative of a corporate party, the applicant must show that the first represented cannot adequately inform himself or herself in order to respond. This is essentially a practical consideration. In *Murao v. Blackcomb Skiing Enterprises Limited Partnership*, [*2003 BCSC 558*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2HV-00000-00&context=) the court said:

[68] In making the determination as to whether the first representative can satisfactorily inform his/herself, the Court should consider such factors as the circumstances of the case; the responsiveness of the witness under examination and the degree to which he has taken pains to inform himself; the nature and materiality of the particular evidence sought to be canvassed with the second representative; and what appears to be the most practical, convenient and expeditious alternative see: *Rogers v. Bank of Montreal* [*(1986), 1 B.C.L.R. (2d) 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1MC-00000-00&context=) (S.C.).

[69] Practicality is a significant factor. In *Vancouver Wharves v. Continental Insurance* [*(1999) 15 C.C.L.I. (3d) 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1Y2-00000-00&context=) (B.C.S.C.), the Court granted this application after concluding that the first representative was a second hand source and consequently although he could inform himself of the initial question he would not be in a position to answer the follow-up questions, "the shape and direction of which would be influenced by the answers as they were given."

**28**  That was applied by the court in *Order of the Oblates of Mary Immaculate in the Province of British Columbia v. Dohm, Jaffer & Jeraj*, [*2007 BCSC 1709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21TY-00000-00&context=):

[17] Applying those principles to the circumstances of the present case, I am satisfied that it is appropriate to exercise the court's discretion to order the discovery of Mr. Levy as a second representative. Given the limitations of Father LaPlante's knowledge he will have to inform himself from Mr. Levy. It is likely that there will be follow-up questions that will be influenced by the answers given. The process will be protracted and cumbersome in circumstances in which the trial is imminent. [...]

**29**  In view of the importance of the terms of the joint venture agreement and the role Mr. Rudy played in negotiations with the defendants on the plaintiff's behalf, I am satisfied that similar considerations apply here and I order the discovery of Mr. Rudy as a second representative.

**Redacted Documents**

**30**  The defendants seek production of full copies of two documents that were produced pursuant to the order of Master Baker, with portions deleted. The first of these is an email from Mr. Rudy to Mr. Divecha. The email says that it encloses a memorandum "summarizing my thoughts" about the joint venture agreement and a draft outline of a proposal he was recommending. Most of the rest of the document is redacted.

**31**  The second document consists of handwritten notes, most of which appear to be redacted, of a meeting that Mr. Rudy attended with another party who was, at the time, involved in negotiations with the corporate defendants. Mr. Rudy says in an affidavit that the document also includes his notes of the "plan of action" for finalizing the joint venture agreement.

**32**  Mr. Rudy deposes that he wrote both documents for the purpose of providing legal advice to Mr. Divecha in the proposed joint venture and the draft joint venture agreement.

**33**  The order of Master Baker required production of documents related to legal advice on two specific provisions in the joint venture, legal advice on the alleged representations made on or before the date of the joint venture agreement and legal advice on the effect incorporation would have on the plaintiff's ability to pursue claims that had already rising. I presume the legal advice that has been redacted refers to some aspect of the joint venture that does not fall strictly within the categories set out in the order.

**34**  I also assume those categories reflect the matters at issue and the evidence that was before Master Baker at the time. However, the basis of the master's decision was more general than that:

[15] It seems to me, and I am of the view that, the legal advice given by Mr. Rudy clearly must reasonably and inferentially have given the plaintiff an understanding of its legal position, and in my respectful view, that understanding of its legal position is clearly in issue.

**35**  That reasoning is consistent with the decision of this court in *Northland Properties Ltd. v. C.M. Oliver Capitol Corp.*, [*[1998] B.C.J. No. 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1CX-00000-00&context=) (S.C.) [*Northland*]:

10 In the present case, Northland pleads that, in reliance upon C.M. Oliver's representation that it would successfully raise the financing required, Northland agreed to the terms of the Agreement and expended time and monies.

11 Northland retained the Law Firm and took legal advice prior to executing the Agreement on August 22, 1994, the terms of which, C.M. Oliver asserts, preclude Northland from relying upon the alleged representations. Northland thus put in issue its state of mind with respect to the legal effect of the representations and warranties allegedly made by C.M. Oliver and the legal effect of executing the Agreement. Any legal advice received on these issues might effectively negate Northland's allegation of reliance on C.M. Oliver's representations.

12 While any legal advice Northland received regarding the legal effect of the alleged representations and warranties and executing the Agreement is not necessarily determinative of the outcome of the proceedings, it is clearly relevant. I conclude that the solicitor-client privilege with respect to the legal advice Northland received with respect to these issues is waived and the relevant documentation must be produced.

**36**  In this case, the plaintiff alleges it relies on numerous representations, some of which were incorporated in the joint venture agreement and some of which were not. As in *Northland*, any legal advice the plaintiff may have received in regard to those representations or the effect of the agreement might effectively negate reliance on some of the alleged representations. I order production of unredacted copies of the two documents at issue.

**Further and Better List of Documents**

**37**  The defendants seek an order that the plaintiff produce a further and better list of documents, including documents from Mr. Rudy's file. Following Master Baker's order, the plaintiff produced a second supplemental list of documents that indicated it was producing five documents from Mr. Rudy's file, including the two redacted documents referred to above. The list also included a "schedule B", listing by date a further 18 documents on which privilege had been claimed.

**38**  In view of what I have said about the issues in this case, privilege may have waived in respect of some or all of the documents listed in schedule B. However, in the absence of some further evidence about the circumstances under which those documents were created, I am not prepared to make a blanket order to that effect. Evidence adduced on the discovery of Mr. Rudy that I have ordered may give the defendants a basis for making a further application before the trial judge.

**Conclusion**

**39**  The plaintiff will have leave to file its proposed second amended statement of claim, except for paragraphs 33, 82-85 and 88-89. The defendant will have leave to conduct an examination for discovery of Brian Rudy as a second representative of the plaintiff company. The plaintiff will produce unredacted copies of the documents marked as exhibits 126 and 130 from the examination for discovery of Mr. Divecha.

**40**  I decline to order an adjournment of the trial, although depending on what happens in the coming weeks, that issue may have to be canvassed again before the trial judge.

**41**  Costs of this application will be in the cause.

N.H. SMITH J.

**End of Document**

[***Burnett Estate v. St. Jude Medical, Inc., [2008] B.C.J. No. 1631***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M391-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.S. Sigurdson J.

Heard: July 7 and 8, 2008.

Oral judgment: July 21, 2008.

Docket: S014221

Registry: Vancouver

**[2008] B.C.J. No. 1631** | 2008 BCSC 1163 | 172 A.C.W.S. (3d) 45

Between Elsie Burnett, as Executrix of the Estate of Earl Burnett, Plaintiff, and St. Jude Medical, Inc. and St. Jude Medical Canada, Inc., Defendants

(69 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Procedure — Discovery — Production and inspection of documents — Evidence in other proceedings — Objections and compelling production — Orders for production — Application by objectors to a class proceeding seeking documentary production partly successful — The settlement documents were ordered produced, but not the "Ontario" documents — If the court was asked to approve a settlement, at least in part, on the basis that the only potential claim that warranted a significant payment related to injuries alleged to have resulted from a paravalvular leak, those documents that led counsel to form that conclusion should be able to be reviewed by the objectors.**

|  |
| --- |
| Application by certain objectors to an as-yet uncertified class proceeding for directions concerning some aspects of the role of the objectors, particularly the question of production of documents in the possession of representative plaintiff's counsel, or her equivalent in Ontario, and the defendants. The litigation involved the alleged ***negligence*** of the defendants in the design, testing, manufacture, distribution and sale of Silzone-coated mechanical heart valves, a heart valve that was recalled on a worldwide basis in 2000.  HELD: Settlement documents ordered produced, but not the "Ontario" documents.  If the court was asked to approve a settlement, at least in part, on the basis that the only potential claim that warranted a significant payment related to injuries alleged to have resulted from a paravalvular leak, those documents that led counsel to form that conclusion should be able to be reviewed by the objectors. However, the other documents sought, described in the outline as the "Ontario" documents need not be produced. Given the settlement proposed in the B.C. action, the issues in the Ontario litigation and the issue of whether there ought to be certification and approval of a settlement in B.C. might be quite different. |

**Counsel**

Counsel for the Plaintiff: J.M. Poyner, K.J. Baxter and P. Klein.

Counsel for the Defendants: D.T. Neave, S. Knowles and S.G. McKee (Ontario).

Counsel for the Province of British Columbia: A.G. Lieberman.

Counsel for the Objectors: R. Mogerman and N. Melling, Articling Student.

**Reasons for Judgment**

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| **J.S. SIGURDSON J. (orally)** |

**INTRODUCTION**

**2**  This is a class proceeding in which the representative plaintiff will shortly seek certification and approval of a settlement with the defendants, St. Jude Medical, Inc. and St. Jude Medical Canada, Inc.

**3**  This, however, is not the hearing to consider the certification and settlement approval. Rather, it is an application by certain objectors for directions concerning some aspects of the role of the objectors, particularly the question of production of documents in the possession of representative plaintiff's counsel, or her equivalent in Ontario, and the defendants.

**4**  The hearing was held pursuant to a direction I gave in June, 2008, which was earlier scheduled to be the hearing of an application to disqualify the firm of Camp Fiorante Matthews from acting (on the ground of conflict of interest), but that motion was abandoned by the representative plaintiff.

**5**  This litigation involves the alleged ***negligence*** of the defendants in the design, testing, manufacture, distribution and sale of Silzone-coated mechanical heart valves. The Silzone heart valve was recalled on a worldwide basis in 2000, and prior to that time about 2,500 Canadian residents, it is asserted, had one or more such devices implanted.

**6**  There are related class proceedings in Ontario and Quebec, with the trial in Ontario of the proceeding, that has been certified, set for March 2009. There are apparently 254 patients in British Columbia who were implanted with the Silzone mechanical heart valve.

**7**  Mr. Mogerman represents 23 objectors in British Columbia who have received notice of the proposed consent to certification and settlement approval hearing. They seek disclosure or discovery of a number of things, including that the plaintiff's counsel provide the objectors with copies of documents in their possession and control specifically pertaining to each of the objectors. That is described in paragraph 2(a) of his outline, and I understand from Mr. Mogerman that since the motion was filed, this has been done.

**8**  The contentious part of the application pertains to two categories of documents. The requests are as follows:

1. that the plaintiff produce a list of all material referred to in paragraph (f) of page 2 of the settlement agreement, including, but not limited to the "expert reports and other documents filed in actions brought against the defendants in Ontario and St. Jude Medical Inc. in the United States, the data regarding the results of the Evert Study as of July 2005, and the data from the University of British Columbia Cardiac Valve Database ... and various patient files" that were reviewed by the plaintiff and her counsel;
2. the defendants produce a list of all documents they have produced to the plaintiffs and are received from the plaintiffs in the Ontario case of ***Anderson v. St. Jude Medical,*** File No. 00CV1959906.

**9**  These categories are respectively referred to by the objectors as the "settlement documents" and the "Ontario documents". The objectors seek further orders establishing timelines for production, review, and the filing of material in opposition, as well as cross-examination.

**10**  The application for production of documents was opposed by counsel for the representative plaintiff, as well as the St. Jude Medical defendants. The hearing on document production touched on issues such as the test for approval of a settlement in a class proceeding, the merits of the plaintiffs' claims, and the possible merit or lack of merit of the proposed settlement. However, those issues were not directly pertinent to this application, although both parties, in different ways, suggest that those issues inform the approach that I ought to take on this application - the objectors' application for access, as they put it, or as those contrary on this motion said - for discovery of documents.

**DISCUSSION**

**11**  As the objectors' role and request for documents relate to a proposed consent certification and settlement, some introductory comments about the process are necessary to put the application in context. Mr. Mogerman argues that a settlement approval and consent certification application is a situation where the main parties are not adverse. He submits the burden of proving that a settlement is fair and reasonable rests with the proponents, and they must adduce positive evidence to support their position. No one took issue with that proposition.

**12**  As Winkler J., as he then was, noted in ***McCarthy v. Canadian Red Cross Society***, [*[2001] O.J. No. 2474*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-F57G-S04N-00000-00&context=), [*8 C.P.C. (5th) 349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDD1-F57G-S04N-00000-00&context=) (O.C.J.) at para. 19:

... The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court. This is a well developed principle of law in respect of ex parte motions for injunctive relief but the underlying concerns it addresses are equally applicable in the context of unopposed motions in class proceedings or on motions where there is the appearance of a risk of collusion among the parties.

**13**  Let me turn specifically to the role of the objectors and this particular application.

**14**  In British Columbia, the role of objectors is not specifically described. However, s. 12 of the ***Class Proceedings Act***, *R.S.B.C. 1996, c. 50*, says as follows:

The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

**15**  The leading authority on the role of objectors appears to be ***Dabbs v. Sun Life Assurance Co. of Canada***, [*[1998] O.J. No. 1598*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JSRM-633X-00000-00&context=) (Q.L.) (Ont. Gen. Div.). In that case, Sharpe J., as he then was, said at para. 20-21:

In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

**16**  In ***Jeffery v. Nortel Networks Corp.***, [*2007 BCSC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61TC-00000-00&context=), Groberman J., as he then was, described the usual questions the court addresses when it considers approval of a settlement of a class action. He referred to the comments of Brenner J., as he then was in ***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co. (c.o.b. Manulife Financial)*** [*(1998), 169 D.L.R. (4th) 565*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2NW-00000-00&context=), [*[1998] B.C.J. No. 2936*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2NW-00000-00&context=) (S.C.), and Gerow J. in ***Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)***, [*2005 BCSC 1123*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B14B-00000-00&context=), [*47 B.C.L.R. (4th) 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B14B-00000-00&context=), and concluded, at para. 28, as follows:

In summary, then, the court must consider four broad questions before approving the settlement of class actions:

1. Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
2. Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
3. On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and
4. Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

**17**  The defendants, while not taking issue with those comments, emphasize different aspects of the settlement approval process. They referred to ***Nunes v. Air Transat A.T. Inc.*** [*(2005), 20 C.P.C. (6th) 93*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-FFTT-X2TH-00000-00&context=), [*[2005] O.J. No. 2527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-FFTT-X2TH-00000-00&context=) (S.C.J.), where Cullity J., at para. 7, described the role of the court and the standards to be applied in determining whether a settlement should be approved, and distilled the principles with reference to ***Vitapharm v. F. Hoffman - La Roche Ltd***, [*[2005] O.J. No. 1118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JJ1H-X1T5-00000-00&context=) (S.C.J.):

In ***Vitapharm***, Cumming J. distilled the following principles from the earlier authorities:

1. to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;
2. the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
3. there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
4. to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
5. a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinise the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation.
6. it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal;
7. the burden of satisfying the court that a settlement should be approved is on the party seeking approval;
8. in determining whether to approve a settlement, the court takes into account factors such as:
9. the likelihood of recovery or likelihood of success;
10. the amount and nature of discovery, evidence or investigation;
11. the proposed settlement terms and conditions;
12. the recommendations and experience of counsel;
13. the future expense and likely duration of litigation;
14. the recommendation of neutral parties, if any;
15. the number of objectors and nature of objections;
16. the presence of arm's-length bargaining and the absence of collusion;
17. information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and
18. the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

**18**  Much of the submission that I heard from Mr. Neave for St. Jude Medical and Mr. Poyner for the representative plaintiff was really directed to the history of the Silzone heart valve, the tracking of the patients in the U.B.C. study, the affidavit of Dr. Jamieson filed in support of the settlement, and the suggestion that the settlement was fair, given that, in the B.C. settlement, a class member who does not opt out does not have to prove causation to obtain recovery, and for serious complications, the amounts paid approach full compensation, even if ***negligence*** and causation were established.

**19**  Mr. Poyner and Mr. Neave argue that they refer to all of this as background, not to have me approve a settlement that is not yet before me, but to try to keep the role of the objectors in its proper context. They argue that the application by the objectors for access or discovery is really asking the court to order discovery in order to litigate the merits of the action. They argue that the approach of the objectors fails to recognize that settlements are a balancing mechanism, and they need not achieve a standard of perfection.

**20**  However, Mr. Mogerman suggests that the picture is not quite as clear as that painted by Mr. Neave and Mr. Poyner, and he argues that the documents he seeks will assist him in presenting a full picture to the court in challenging whether the settlement is fair and reasonable and in the best interests of the class as a whole.

**21**  I only touch upon the legal and factual issues relating to the settlement and certification as they provide some context, however, those issues are for a later application. Let me turn to the application at hand.

**22**  Mr. Mogerman submits that the production of documents he seeks is needed so that the objectors may be helpful to the court, to allow it to apply the test to determine if the settlement should be approved. He says that the court must be able to assess the completeness and candour of the evidence, and whether the settlement is based on a proper appreciation of the background facts. The documents, he says, will assist the court in that task, as well as determining whether the process leading to the settlement was satisfactory. He said that, given the high number of objectors, they should be given a high level of participation, and access to the documents will foster those goals. He points out that there is a trial in Ontario commencing in March 2009, and in that litigation, there are many expert reports, reply reports, and other relevant documents.

**23**  As to the scope of what may exist in the Ontario proceedings, I refer to paragraph 15 of the affidavit of Lise Carmichael, a paralegal at Camp Fiorante Matthews, where she says as follows:

... To date, many millions of pages of documents have been produced by the defendant. Witnesses on behalf of the Canadian and US defendant have been produced and examined over numerous days. Extensive written interrogatories were made of the defendants. In addition, the CNCA was able to access many millions of pages of documents produced to the PSC by the US defendant in MDL 1396, and also had access to many of the depositions taken by the PSC in MDL 1396, which will be described in more detail below. In addition, there have thus far been approximately 10 days of discovery motions argued, another 2 days scheduled, and a number of further days of discovery motions which may be required to complete discovery.

**24**  She goes on to say, at paragraph 17 of her affidavit:

One of the most significant issues in this action, as in all other Silzone actions, is what the true data are from the clinical trial study known as the AVERT ("Artificial Valve Endocarditis Reduction Trial"), which the defendant sponsored, what influence the defendants have had over the conduct of this clinical trial, and what conclusions can reasonably be drawn from the AVERT data.

**25**  Mr. Mogerman said that the position of the objectors might be different if the plaintiff and St. Jude Medical conceded that there was a serious contest whether there is a potential for serious consequences from the Silzone heart valve beyond those that the defendants say exist for all mechanical heart valves.

**26**  Mr. Neave and Mr. Poyner oppose the applications for production. They say that the Ontario litigation is different, because there are serious issues there that have no bearing on the question of the B.C. settlement. They describe those issues as causation and the AVERT study.

**27**  In terms of production, the entire certification record from Ontario has been filed in British Columbia, and it is extensive, but Mr. Neave nevertheless takes the position that it is not really relevant to the issues in the B.C. case, as the purpose of the settlement approval process is not to litigate the merits of the underlying claim. He says it is not the court's function to substitute its judgment for that of the parties, or attempt to renegotiate the proposed settlement.

**28**  Mr. Neave goes on to say that, at best, the AVERT study is only background. He says that the case is different from Ontario, as here the condition of the patients is known. He argues that causation is not an issue, nor is the validity of the AVERT study, both of which are apparently serious issues in Ontario. However, he suggests the evidence indicates that the B.C. patients are no different from the OPC (the Objective Performance Criteria) adopted by the Food and Drug Administration, which he said is regarded as an accurate record of the actual experience of people with mechanical heart failures.

**29**  Dr. Jamieson provided evidence on behalf of the plaintiffs, with respect to the UBC database and his review of records of 254 patients who were implanted with Silzone valves. He says as follows in paragraphs 54-56 of his affidavit:

1. In August 2006, I, along with other researchers, completed a study of patients in the UBC Valve Database who had been implanted with Silzone (R) valves to determine the complication rates in that patient group for major and minor paravalvular leak, major thromboembolism, haemorrhage and valve related re-operation ("Seven Year Study").
2. As part of the Seven Year Study, I undertook an analysis of the complication rates in the patients in the UBC Valve Database who had been implanted with Silzone (R) valves, including a comparison of those rates with the OPC rates for those complications. The data in the UBC Valve Database demonstrate that the complications experienced by those Silzone (R) valve recipients have occurred at rates that are not statistically significant different from the acceptable background rates represented by the OPC.
3. In addition, I conducted a comparison of the upper 95 percent confidence intervals for the linearized rates for each of the complications in the UBC Valve Database as against two times the OPC rate. That analysis is similar to the method the FDA uses in evaluating a new mechanical heart valve for approval (as opposed to a modification to a previously approved valve, like the addition of Silzone (R) coating to the sewing cuff). If the upper limit of the 95 percent confidence interval is less than twice the OPC rate the valve performance is considered acceptable for approval purposes. The upper 95 percent confidence interval for the linearized rate of each complication in the UBC Valve Database was less than twice the value of the applicable OPC rate for each complication.

**30**  Mr. Neave and Mr. Poyner say that the disclosure of the Ontario documents is irrelevant in the event that the settlement passes muster, and they argue that the court must recognize that the settlement process involved an imperfect resolution of competing claims. They say that the disclosure of hundreds of thousands, perhaps millions, of pages of documents will be extremely time consuming, costly, and, more importantly, of no real consequence given the terms of the proposed settlement.

**31**  Apart from the enormity of the requested production, Mr. Neave argues that it would be necessary to redact documents to deal with privilege and privacy issues, that there will be "cherry picking" by both parties to attempt to demonstrate the merits of one perspective over another, and that there will be little benefit. He said it is not appropriate to try the case on the motion to approve the settlement. Mr. Neave argued that if I cannot determine, on the material in support of certification and settlement, that it should be approved, then I am able to dismiss the application for certification and settlement.

**32**  Mr. Mogerman says that Mr. Poyner and Mr. Neave focus on the merits of the settlement, which he says is not the issue. Rather, his request for documents is to be able to challenge their assertions that the settlement is fair and reasonable. Mr. Mogerman argues that the contention that causation is not an issue only means that there has been a trade-off in terms of the payment in exchange for not contesting liability. He also says the AVERT study is relevant, is relied on by Dr. Jamieson, and the UBC study does not explain why the patients' complications occurred or predict whether there will be more complications in the future.

**33**  I note that Master MacLeod in reasons dated January 21, 2008 [***Andersen v. St. Jude Medical Inc.,*** [*[2008] O.J. No. 430*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF11-FFTT-X392-00000-00&context=) (Q.L.) (S.C.J.)] noted that the AVERT data was relevant to the issue of whether or not Silzone is dangerous and to the question of St. Jude's knowledge of whether, at different times, the defendants in Ontario should be required to implement a medical monitoring regime. Those issues, however, may not arise in the same way in the settlement approval application here as they do in the Ontario litigation.

**34**  One of the key issues appears to be whether the paravalvular leak is the only major complication. One of the issues in Ontario was whether the risk that Silzone patients face is confined to the paravalvular leakage. Let me quote in part from preamble F to the settlement agreement. Paragraph F reads:

The plaintiff and Poyner Baxter LLP, based on their analyses of the facts and the law applicable to the Plaintiffs and the B.C. Class members' claims, and having regard to the burdens and expense in prosecuting the Proceeding, including the risks and uncertainties associated with trials and appeals, have concluded that this Settlement is a fair, cost-effective, and assured method of resolving the claims of the B.C. Class at this early stage of the Proceeding and one that provides compensation and other benefits to the B.C. Class that are fair, reasonable, adequate and in the best interests of that class. In particular, the Plaintiff and Poyner Baxter LLP concluded, following a review of expert reports and other documents filed in actions brought against the Defendants in Ontario and against St. Jude Medical, Inc. in the United States, the data regarding the results of the AVERT Study as of July 2005 and the data from the University of British Columbia Cardiac Valve Database of the Division of Cardiac Surgery and various patient files, that the only potential claim of the Plaintiff and members of the B.C. Class that warrant significant payments from the Settlement Fund are those related to injuries alleged to have resulted from paravalvular leak ....

**35**  I have decided the following order is appropriate in the circumstances. If the court is asked to approve a settlement, at least in part, on the basis that the only potential claim that warrants a significant payment relates to injuries alleged to have resulted from a paravalvular leak, those documents that led counsel to form that conclusion should be able to be reviewed by the objectors. Those are the documents that I understand are described by Mr. Mogerman as the settlement documents. As I noted, the settlement document provided in part:

... [F]ollowing a review of the expert reports and other documents filed in actions brought against the Defendants ..., the data regarding the results of the AVERT Study ..., the data from the University of British Columbia Cardiac Valve Database ..., the only potential claim of the Plaintiff and members of the B.C. Class that warrant significant payments from the Settlement Fund are those related injuries alleged to have resulted from paravalvular leak ....

**36**  From the submissions of counsel, I would expect that most of those documents, if not all of those documents, have been filed as part of the certification material to which Mr. Poyner referred in his submission. Those documents are themselves extensive and presumably include expert evidence that may be of assistance to Mr. Mogerman's position that there may be more extensive complications from the Silzone valve that warrant compensation.

**37**  I think it would be a relatively straightforward matter to provide a list of those materials, in workable form, and if they are in the materials filed for certification, identify them for the benefit of counsel for the objectors. If there are documents in addition to those filed in B.C., identify them so that they may be produced. Those documents, I assume, have been in or are currently in the possession of the plaintiff's counsel, and I assume, to the extent that any documents are privileged or are subject to privacy interests of patients, they may be redacted to deal with those concerns. So, following delivery of these reasons, I will discuss a time period for the production of what I will refer to as the settlement documents.

**38**  I now turn to the second part of the motion.

**39**  I should note that the objectors are not parties, and even for parties at the pre-certification stage, discovery of documents is not a matter of course. The fact that discovery was not automatic at the certification stage, even for a party, was reiterated by Myers J. in ***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=), where he said, at para. 25 (after referring to the approach described in ***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=), (S.C.) 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=)):

I, too, would adopt that approach. 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.

**40**  The objectors, however, say they are seeking access and not discovery, something I think is probably a real distinction. However, I find the other documents sought by the objectors described in the outline as the Ontario documents need not be produced. I say that for a number of reasons.

**41**  First, it appears that, given the settlement proposed in the B.C. action, the issues in the Ontario litigation and the issue of whether there should be certification and approval of a settlement in B.C. may be quite different.

**42**  Moreover, it appears that there may well be many hundreds of thousands of documents, if not more, and I was not persuaded that they are necessary for the court to fulfil its obligation at the certification and settlement approval hearing. I may have a different view later, and it may be that I refuse to approve the settlement on the ground that I do not have adequate information, but at this point, I think it is appropriate to decline the objectors' application for the Ontario documents.

**43**  Third, one of my responsibilities is to manage the proceeding to ensure its fair and expeditious determination. I have to keep in mind that there is a possibility that discovery or access to documents in this category may well be extremely time consuming and costly, and unnecessary production may be a barrier to otherwise reasonable settlements of class proceedings.

**44**  Fourth, I am mindful that the production that the objectors seek in terms of the settlement documents, and that I ordered produced, may be sufficient to allow them to properly voice their opposition to the settlement.

**45**  Finally, the objectors may well be able to persuade me there is a real question whether there are more serious complications from the Silzone valve and that if there are, the amount of compensation that is paid in a settlement should be greater, and that that relates to the fairness and reasonableness of the settlement.

**46**  I think that it is appropriate to hear the submissions and evidence on the settlement approval motion and if there should be further evidence, it is always open to me to make such an order at that time.

**47**  Accordingly, although I direct the production of the settlement documents, as I have said, I decline to order what are referred to as the Ontario documents. I will discuss with counsel a time limit for the production of these documents, but I will not direct cross-examination as a basis for it has not been demonstrated on the material that has been filed. The objectors have leave to renew that application for cross-examination once they have filed their material.

**48**  So I will now discuss with counsel a timeline for the various things I have ordered and any other timelines that counsel wish to discuss. Mr. Baxter.

**49**  MR. BAXTER: Well, as you may note, Mr. Poyner Sr. isn't here. He is on holidays for two weeks. He will be back at the beginning of August. I would suggest that as far as our documents are concerned, I think that we would be able to produce those by August 8.

**50**  THE COURT: So why do we not start with that first date and see if that is acceptable to your friend.

**51**  MR. MOGERMAN: It makes sense to me, My Lord.

**52**  THE COURT: So then what is the next date that we have to fix for that?

**53**  MR. BAXTER: Well, perhaps a hearing date.

**54**  THE COURT: Well, I assume Mr. Mogerman is going to file some material. There is going to be perhaps some reply material beyond what you have filed. So, Mr. Mogerman, it is really in your court.

**55**  MR. MOGERMAN: Yeah. I mean, the way the staging works in my mind is that when we get that list, we will have to very quickly say, these are the things that make sense for us to review off that list. I can go to my friend's office. We'll get copies of those things. So, to me, logically the next date is the date that we prepare our material. We could set a date for finalization of getting our hands on the documents, but probably the date we prepare our material, and I am thinking three weeks from that August date. So taking us up to the end of August makes sense to me.

**56**  MR. BAXTER: 29th?

**57**  THE COURT: The 29th.

**58**  MR. BAXTER: The 29th for objector material.

**59**  MR. MOGERMAN: And the only --

**60**  THE COURT: I assume counsel will step up if there are any difficulties with these dates.

**61**  MR. MOGERMAN: I will. Thank you, My Lord.

**62**  THE COURT: Thank you. So August 29th for the objectors' material. And what about a reply date? Presumably the representative plaintiff or the St. Jude defendants may want to file something at that time.

**63**  MR. BAXTER: September 12th?

**64**  MR. MCKEE: I think that's fine as long as we have the option of coming back once we see what the material is to revisit that date.

**65**  THE COURT: September 12th, with liberty to apply. And, Mr. Mogerman, I think what we should do, and maybe what we should do now, is leave it to counsel to speak to the registry about fixing a hearing date, and my view would be if there are applications preliminary to that, we are just going to have to fit them in before hearing date.

**66**  MR. BAXTER: Well, we're just discussing how long we think we should set aside for the hearing itself, and all lawyers like to say they're very quick, but probably three days would be on the safe side.

**67**  THE COURT: All right. Ms. Knowles, are you going to let Mr. McKee speak or are you going to speak to it?

**68**  MS. KNOWLES: I know Mr. Neave had suggested a week would be more appropriate.

**69**  THE COURT: Well, I think once we are booking three days we are quite close to a week. Well, I would like to have this matter heard and dealt with by October/November period, so why do you not just mention that to the registry and I am sure they will contact me and tell me I have got some other things, but after you have given the registry your dates, then I will speak to them and I will report to counsel what the hearing date will be.

J.S. SIGURDSON J.

**End of Document**

[***Butterman v. Richmond (City), [2013] B.C.J. No. 461***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G23S-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

L.W. Bernard J.

Heard: October 12, 2012.

Judgment: March 13, 2013.

Dockets: S090357, S107417

Registry: Vancouver

**[2013] B.C.J. No. 461** | 2013 BCSC 423 | 8 M.P.L.R. (5th) 310 | 2013 CarswellBC 666 | 226 A.C.W.S. (3d) 861

Between Silvia Butterman, Plaintiff, and City of Richmond, Ramandeep Kooner and Aryeh Meir, Defendants And between Silvia Butterman, Plaintiff, and Richmond Animal Protection Society, Defendant

(53 paras.)

**Case Summary**

**Municipal law — Powers of municipality — Regulation of property and activities — Animals — Dangerous dogs — Action by Butterman for declaration that City and Animal Protection Society were negligent in failing to enforce bylaws respecting dangerous dogs dismissed — Butterman was injured by dogs — It could not reasonably be said that information that dogs had collective propensity to attack small dogs should or likely would have changed course of investigation of previous attack — It was speculative to suggest that City and Society could have found owner — Circumstances permitting seizure did not exist.**

**Municipal law — Actions by and against — Actions against municipality — Action by Butterman for declaration that City and Animal Protection Society were negligent in failing to enforce bylaws respecting dangerous dogs dismissed — Butterman was injured by dogs — It could not reasonably be said that information that dogs had collective propensity to attack small dogs should or likely would have changed course of investigation of previous attack — It was speculative to suggest that City and Society could have found owner — Circumstances permitting seizure did not exist.**

**Municipal law — Liabilities of municipality — *Negligence* — Types — Bylaw enforcement — Action by Butterman for declaration that City and Animal Protection Society were negligent in failing to enforce bylaws respecting dangerous dogs dismissed — Butterman was injured by dogs — It could not reasonably be said that information that dogs had collective propensity to attack small dogs should or likely would have changed course of investigation of previous attack — It was speculative to suggest that City and Society could have found owner — Circumstances permitting seizure did not exist.**

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| Action by Butterman for a declaration that the City of Richmond and the Richmond Animal Protection Society were negligent in failing to enforce bylaws with respect to dangerous dogs. The City designated two dogs as "dangerous dogs" after they collectively attacked small dogs on two occasions. The dogs attacked another small dog, whose owner reported the incident to the Society. The Society's investigation of the incident was outstanding when the dogs attacked Butterman's small dog. Butterman was injured while attempting to protect the dog. Butterman claimed that the City and the Society failed to exchange pertinent history regarding the dogs and take reasonable steps to locate their owner. The owner had changed residence with no forwarding address after the third attack but before it was reported. After the report, the Society left telephone messages for him and called the City to ask what information it had about him. According to the Society, the City advised it of the prior complaints about the dogs but not that they had been designated as dangerous. Neither the City nor the Society became aware of the owner's new address until after the Butterman incident.  HELD: Action dismissed.  The known history of the dogs prior to the third attack consisted of two similar attacks on small dogs, without serious injuries to dogs or humans. It could not reasonably be said that the information that the dogs had a collective propensity to attack small dogs, had it been known, should or likely would have changed the course of the investigation. It was speculative to suggest that the City and the Society could have found the owner had they employed the resources available to them. Even if they did, the specific circumstances permitting seizure of the dogs did not exist. |

**Statutes, Regulations and Rules Cited:**

Animal Control Regulation Bylaw No. 7932,

Community Charter, [*SBC 2003, CHAPTER 26, s. 49*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-F4W2-61H7-00000-00&context=)(2)

Dog Licensing Bylaw No. 7138,

Municipal Ticket Information Authorization Bylaw No. 7321,

**Counsel**

Counsel for the Plaintiff Silvia Butterman, in both actions: R.W. Mostar.

Counsel for the Defendant City of Richmond in Action No. S090357: L.L. Afonso.

Counsel for the Defendant Richmond Animal Protection Society in Action No. S107417: M.L. Chorlton.

**Reasons for Judgment**

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| **L.W. BERNARD J.** |

**A. Overview**

**1**  On November 23, 2008, Silvia Butterman's dog was set upon by two dogs owned by Aryeh Meir. The incident occurred as Ms Butterman walked her small dog along a sidewalk in a residential neighbourhood of Richmond, BC ("the City"). When Ms Butterman intervened to protect her small dog from Mr. Meir's two large dogs she was injured.

**2**  Prior to the Butterman incident, the City had designated Mr. Meir's dogs as "dangerous dogs"; a classification which obliged Mr. Meir to keep his dogs leashed, muzzled, and under his care and control while in public places, and securely confined at all times, either indoors or in an enclosure, while on any premises owned or controlled by the owner. In the incident in question, Mr. Meir's unleashed and unmuzzled dogs escaped from his fenced yard. It is common ground that they were not confined as required by the designation.

**3**  The dangerous dog designations were a consequence of two prior attacks by Mr. Meir's dogs upon other small dogs, in June and July of 2008. A third similar incident involving Louise German's small dog occurred on October 5, 2008 (the "German incident"). On November 5, 2008, Ms German reported the incident to the Richmond Animal Protection Society ("RAPS"). Significantly, the German incident was the subject of an outstanding investigation by RAPS at the time of the Butterman incident. It is the alleged mishandling of the German incident which is the foundation of Ms Butterman's claim that the City and RAPS were negligent by failing to enforce, in an effective and timely manner, the City's bylaws regarding the management and control of dangerous dogs.

**4**  RAPS is a charitable organization which was, at the time, under contract with the City to provide certain animal control bylaw enforcement services in Richmond.

**5**  The essence of Ms Butterman's position is that the City and RAPS were negligent by: (a) failing to exchange pertinent history regarding the dogs; and, (b) failing to take reasonable steps to locate Mr. Meir and his dogs after receiving the complaint of the German incident on November 5, 2008. Ms Butterman says that but for these failures, the attack upon her dog and, thus, her injuries, would not have occurred.

**6**  Ms Butterman seeks a declaration that the City and RAPS are liable for damages, to be assessed at a later date.

**7**  It is common ground: (a) that on or about October 20, 2008 Mr. Meir and his dogs changed residence without leaving a forwarding address; and, (b) that Mr. Meir's new residence did not become known to RAPS and the City until after the Butterman incident was reported.

**8**  Upon the City receiving the Butterman complaint and learning the whereabouts of Mr. Meir, on December 4, 2008 the City obtained a warrant to seize the dogs. On January 8, 2009, the dogs were euthanized.

**9**  It is agreed that at all relevant times, RAPS was under contract (the "Contract") with the City to provide animal control services, including the enforcement of some city bylaws, including Bylaws 7932, 7138 and 7321.

**10**  On July 8, 2010, Ms Butterman obtained default judgment against the defendant Aryeh Meir, after he failed to attend to his examination for discovery. The defendant Ramandeep Kooner is the owner of the residence Mr. Meir was renting at the time of the attack. He did not file an appearance in this action, and the claim against him remains outstanding.

**11**  The parties agree that the evidence is not contentious and that the issue of liability is suitable for resolution by summary trial and ought to be resolved accordingly.

**B. Evidentiary Synopsis**

**12**  In 2007 Aryeh Meir adopted two bull mastiff dogs from RAPS. He and his dogs resided at rental unit #207 of a strata-titled residential complex at 3851 Francis Road, Richmond, BC, until approximately October 20, 2008.

**13**  In June and July of 2008, two residents of the Francis Road complex complained to the City about incidents of aggression by Mr. Meir's dogs.

**14**  In the June incident, one of Mr. Meir's dogs jumped up on a man as he held his small dog in his arms. There were no puncture wounds to the man or his dog in this incident; however, the man sustained a scratch to his skin.

**15**  In the July incident, Mr. Meir's dogs attacked another man and his dog, as the man held his dog in his arms. This attack resulted in cuts, scrapes and a bite mark to the man's dog. In addition, the man's shirt was torn and he reported numerous abrasions.

**16**  Based upon the foregoing complaints, and Mr. Meir's lack of response to them, Mr. Dal Benning, a bylaw enforcement officer for the City, designated the dogs as dangerous and informed Mr. Meir of this decision by letter, mailed on August 28, 2008, to the Francis Street address. The letter set forth the requirements of the designation. There has been no suggestion that Mr. Meir did not receive this letter.

**17**  The next known incident involving Mr. Meir's dogs occurred on October 5, 2008, near the intersection of Francis and No. 1 Roads, in Richmond. In this incident Mr. Meir's bull mastiffs attacked Louise German's shih tzu as she walked her dog along a sidewalk. During the incident, one of the bull mastiffs grasped the shih tzu with its mouth and "shook it like a toy". Ms German and her father struggled with the bull mastiffs and managed to rescue the shih tzu without injury to themselves. The shih tzu sustained a bleeding bite mark on its back from the attack; however, stitches were not required.

**18**  Ms German did not report the attack on her dog until November 5, 2008, by which date Mr. Meir had moved from his Francis Road address without leaving a forwarding address.

**19**  Ms German's report was by way of an email to RAPS. A RAPS file was immediately opened and the matter was assigned to a RAPS animal control officer, Shane Burnham, for investigation. Mr. Burnham took the following immediate action: (a) he spoke to Ms German and was informed (i) that the man walking the bull mastiffs had identified himself as John McRoberts, and had given his telephone number as 275-1428, and (ii) that the dogs' tags bore numbers 7486 and 6581, and telephone number 275-7165; (b) he entered the information received into RAPS' computer system and by so doing learned that the dogs' owner was Aryeh Meir; and, (c) he telephoned Mr. Meir and left a message requesting that Mr. Meir return his call.

**20**  In relation to the nature and urgency of the matter, Mr. Burnham assessed it as follows:

Given the length of time between the incident in question and the filing of the complaint, in addition to the fact that the complaint involved a dog-on-dog fight, with relatively minor injuries, I did not consider this complaint to be urgent, nor did I believe there was any immediate threat to human safety.

**21**  On November 6, 2008, Mr. Burnham continued his investigation, as follows: (a) he left a second telephone message with Mr. Meir because he had not yet heard from him; (b) he spoke to Ms German, at her residence, to confirm her report; (c) he attended to the address of Mr. Meir's former residence on Francis Road (obtained from RAPS' adoption records) where the building manager informed him that Mr. Meir had moved in October 2008 without leaving a forwarding address; (d) he left another telephone message for Mr. Meir at a number provided to him by the building manager; and, (e) he placed a call to the City to determine what information it had about Mr. Meir and his dogs, but was unable to speak to the clerk at that time.

**22**  On November 7, 2008, Mr. Burnham placed another telephone call to the City, but "got no answer". He also left another telephone message for Mr. Meir.

**23**  By November 12, 2008, Mr. Burnham had not heard from Mr. Meir. He placed another call to the City; this time he connected with Norman Kotze, a clerk in the bylaw department. He informed Mr. Kotze of Ms German's complaint and of his inability to locate Mr. Meir due to his recent change in residences. Mr. Burnham said that Mr. Kotze advised him that there had been other complaints about Mr. Meir's dogs; that the City did not have a new address for Mr. Meir; and, that the RCMP was also looking for Mr. Meir. Mr. Burnham said he was not informed that the dogs had been designated as dangerous.

**24**  After November 12, 2008, Mr. Burnham took no further steps to locate Mr. Meir. In this regard he said:

As of November 12, 2008, I had no information upon which to track down Mr. Meir and, therefore, I was unable to speak with him to investigate further until either the RCMP or the City were able to locate a new address.

I was not told by the City at any time that Mr. Meir's dogs had been designated as "dangerous" dogs. However, regardless of whether the dogs were declared "dangerous" or not, at that point my general investigative procedure is the same and until an updated address was provided for locating Mr. Meir, I had no further power upon which to move the investigation forward.

On December 4, 2008, I was advised by the City that they had a new address for Mr. Meir. I was asked to attend with the City and RCMP at Mr. Meir's residence in order to assist the City in apprehending Mr. Meir's dogs. I understood that the City and RCMP had been able to locate Mr. Meir because of a further dog bite incident. ...

**25**  On November 23, 2008, Ms Butterman reported the same-day attack to the City. As stated above, the attack occurred when Mr. Meir's dogs escaped from the fenced yard of his residence as Ms Butterman walked her dog along an adjacent sidewalk. It was the report of Ms Butterman which brought Mr. Meir's new residential address to the attention of the City. An investigation immediately ensued.

**26**  It was not until after the Butterman complaint had been made that the German incident came to the attention of Mr. Benning at the City. In this regard, Mr. Benning said:

If I had been advised of the October 5, 2008 incident prior to the Plaintiff's incident, I would have instructed the RAPS to pass the information they had on to me, and I would have interviewed witnesses. I did not have the new address where Mr. Meir lived, so I would not be able to interview him unless he returned my phone call. If I came to the conclusion that the complainant's story was true, and if I believed the Dogs may seriously injure or kill a person or domestic animal, I would have decided to seize the Dogs, but I would have first had to locate Mr. Meir. At that time, the City's file only had Mr. Meir's old address ...

In this case, where the new address for Mr. Meir was unknown and he was not returning phone calls, I would have notified the RAPS and the City's Animal Control to be on the lookout for Mr. Meir and these Dogs and to advise when they had been located.

**27**  Under the terms of its contract with the City, RAPS was obliged to perform the following services:

1. to patrol for animal control and enforcement of related bylaws;
2. to pick up and seize injured, stray, or dangerous domestic animals;
3. to enforce, including issue tickets for, violations of Animal Control Regulation Bylaw No. 7932, Dog Licensing Bylaw No. 7138, and Municipal Ticket Information Authorization Bylaw No. 7321.

**C. Synopsis of the Plaintiff's Position**

**28**  The plaintiff submits that the City and RAPS were engaged in a joint enterprise to enforce the City's animal control bylaw, yet they operated as "two solitudes". The plaintiff says that Mr. Burnham's and Mr. Kotze's failure to fully apprise one another of the dogs' history and the details of the German incident were negligent failures. The plaintiff argues that if they had shared information then it would have been apparent to both that they had a "ticking time bomb" on their hands.

**29**  The plaintiff characterizes the dangerous dog designation, in particular, as "explosive information" which created a joint responsibility to take quick action to extinguish this "ticking time bomb". The plaintiff says that information-sharing would have triggered investigative steps different and more fruitful than those taken by Mr. Burnham; ones which were likely to have resulted in establishing Mr. Meir's whereabouts and seizing his dogs prior to the Butterman incident.

**D. Synopsis of the Defendants' Positions**

**30**  The City acknowledges that it has a duty to enforce the bylaw in question, and RAPS acknowledges that it has a contractual obligation to actively enforce the bylaw. Their collective position is that their obligations were properly discharged because the City and RAPS acted reasonably in all the circumstances. In this regard, the City says it quickly responded to the June and July 2008 complaints, classified Mr. Meir's dogs as dangerous, and informed Mr. Meir of his obligations following such a designation. The City notes that if Mr. Meir had met his obligations then the Butterman incident would not have occurred. In relation to the German complaint, the City and RAPS says the response was immediate and the investigative steps to locate Mr. Meir were reasonable.

**31**  In relation to the manner of investigation of the German incident, the City and RAPS submit that it is of no consequence that there was incomplete information-sharing between Mr. Burnham and Mr. Kotze because at the time of the report, Mr. Meir's whereabouts were not known to either the City or RAPS and, thus, nothing more could be done. As for whether the City or RAPS would have likely located Mr. Meir in the short period between the German incident, reported on November 5th, and the November 23rd Butterman incident if they had taken further steps, they submit that the plaintiff has failed to show that there were such fruitful avenues open to the City or RAPS.

**32**  The City and RAPS further submit that even if Mr. Meir's whereabouts had been ascertained prior to the Butterman incident, it is highly improbable that the dogs would have been seized because the dogs' histories, including the German incident, were not sufficiently serious to have justified such.

**33**  RAPS submits that its contract with the City obliges RAPS to engage in active enforcement of the bylaws and the issuance of tickets. It notes that the Contract does not specify how investigations related to enforcement are to be conducted; however, it says that the investigative steps taken by Mr. Burnham constituted active enforcement, and that when Mr. Burnham could not locate Mr. Meir, there were no other reasonable steps for Mr. Burnham to take. Alternatively, RAPS' position is that if the contractual requirements fell below the applicable standard of care, then any residual liability would lie with the City.

**34**  RAPS adopts the City's submission regarding causation. It argues that nothing Mr. Burnham did or did not do, or knew or did not know, during the investigation of the German incident would have changed the outcome because Mr. Meir and his dogs were located only as a result of the Butterman report.

**E. Discussion**

**35**  It is well-settled that to prove a claim of ***negligence***, a plaintiff must show: (a) that the defendant owed the plaintiff a duty of care; (b) that the defendant's conduct breached the applicable standard of care; (c) that the plaintiff sustained damages, and, (d) that the damage was caused, in fact and in law, by the defendant's breach: see *Mustapha v. Culligan of Canada Ltd.*, [*2008 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=), [*[2008] 2 S.C.R. 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C7-00000-00&context=), at para. 3.

**36**  In the case at bar, it is not a matter of controversy: (a) that the City and RAPS owed Ms Butterman a duty of care in relation to the enforcement of Richmond's animal control bylaw; (b) that the applicable standard of care is that which would be expected of an ordinary, reasonable and prudent body in the same circumstances (see *Foley v. Shamess*, [*2008 ONCA 588*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF41-F016-S0C7-00000-00&context=)); and, (c) that where an independent contractor (i.e., RAPS) complies with the standard imposed by the terms of its contract with the government (i.e., the City), even if this standard is below the applicable common law standard, no liability can result to the contractor (see *Holbrook v. Argo Road Maintenance Inc.*, [*[1996] B.C.J. No. 1855*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61PW-00000-00&context=), [*1996 CanLII 3600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61PW-00000-00&context=) (B.C.S.C.) at paras. 34 and 35).

**37**  Similarly, it is not in issue that the manner of enforcement of the bylaw in question is a matter of policy within the discretion of the City. There has been neither a suggestion that there is an express statutory duty obliging the City to enforce the bylaw nor any argument that such is implicit. In the absence of such a positive duty, the jurisprudence establishes that the City is afforded broad discretion to determine how it will enforce its own bylaws, and that the manner of enforcement is not to be left to the whims or dictates of the citizenry (see *Foley v. Shamess*, *supra*, at para. 29).

**38**  Where enforcement of a bylaw is discretionary, as it is here, the City is obliged to: (a) act in good faith in relation to its decisions as to how the bylaw will be enforced; and, (b) act with reasonable care in any steps it takes to enforce the bylaw (see *Foley v. Shamess*, *supra*, at para. 29; *Froese v. Hik*, [*[1993] B.C.J. No. 731*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23C3-00000-00&context=) (B.C.S.C.)). As Huddart J. (as she then was) succinctly stated in *Froese*, *supra*:

... Municipalities do not insure or guarantee everything included in applications filed to obtain permits under regulatory schemes. They do not even insure or guarantee compliance with by-laws, unless the by-law or the enactment authorizing that by-law creates a statutory duty to enforce some or all of its provisions. Municipalities in the position of Matsqui owe a duty of good faith decision-making to the public as a whole and a duty to take reasonable care in the implementation of a regulatory scheme to those in sufficient proximity to merit that duty. The precise nature and extent of that duty is determined on a case by case basis, taking into account the nature and purpose of the authorizing legislation, the nature and purpose of the subordinate legislation, and the relationship between the municipality and the person asserting its obligation of care. It may be that such a duty does not extend to encompass purely economic loss (and there may be other policy reasons limiting the scope of the duty of care). These are the principles I extract from *Kamloops*, [*[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=), *supra* and *Manolakos*, [*[1989] 2 S.C.R. 1259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652M-00000-00&context=), *supra*.

**39**  Notwithstanding the plaintiff's complaint that the City and RAPS acted as two solitudes, there has been no suggestion that the City acted without good faith in its decision-making as to how, generally, it would enforce the bylaw in question; thus, the remaining live issue is whether the City and/or RAPS failed to act with reasonable care in relation to the steps they took to enforce the bylaw, upon receipt of the German complaint.

**40**  On this question, the essence of the plaintiff's position is that the City and RAPS did not act with reasonable care when they failed to share certain information about Mr. Meir's dogs. Having regard to the aforementioned standard of care, "reasonable care" is that which would be expected of the ordinary, reasonable and prudent body, in the same circumstances.

**41**  A useful starting point is an examination of the nature of the German complaint. The evidence establishes that it was in relation to a brief dog-on-dog attack, in which Ms German's small dog received a minor and transitory injury. Although the event was, undoubtedly, a traumatic event for both Ms German and her dog, there were no serious injuries and no humans were either attacked or injured by the aggressor dogs in the incident. It is also, arguably, of some weight in assessing the seriousness of the incident that an entire month elapsed before Ms German reported the incident.

**42**  Not surprisingly, it has not been suggested that the investigative steps taken based solely upon the German complaint were unreasonable; rather, the plaintiff's submission is that it is the histories of the dogs - in particular, the dangerous dog designations - which informs the question of reasonableness and establishes that the steps taken were not reasonable, in all the circumstances.

**43**  In this regard, the evidence of Mr. Burnham and Mr. Benning is essentially the same: that is, an awareness of the histories of these dogs (including the details of the German complaint) would not have altered the course of the investigation for either RAPS or the City. The plaintiff clearly challenges these assertions by characterizing the unshared information as "explosive" and revealing "a ticking time bomb".

**44**  The reasonableness of Messrs. Burnham and Benning's assertions must be assessed by examining the nature of the unshared information within the context of the German complaint. If the plaintiff's characterization of it is fair and reasonable, then the evidence of Messrs. Burnham and Benning is troubling; however, for the reasons which follow I am not persuaded that it is.

**45**  The evidence establishes that the known history of Mr. Meir's dogs consisted of two similar attacks upon small dogs, each without serious injury to the dogs or to humans. It is solely this history which resulted in the dangerous dog designations. While I am satisfied that it would be evident to anyone aware of this history and of the details of the German complaint, that Mr. Meir's dogs had a collective propensity to attack small dogs, I am not persuaded that this information can fairly be characterized as "explosive" such that if it had been known it can reasonably be said that it should, and likely would, have changed the course of the investigation. In the absence of a history of attacks upon humans or attacks upon animals causing serious injury to them, I am unable to agree that the terms "explosive" and "ticking time bomb" are reasonable and accurate characterizations of the unshared information.

**46**  The reality was that the complaint of Ms German was in relation to a relatively minor dog-on-dog attack; that a significant period of time had elapsed between the attack and the lodging of that complaint; that the history of the impugned dogs consisted of two relatively minor similar incidents; and, that in response to the two prior attacks, the City had classified the dogs as dangerous and notified Mr. Meir of his obligations under the bylaw.

**47**  Even if it could reasonably be said that the history of the dogs would have been germane to the investigation, the evidence establishes that no measures could be taken against Mr. Meir and his dogs until they were located, and their whereabouts were unknown, and remained so, until the Butterman incident.

**48**  The plaintiff submits that reasonable steps, in all the circumstances, were not taken to find Mr. Meir and his dogs; that had the defendants employed the resources available to them, this investigation would likely have revealed Mr. Meir's new address. The difficulty with the foregoing argument is that it is speculative and without evidentiary support. There is no evidence that the various information sources suggested by the plaintiff (e.g., Canada Post, ICBC, and the RCMP) held Mr. Meir's new address, let alone that such information would have been accessible by either the City or RAPS; instead, there is evidence of an RCMP inquiry to the City suggesting that the RCMP, with all its investigative tools and resources, was also unaware of Mr. Meir's whereabouts.

**49**  Having regard to the foregoing, I am satisfied that the steps taken by Mr. Burnham to locate Mr. Meir were reasonable, in all the circumstances. Mr. Burnham acted quickly upon receipt of the German complaint and he explored all reasonable avenues in his efforts to locate Mr. Meir, including the City's records. Even if there were other potential avenues available to him, I am satisfied that neither the nature of the complaint nor an awareness of the dogs' history would have made it reasonable for him to take them. Such would have amounted to extraordinary steps not warranted in all the circumstances. Similarly, I am not persuaded that the City would have investigated the matter differently.

**50**  Even if Mr. Meir and his dogs were found within the 18-day period between the German report and the Butterman incident, I am not persuaded that the Butterman incident would have been averted. Aside from the very limited time frame, s. 49(2) of the *Community Charter* only permits seizure in specific circumstances which, unquestionably, did not exist here. This provision requires that an animal control officer may seize a dog only if the officer believes, on reasonable grounds, that the dog: (a) has killed or seriously injured a person; (b) has killed or seriously injured a domestic animal, while in a public place or while on private property, other than property owned or occupied by the person responsible for the dog; or, (c) is likely to kill or seriously injure a person. Virtually the same grounds must exist before a Justice may issue a warrant to seize a dog.

**F. Conclusions**

**51**  The City and RAPS acted reasonably in response to the German complaint. The investigative steps taken were those which could be expected of an ordinary, reasonable and prudent body, having due regard to the nature of the German complaint and the dogs' histories. The evidence does not establish that different investigative steps would have been taken by an ordinary, prudent, and reasonable bylaw enforcement officer fully informed of the dogs' histories and of the details of the German complaint.

**52**  Even if, however, the failures of the City and RAPS to share information were a breach of the applicable standard of care, the plaintiff's case would fail for lack of proof of the requisite causal link between the ***negligence*** and the Butterman incident. The evidence does not prove, on a balance of probabilities, that different investigative steps would have resulted in finding Mr. Meir and his dogs prior to the Butterman incident; moreover, it is abundantly clear that even if such occurred, there was an insufficient basis to support the seizure of the dogs. In the absence of a seizure, I am not satisfied, on a balance of probabilities, that the Butterman attack would have been averted.

**G. Disposition**

**53**  The plaintiff's claims against the City and RAPS are dismissed. The parties have liberty to make written submissions regarding costs, if necessary.

L.W. BERNARD J.

**End of Document**

[***Crudo v. Westfair Foods Ltd., [2005] B.C.J. No. 457***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M42S-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Loo J.

Heard: February 7 - 10, 2005.

Judgment: March 7, 2005.

New Westminster Registry No. S068891

**[2005] B.C.J. No. 457** | [*2005 BCSC 320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F65M-61HP-00000-00&context=) | [*137 A.C.W.S. (3d) 870*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F65M-61HP-00000-00&context=)

Between Anna Maria Crudo, plaintiff, and Westfair Foods Ltd., defendant

(43 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Evidence and proof — Defences — Statutory compliance — Occupiers' liability.**

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| Action by the plaintiff, Crudo, for damages resulting from a slip in fall in the store of the defendant, Westfair Foods. Crudo and her husband entered the store on a rainy day. Shortly after entering the store, Crudo suddenly fell, hitting her teeth on the floor. The assistant manager provided first aid and took a photograph of the mark left by Crudo when she skidded on the floor. The manager testified that Crudo told her that her feet slipped out from under her. A report completed by the manager stated that she did not see anything that Crudo could have slipped on and listed the cause of the incident as unknown. The report speculated that Crudo's shoes were wet from the rain outside. Crudo testified that she slipped on water. She admitted that she did not see water on the floor when she fell, but claimed she saw water on the floor after the accident. Her husband did not recall seeing water where Crudo fell, but claimed that one of her pant legs was soaked with water.  HELD: Action dismissed.  Where there was a conflict in the evidence, the testimony of the store manager was preferred to that of the plaintiff Crudo. The most likely cause of the accident was that Crudo suddenly slipped and fell. Even if there was water on the floor, the store met its requisite standard of care under the Occupier's Liability Act. The store conducted regular sweeps of its floor which were logged and reviewed on a weekly basis to ensure compliance. An awning over the store entrance and interior mats provided protection from rain. On the evidence, no liability was attributable to the store. |

**Statutes, Regulations and Rules Cited:**

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

**Counsel**

Counsel for the Plaintiff: B.R. Marshall

Counsel for the Defendant: I.C. Hallam

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| **LOO J.** |

**1**   The plaintiff Anna Crudo injured herself when she slipped and fell in a Great Canadian Superstore. The defendant's liability and the amount of Mrs. Crudo's damages are at issue.

**2**  On Saturday, October 30, 1999, at approximately 7:00 p.m., Mrs. Crudo who is now 62 years old, and her husband Frank Crudo, drove to the Superstore in Coquitlam where they generally shopped. Mr. Crudo parked his truck about 250 feet from the entrance and the couple ran to the store because it was raining heavily that evening. Before entering the store, the Crudos passed under a large canopied area, through some doors, and over an entrance grate. Once inside the store, they walked over a floor mat.

**3**  At the store entrance customers are funnelled towards the right hand area of the store. They walk in between the Customer Service area to their left, and the "greeter" host or hostess to their right. Customers then walk past checkout counters to their left, and the Beauty Department to their left. At the end of the Beauty Department are "beauty bins", and at that point, roughly 100 feet from the front entrance, customers can turn left, right, or continue straight ahead.

**4**  When the Crudos reached the beauty bins Mr. Crudo turned left and continued walking while Mrs. Crudo momentarily stopped to look at some items in the beauty bins. Mrs. Crudo then started to walk when suddenly her right knee "went under" her and she felt an "explosion" when her knee hit the floor. Mrs. Crudo's left leg went forward, she banged her teeth on the floor, and saw stars for a few seconds.

**5**  Two teenaged boys ran over and helped pick her up. A Superstore employee on roller skates skated off to get a chair for her to sit on.

**6**  Mr. Crudo was about 20 feet away when he heard the "commotion". He turned around and ran over to help his wife. He saw the two boys helping Mrs. Crudo onto her feet. When he got to where his wife had fallen, the two young men had her "half way up". Mrs. Crudo was unable to put any weight on her right foot, so Mr. Crudo helped her onto the chair which was placed next to the beauty bin.

**7**  A first aid "code 66" announced over the intercom brought Ms. Kropf, the assistant store manager, to Mrs. Crudo's side. The store's video surveillance camera system starting at 7:02:55 shows Mrs. Crudo seated beside the beauty bins, Ms. Kropf talking to her, giving her ice to put on her knee, and inspecting the area around the chair. A few moments later, the video shows someone bringing a camera to Ms. Kropf.

**8**  Ms. Kropf is seen on the video bending over in front of Mrs. Crudo and taking a photograph of the floor. Mrs. Crudo shrugs her shoulders as Ms. Kropf looks down at the ground. In fact, Ms. Kropf was photographing a skid mark she saw on the floor close to where Mrs. Crudo sat on the chair. Mrs. Crudo admitted on cross-examination that the skid mark was the mark her shoe left on the floor when she slipped and fell.

Location of the Fall

**9**  Mrs. Crudo had a difficult time recalling where the accident occurred. She marked on a plan of the area where she fell, and that mark was at or near the same location noted by Mr. Crudo and Ms. Kropf as where the accident occurred. However, Mrs. Crudo later testified that she fell not where she marked her "X" on the plan, but that she fell further away from the beauty bins, four or five feet in front of the first cashier.

**10**  The video does not show Mrs. Crudo indicating to Ms. Kropf that she fell in an area other than close to where she was seated. Mrs. Crudo suggested that the video does not show this because she kept her hands close to herself and the camera does not show her hands. At trial Mrs. Crudo demonstrated how she had kept her hands close to her body and lap while pointing to the left. Alternatively, Mrs. Crudo said that the video does not show her pointing out to Ms. Kropf where she fell, because she indicated this to Ms. Kropf before the video started.

**11**  If as Mrs. Crudo said, she had pointed out to Ms. Kropf before the video started, that she had fallen some distance from where she sat on the chair there would be no reason for Ms. Kropf to inspect the area around where Mrs. Crudo sat, or to photograph a skid mark close to where she sat.

**12**  I find that Mrs. Crudo fell close to the beauty bins in the Beauty Department.

Presence of Water

**13**  Mrs. Crudo says she slipped on water. Mr. Crudo admits he did not see any water around the area where his wife fell, either before or after she fell, but he claims that he saw that the right knee of her pants was soaked with water. He says the pants must have soaked up all of the water that was on the floor.

**14**  Mr. Crudo never mentioned his theory of how the accident occurred to Ms. Kropf.

**15**  Mrs. Crudo admits she did not see any water on the floor before she fell, but she claims she saw water on the floor after the accident.

**16**  Mrs. Crudo could not describe the water she saw on the floor after she fell. For example, she could not say whether she saw small spots of water or a puddle of water. However, she said that her right knee and the "left hand bum" of her pants were wet when she was seated on the chair. Mrs. Crudo says that she told Ms. Kropf that she had slipped on water on the floor and that her clothes were wet from the water.

**17**  Ms. Kropf testified that when she asked Mrs. Crudo what happened, Mrs. Crudo told her that her feet just slipped out from under her. Mrs. Crudo never told her that she had slipped on water on the floor, or that her pants got wet from water on the floor.

**18**  Ms. Kropf made notes of the incident and her conversation with Mrs. Crudo. The next day she used the notes to complete an Incident Involving Customer Form. With respect to how the incident happened, she wrote: "customer slipped on floor. I examined the area where she fell, I didn't see anything she could have slipped on, no water or foreign objects". With respect to the cause of the incident, she wrote: "unknown - customer said that all of a sudden her feet went out from under her". Under the heading "what other circumstances might have contributed to the incident (i.e. type of shoes, infirmities, age,) Ms. Kropf wrote: "customer was wearing shoes with small heels, the bottoms of heels were starting to fray. Shoes were also most likely wet from rain outside".

**19**  If there is a conflict in the evidence, I prefer Ms. Kropf's testimony over Mrs. Crudo's.

**20**  Mrs. Crudo's pants may have been damp because it was raining heavily outside, but I do not find that her pants were "wet" from water on the floor as she and her husband claim.

**21**  It is alleged in the Statement of Claim that Mrs. Crudo "... slipped in a large puddle of water on the floor of the Superstore ...". I find that there was no water on the floor where Mrs. Crudo slipped and fell.

**22**  Even if there was water on the floor, I find that the defendant met the requisite standard of care required of it under the Occupier's Liability Act, *R.S.B.C. 1996, c. 337*.

The Law

**23**  The duty of care expected of an occupier is provided by s. 3(1) of the Occupier's Liability Act, which states:

Occupiers' duty of care

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.

**24**  Counsel are agreed that the applicable law is succinctly set out in Navaratnaraja v. Westfair Foods Ltd., [*[1998] B.C.J. No. 1576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2FS-00000-00&context=) (29 June 1998), New Westminster No. S035121 (B.C.S.C.) at [paragraph] 14:

1. the Act does not create a presumption of ***negligence*** against the occupier of the premises whenever a person is injured on the premises and the person must still be able to point to an act or failure to act on the part of the occupier which caused the injury;
2. the Act imposes an affirmative duty on occupiers to take reasonable care for the safety of people who are permitted on the premises and the factors which are relevant to an assessment of what constitutes reasonable care will be specific to each fact situation;
3. the test to be applied is one of reasonableness and not one of perfection;
4. it is not sufficient for the party on whom the onus of proof lies to seek an affirmative finding of fact based on a want of evidence on both sides;
5. the Act does not absolve a visitor of their duty to take reasonable care; and
6. one must apply the test as to whether or not the danger was foreseeable and the question of foreseeability is not to be tested by looking at the unfortunate injury and then say it was foreseeable merely because it happened.

[Footnotes omitted].

**25**  An occupier may be found to have taken reasonable care if it can show it has implemented a regular and reasonable cleaning routine and if it can show the routine was being complied with in the circumstances: (Rees v. B.C. Place Ltd., [*[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=) (9 December 1986), Vancouver No. C850843 (B.C.S.C.); 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.)).

**26**  The steps that the defendant took to see that persons on the premises would be reasonably safe in using the premises included:

1. instructing employees that when they see any substance on the floor, 'don't pass it up, pick it up';
2. requiring that sweeps be carried out at regular intervals and recorded in department sweep logs;
3. requiring supervisors to review sweep logs weekly and to forward the logs to managers weekly to ensure compliance;
4. having store managers and assistant managers spend much of their time walking the floors;
5. placing a large awning over the store's entrance and exit to provide protection from the rain; and
6. placing mats at the entrance to the store.

**27**  It is argued that on a Saturday before Halloween when there are an estimated 1,000 customers shopping throughout the day during heavy rain, there is a logical inference that customers track water through the store. The plaintiff complains that the store's system of sweeping the Front End every hour, and the Beauty Department every two hours was not only unreasonable, it was not followed.

**28**  The Front End sweep log showed that the defendant's employee, Tara Fenimore, failed to comply with the store's policy of sweeping ever hour because she swept at 4:15, 5:30 and 7:00 p.m. the day of the accident. Ms. Fenimore completed her sweep at 7:00 p.m. which is around the time that Mrs. Crudo slipped and fell.

**29**  The sweep log for the Beauty Department shows that it was last swept by Jesse Wild at 6:05 p.m..

**30**  Both Ms. Fenimore and Ms. Wild indicated the area that they swept on a plan of the store. They both swept the area Mr. and Mrs. Crudo covered as they entered the store and walked towards the beauty bins.

**31**  On Saturday evening when the Crudos were at the store, Ms. Kropf spent almost all of her time on the sales floor to ensure, among other things, that the cleaning and maintenance standards were being met.

**32**  It is argued that there ought to have been signs or cones warning Mrs. Crudo that the floors were slippery. Mr. and Mrs. Crudo say they saw no cones or signs at the entrance of the store warning them that the floor might be wet. However, Mrs. Crudo admitted that she did not need a sign to warn her that the floors might be damp if it was raining outside.

**33**  It is argued that the store ought to have been swept more frequently than every hour or two hours because of the amount of traffic in the store and the heavy rains. However, it would have made no difference because there was nothing on the floor where Mrs. Crudo slipped and fell. The accident most likely happened the way Mrs. Crudo relayed the incident to Ms. Kropf: all of a sudden her feet just went out from under her.

**34**  I cannot on the evidence attribute any liability on the part of the defendant.

Damages

**35**  Mrs. Crudo's neck and shoulder pain resolved by early 2000.

**36**  There is an issue as to whether Mrs. Crudo's lower back pain is related to the slip and fall on October 30, 1999. Mrs. Crudo has pre-existing degenerative discs in her lower back. In the early 1970's she underwent a low back spinal fusion. Some time before 1993, Mrs. Crudo was picking something up when her back went out and she had to lie on the floor for eight days. As a result she saw a chiropractor on a monthly basis to deal with her back. At the time of the accident, she was symptom free.

**37**  In early December 1999 Mrs. Crudo was washing her hands when she says "in my back went like shock and I couldn't move". Mrs. Crudo again lay on the floor for eight days. She sustained a herniated disc in her lumbar spine.

**38**  Mrs. Crudo saw her family physician Dr. Ron Collette on a fairly regular basis before and after the slip and fall of October 1999. Dr. Collette referred Mrs. Crudo to Dr. Mark Matishak, a neurosurgeon who she saw on five occasions from June 23, 2000 to August 2, 2002. Dr. Collette is of the opinion that her herniated disc was related to the slip and fall. I share the same view.

**39**  Mrs. Crudo's back problems seemed to have eventually resolved sometime in 2002.

**40**  Mrs. Crudo also tore the cartilage in her right knee as a result of the slip and fall. In September 2000 she underwent an arthroscopic partial medial meniscectomy and debridement. Consistent with Mrs. Crudo's evidence of her complaints, Dr. Peter Kokan, an orthopaedic surgeon, states in his report that patellofemoral pain is brought on by activities such as getting up from a lower chair, going up or down the stairs, running or jumping. The pain can make kneeling and crouching difficult and can become very severe. Mrs. Crudo continued to complain of severe pain in her knee and underwent further surgery in August 2004.

**41**  While Mrs. Crudo can now walk a mile or two each day aided by a brace, her right knee continues to give her problems. It has been more than five years since the accident, and Mrs. Crudo still can not go on long hikes, go dancing, do all of her housework, work in her garden, bend or kneel down, or play with her grandchildren as she would like. However Dr. Kokan is his report of November 30, 2004 expects her to have a near full recovery. From time to time she may continue to have residual anterior knee symptoms when she climbs stairs or tries to kneel or crouch.

Conclusion

**42**  On behalf of the plaintiff Mrs. Crudo, it is argued that damages should be in the range of $50,000 to $60,000. The defendant contends that the damages should range between $30,000 to $50,000. If I had found the defendant liable for Mrs. Crudo's injuries I would have awarded her $50,000.

**43**  I have sympathy for Mrs. Crudo because it is clear the consequences of the accident have adversely affected the quality of her life. However on the evidence and the law, I do not find the defendant liable for the accident. The action is therefore dismissed with costs.

LOO J.

**End of Document**

[***Davidson v. Kokanee Park Marine Ltd., [2001] B.C.J. No. 1316***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63TP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nelson, British Columbia

Humphries J.

Heard: May 22 - June 5, 2001.

Judgment: June 26, 2001.

Nelson Registry No. 6724

**[2001] B.C.J. No. 1316** | 2001 BCSC 940 | 106 A.C.W.S. (3d) 140

Between Douglas Davidson, plaintiff, and Kokanee Park Marine Ltd., Leonard Cassimar Filbert and Catherine Mary Filbert, defendants

(29 paras.)

**Case Summary**

**Practice — Costs — Party and party costs — Special orders — Increase in scale of costs, difficulty and complexity of proceedings — Judgments and orders — Enforcement of judgments — Stay of — Considerations.**

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| Application by Davidson for increased costs. Application by the defendant Kokanee Park Marine for a stay of execution of the judgment in favour of Davidson. Davidson entered into an apprenticeship agreement with Kokanee in 1990. He was injured on December 2, 1990. That day was a Sunday. Davidson's work period for the year had ended. He filed a claim with the Workers' Compensation Board in March 1991. In his application Davidson stated that he sustained injuries in two falls. Benefits were paid. In 1996 Kokanee obtained a ruling from the Board that Davidson was not a worker at the time of the accident. At that time Davidson informed the Board that most of his injuries occurred when he lifted a motor. Davidson appealed the ruling, abandoned the appeal and commenced this action. Kokanee moved to dismiss the action based on the Limitation Act. It claimed that the claim was tort-based and did not arise out of an employment relationship. This application was dismissed. Kokanee unsuccessfully attempted to adjourn the trial until the Board decided whether Davidson had the right to bring it. The statement of claim stated that Davidson sustained injuries when he lifted the motor and when he fell. At trial Davidson based his claim on an employment relationship. The jury found that Kokanee was liable in ***negligence*** or under the Occupiers Liability Act. The individual defendants, who were principals of Kokanee, were also found to be partially liable. Davidson was awarded judgment for $578,000. He sought costs at a scale higher than scale 3. The stay of execution was for the Board to redetermine whether Davidson was a worker at the time of the accident and whether he was injured in the course of employment. After the trial the parties agreed that the injuries occurred in an employment relationship. Davidson was unable to work because of his injuries.  HELD: Both applications were allowed.  Davidson was awarded costs at scale 4. Execution of the judgment was stayed for six months. The defendants were to pay Davidson $3,000 per month until the stay was lifted. The payments would be deducted from the judgment, if it was valid. The defendants were required to post an irrevocable letter of credit for the full amount of the judgment. The positions of both parties changed substantially from time to time. Changes in Davidson's position were caused by the decisions of the Board. The defendants' conduct to defend this confusing claim was not reprehensible. Davidson was not entitled to special costs. He was awarded increased costs because this action involved unusual issues that necessitated several difficult motions and arguments at various stages. There were cogent reasons to grant a stay. If the Board decided to deal with the merits Davidson could be considered a worker and the individual defendants would also be considered as employees. If this occurred the court would have lacked jurisdiction to conduct the trial. The court would not require the parties to incur additional expenses in connection with the recovery of the judgment until this issue was settled. The interim payments were to enable Davidson to address their financial problems. |

**Statutes, Regulations and Rules Cited:**

Limitation Act.

Occupiers Liability Act.

**Counsel**

T.W. Pearkes, for the plaintiff. J.M. Moshonas and T.R. Darby, for the defendants.

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| **HUMPHRIES J.** |

**1**   This trial commenced May 22, 2001 and concluded on June 5, 2001 with the jury's verdict. According to the findings of the jury, Mr. Davidson was injured on December 2, 1990 by lifting a motor, falling from a loader, falling near the boat dock on the defendants' property, and falling near a propane tank. It was the plaintiff's theory at trial and in the pleadings that lifting the motor and falling near the propane tank engaged the liability of the defendants. The jury found each of the defendants to have breached a duty of care to Mr. Davidson, either in ***negligence*** or under the Occupiers Liability Act and apportioned liability 25% to Mr. Filbert, 10% to Mrs. Filbert, 40% to Kokanee Park Marine, and 25% to Mr. Davidson himself. Damages totalling $826,000 were reduced by a further 30% for failure to mitigate.

**2**  The plaintiff, having been denied an earlier request to amend the pleadings to seek aggravated and punitive damages, seeks special costs on the basis that the defendants' conduct during the litigation aggravated the plaintiff's condition, or in the alternative, increased costs, or costs at a Scale higher than Scale 3. No authorities or new materials were filed in support of this application.

**3**  The defendant seeks a stay of execution of the judgment to allow a determination to be made by the Workers' Compensation Board (WCB) as to whether the plaintiff was a worker at the time of the incident, and whether he was injured in the course of his employment.

BACKGROUND

**4**  The plaintiff entered into an Apprenticeship Agreement with Kokanee Park Marine Ltd., the corporate defendant, in 1990. The plaintiff was injured on December 2, 1990. December 2 was a Sunday and the plaintiff's work period for that year had ended. He was scheduled to go on a training course for his apprenticeship program the next day. He was unable to go because of the injury. He filed a claim with the WCB in March of 1991. This claim was supported by his employer. Benefits were paid. In 1996, the employer was successful in seeking a re-adjudication from the WCB, obtaining a ruling that the plaintiff was not a worker at the time of the accident. The plaintiff appealed, abandoned the appeal and started this action.

**5**  In 1999, by Stated Case, the defendants applied to dismiss the action based on the Limitation Act. During argument, the defendants took the position that the claim was tort-based rather than one arising out of an employer/employee relationship. The application was dismissed (see Davidson v. Kokanee Park Marine Ltd. et al, [*174 DLR (4th) 568*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4GG-00000-00&context=)). The defendants subsequently amended their defence to plead the Workers Compensation Act, taking the position that the plaintiff was indeed a worker.

**6**  In March of 2001, the defendants sought an adjournment of the trial on the basis that the action should not proceed until the issue of whether the plaintiff had standing to bring it, (that is, whether or not he was a worker injured in the course of employment), was determined by the WCB. At that time, the defendants were in the process of completing their submissions to WCB in support of this position. The request for an adjournment was refused. Mr. Justice McEwan's reasons for the refusal set out the history of this matter in some detail (Davidson v. Kokanee Park Marine Ltd. et al, (March 6, 2001), [*2001 BCSC 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2SP-00000-00&context=), [*[2001] B.C.J. No. 633*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2SP-00000-00&context=)). In April of 2001, the defendants filed their submissions with the WCB seeking a determination that the plaintiff was a worker at the time of the incident and was injured in the course of his employment.

**7**  The defendants renewed their application for a stay before me at the commencement of the trial on May 22, 2001. By this time, the WCB had stipulated the order in which submissions for the determination would be received, though no time-table was set, other than that the defendants' supplementary submissions were to be filed by May 22, the first day of the trial (counsel advises me those submissions have been filed).

**8**  The plaintiff opposed the stay application on several bases: that the WCB certificate currently being sought by Kokanee Park Marine Ltd. does not relate to the individual defendants; that the action raises an occupiers liability issue which is not addressed in the requested certificate and which is separate from the worker/employer issue; that the state of the WCB proceedings was little advanced from the time of the adjournment application; and that there is an extant decision that the plaintiff is not a worker which is unlikely to be overturned for the reasons contained in McEwan J.'s reasons of Marcy 6, 2001; and based on this extant ruling, Mr. Davidson has been pursuing his litigation for five years. I indicated I had strong misgivings, but allowed the trial to proceed. My reasons for this ruling are on file.

**9**  As the trial commenced and I heard the evidence, I began to be concerned that the plaintiff's position was clearly that he was a worker at the time of the incident. At the end of four days of trial, during a discussion with counsel as to the nature of the duty of care upon which I would be called to charge the jury (the pleadings offering little if any assistance), counsel for the plaintiff told me that the context of the claim was defined by the employee/employer relationship, and the duty upon which he relied is that of a master to his servant. This caused me even further concern, but counsel later characterised the duty in a more general fashion, that is the duty owed by a "neighbour", with special reference to the Apprenticeship Agreement in effect between Mr. Davidson and the defendants, although he continued to insist that the Workers Compensation Board Regulations be put to the jury to define the extent of the duty. I refused to do so.

**10**  By the end of the trial, it appeared to me that, call it what you might, the plaintiff was relying on an employee/employer relationship to found the duty of care, at least for the motor-lifting incident, which incident had become the main focus of the action.

**11**  It became apparent as the trial advanced that there were problems facing the plaintiff with respect to the motor-lifting incident, and as a result, counsel for the plaintiff wished to have the most recent submissions to WCB entered as an admission against the defendant. For several years following the initial claim the cause of injury was assumed to be a fall, based on the information provided by the plaintiff when he filed his claim some three or four months after the accident. The information in the WCB claim filled out by Mr. Davidson on March 15, 1991, was that he was injured on December 2, 1990 by two falls - the first while walking out of the shop to the boat ramp and the second at the propane tank. The supporting form from the employer was signed by Mr. Filbert on April 3, 1991, listing two falls (one in the yard and one near the propane tank), with Mrs. Filbert as a witness. It was not until 1996 that a motor-lifting incident was referred to in a report from WCB, based on an interview with Mr. Davidson, although Dr. Chung, a psychologist from the WCB, had mentioned a strain from lifting a motor during an attempted return to work in 1993.

**12**  Although the jury accepted that Mr. Davidson did injure himself by lifting a motor on December 2, 1990, it is by no means clear to me that the defendants knew that this incident was the foundation of the claim until after they sought the first re-determination in 1995. That ruling is concerned with the fall at the propane tank and does not mention a motor-lifting incident. The discovery evidence read in by the plaintiff from both Mr. and Mrs. Filbert is to the effect that neither had any knowledge of a motor-lifting incident.

**13**  At trial, the plaintiff read in discovery from Mrs. Filbert in which she said Mr. Davidson was not providing a service to Kokanee Park Marine Ltd. and was not entitled to payment by them when he was delivering the propane, which is consistent with the defendants' position in 1995 that Mr. Davidson was not a worker for that particular incident, which appears to be the only one under consideration at that time.

**14**  As for the plaintiff's evidence, for the most part Mr. Davidson would not adopt, deny or explain anything put to him while on the stand, retreating into anger and abusive comments. It is difficult to say what his present position is as to his status on the day in question, but he did testify in direct examination that he suffered an injury while carrying a motor the day before he was to leave for an apprenticeship course in December of 1990. He was not sure if he mentioned it to anyone at the time, although he thought he must have.

**15**  The head mechanic, Lawrence Campbell, called by the plaintiff, testified that he recalled Mr. Davidson complaining to him of back pain a day or so after lifting a motor, but did not recall a complaint at the time the incident occurred. Mr. Campbell was of the view that the incident did not happen on December 2, 1990, but rather earlier in November.

**16**  In 1997, the pleadings were filed and the Statement of Claim mentions a motor-lifting incident and a fall at the propane tank. At trial, the motor-lifting incident was alleged to have been the main cause of the injury, with subsequent falls contributing, if at all, to a much lesser degree. Only the fall at the propane tank was alleged by the plaintiff to engage the liability of the defendants, the other falls simply being manifestations of the nerve damage caused by lifting the motor. Notwithstanding that the emphasis on the motor-lifting incident emerged rather late in the day, the most recent submissions of the defendant to the WCB contain several references to the motor-lifting incident and do not dispute that it happened.

**17**  I raise these issues to show how the positions of both parties have evolved or changed substantially from time to time, both factually and legally, although I recognize that the changes in the plaintiff's legal position have been necessitated by the second ruling of WCB sought by the defendants, who now seek to change their position once again by the present request to the Board. It is true that the defendants raised the "worker" defence somewhat late in the day, and in contradiction to their earlier position, but the plaintiff's position on the facts has evolved substantially since the initial claim was filed, and in material ways, as I have set out above.

**18**  In all the circumstances here, I cannot say the defendants' conduct in defending this confusing claim is reprehensible or in any way deserving of an assessment of special costs; nor am I persuaded there would be an unjust result if costs were assessed under the normal Scales. Whatever may be said about the statute or practice which governs WCB and which allows parties to have issues of this sort visited and revisited into the future, within the context of the litigation, all that can be said is that the defendants have defended the case vigorously, using any legitimate defence available to them. Nevertheless, the issues in this trial have taken it somewhat beyond a "run of the mill" action, necessitating a number of difficult motions and arguments at various stages. For that reason, I would order costs at Scale 4.

**19**  The context of the competing WCB claim and ongoing action also underlies the stay application. It was argued that a stay should be refused because Mr. Davidson should not be expected to understand that execution of his judgment could be stayed following the jury verdict, especially since the application had been denied twice before. It is common ground, however, that if the plaintiff's anticipated arguments before the WCB of, inter alia, jurisdiction over the individual defendants and estoppel do not succeed, and the WCB does decide that Mr. Davidson was a worker and was injured in the course of his employment, then he had no standing to bring the action.

**20**  I can only assume that Mr. Davidson had the legal positions upon which his case is based explained to him thoroughly, and that he instructed his counsel to press on with the litigation regardless of the issue as to lack of standing. From Mr. Davidson's presentation in court, I can accept that it is difficult to explain contingencies to him without being faced with dismissive anger, but this cannot prevent me from exercising my discretion fairly and judicially.

**21**  When the trial began, the outcome was, of course, unknown. In submissions at the outset, I was told by counsel for the plaintiff that there was an issue as to whether Mr. and Mrs. Filbert would be covered by any WCB ruling that might eventually be made. There also appeared to be an issue on the pleadings, subsequently confirmed in the evidence adduced at trial, as to whether the slip and fall at the propane tank was a matter falling under the Occupiers Liability Act, and not arising within the scope of employment.

**22**  I have now heard the evidence and have the benefit of the jury's decision that there was a motor-lifting incident on December 2, 1990. The jury also found that the motor-lifting incident caused the majority of the damages, as they assigned only 10% of the liability to Mrs. Filbert for the fall at the propane tank, with arguably an equivalent amount to Kokanee Park Marine Ltd. for that incident. As well, I now know that, notwithstanding the presently extant ruling of WCB that Mr. Davidson is not a worker and the arguments he will make before the Board on the re-adjudication, all parties take the position the injury-causing event occurred in an employee/employer relationship (with the possible exception of the slip and fall at the propane tank).

**23**  The considerations underlying whether to grant a stay are now more cogent, even though the trial has completed.

**24**  It may well be that the WCB will accede to the plaintiff's arguments and refuse to re-open the matter, for the reasons outlined in McEwan J.'s reasons of March 2001. It may be that the individual defendants will not be covered by any ruling that is eventually made. However, I cannot ignore the evidence that emerged during the trial. There is a real possibility that, if WCB decides to deal with the merits, Mr. Davidson will be held to be a worker, and Mr. and Mrs. Filbert, if not designated as employers, would be designated as other employees of Kokanee Park Marine. If this occurs, the trial we have just completed was conducted without jurisdiction (see Hazell v. Toews et al., [*[1997] B.C.J. No. 2495*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M22B-00000-00&context=) (B.C.S.C.) and cases cited therein).

**25**  It would be foolish to put the parties to the expense of further litigation over the recovery of a judgment that was obtained by a plaintiff who had no standing to bring the action if a stay for a defined period may settle the issue.

**26**  The defendants filed their supplementary submissions on May 22, 2001. There is no schedule for the timing of subsequent submissions, but the Board requires them from the Crown because of an issue arising from the Apprenticeship Agreement, and from the plaintiff. In the material before the court, WCB has indicated they require 90 days for a decision after submissions are received.

**27**  Execution of the judgment, with the exception of the order for costs, will be stayed until December 7, 2001. This date may be adjusted by agreement of the parties or by order of the Court.

**28**  The evidence revealed that the Davidsons are in financial straits as a result of Mr. Davidson's inability to work. Defendants' counsel suggested an interim monthly payment if a stay were granted. This was supported by plaintiff's counsel, who nevertheless maintained his strong objection to any stay at all. Neither counsel suggested any amount. There will be an interim payment of $3000/month to the plaintiff. I will not require the plaintiff to post any security for this. The defendants should have brought their request to the WCB much earlier, and it is their fault that the plaintiff has to wait during the period of the stay. If the damage award stands, the amount of the interim payments will be deducted from it. I have no information as to what will happen if the WCB assumes jurisdiction over the matter, so impose no further condition on the interim payment at this time. This may be spoken to further if necessary, or addressed in writing through the Registry.

**29**  The defendants will post an irrevocable letter of credit in the full amount of the judgment, without prejudice to either party's right of appeal.

SUMMARY

1. Costs to the plaintiff at Scale 4.
2. Execution of the judgment, with the exception of the order for costs, is stayed until December 7, 2001, subject to further court order or agreement.
3. The defendants will pay to the plaintiff an amount of $3,000/month until the stay is lifted, to be deducted from the damage award, if it stands.
4. The defendants will post an irrevocable letter of credit for the full amount of the judgment, without prejudice to either party's right of appeal.

HUMPHRIES J.

**End of Document**

[***Delta Lion Pub & Bistro Ltd. v. Delta (Corporation), [2003] B.C.J. No. 2547***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0K0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Beames J.

Heard: October 7, 2003.

Oral judgment: October 10, 2003.

Vancouver Registry No. S03428

**[2003] B.C.J. No. 2547** | 2003 BCSC 1668 | 45 M.P.L.R. (3d) 99 | 127 A.C.W.S. (3d) 766

Between Delta Lion Pub & Bistro Ltd. and Peter Mahony, plaintiffs, and Corporation of Delta, defendant

(30 paras.)

**Case Summary**

**Land regulation — Land use control, zoning bylaws — Enactment and interpretation — Enforcement — Estoppel.**

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| Application by the plaintiff, Delta Lion Pub, for judgment on its claim for declaratory relief from the defendant Corporation of Delta. The Pub had been approved for a licence to operate a cold beer and wine store. It had been assured by Delta that this was allowed under the current zoning. This was an error, as licensee retail liquor stores were an excluded use. The Pub was closed down and construction began on the intended liquor store. Delta then issued a stop work order, citing a zoning infringement. The Pub argued that the zoning was discriminatory, as it would allow government liquor stores but not licensee liquor stores. It also argued that Delta was estopped from relying on the bylaw. In addition to the relief sought in this application, the Pub advanced a claim in ***negligence*** in the action.  HELD: Application dismissed.  The bylaw was not ultra vires on the ground of discrimination. Zoning bylaws were by nature discriminatory. However, this was not unlawfully discriminatory. Delta was not estopped from relying on the bylaw. |

**Statutes, Regulations and Rules Cited:**

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=).

**Counsel**

N.P. Kent, for the plaintiffs. M. Carroll, for the defendant.

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| **BEAMES J. (orally)** |

**1**   The plaintiff corporation and the individual plaintiff, who together with his wife owns another corporation which owns and operates the plaintiff corporation, have brought an action against the defendant municipality seeking declaratory relief, general damages and special damages. The plaintiffs have applied, pursuant to Rule 18A, for judgment on the issue of entitlement to the declaratory relief sought. The parties agree that the plaintiffs' claims for damages in ***negligence*** and misrepresentation will be dealt with at a subsequent proceeding, presumably by way of a normal trial.

**2**  The plaintiff corporation operates a pub in the defendant municipality. Until December 2, 2002, the plaintiff had a Class D licence issued by the Liquor Control and Licensing Branch, which permitted the operation of a neighbourhood pub. In addition to the pub, and in space immediately contiguous to the pub, the plaintiff corporation, as I understand it, also operated a restaurant and catering business.

**3**  On August 12, 2002, the provincial government announced that, for the first time since 1988, holders of Class D licences, amongst others, could apply for a Class G licence, which would permit the operation of a cold beer and wine store. Applications had to be made before November 29, 2002.

**4**  The individual plaintiff had long hoped to obtain such a licence and operate a cold beer and wine store at the pub's location. Knowing that the long-standing moratorium on Class G licences was likely to be lifted, the individual plaintiff attended in early August at the Community Planning and Development Department of the defendant and made inquiries as to whether the zoning of the property on which the pub operated allowed the operation of a cold beer and wine store. He was told it did.

**5**  Several days later, on August 12, 2002, the individual plaintiff completed the application for a Class G licence. On August 13, 2002, he re-attended at the defendant's planning department and was given assurances about zoning, as well as some documents confirming zoning, which he sent to the Liquor Control and Licensing Branch, together with his application.

**6**  The plaintiffs' application for a Class G licence was approved, and the plaintiffs applied for and obtained a building permit from the defendant for the necessary renovations and construction for a cold beer and wine store. The restaurant and catering business was then closed and construction started on the new store.

**7**  On January 24, 2003, an employee of the defendant attended at the business and attached to the premises a stop-work order, the defendant having discovered that a cold beer and wine store was not, in fact, a permitted use under the zoning bylaw pertaining to the property on which the business was located.

**8**  The plaintiffs seek, by way of the present application, a declaration that the bylaw upon which the defendant relies is ultra vires, invalid, or otherwise unenforceable against the plaintiffs, and a declaration that the stop-work order is invalid and that the plaintiffs are entitled to continue the construction and then be entitled to operate a cold beer and wine store on the premises in question. If I conclude that the bylaw is valid, the plaintiffs say the defendant should be estopped from enforcing the bylaw.

**9**  The defendant does not dispute the facts as summarized by the plaintiffs' counsel and contained in the affidavit material before me. The defendant acknowledges that the advice given to the individual plaintiff was erroneous and that based on that advice, the plaintiffs commenced construction of a cold beer and wine store. However, the defendant says that the appropriate remedy in this case is damages, as the zoning bylaw is valid, and that the municipality is not estopped by its conduct from enforcing it.

**10**  The property in question is zoned C-1, "Core Commercial". As of October 1990, the bylaw which defined zone C-1 was Bylaw 2750. Bylaw 2750 provided that permitted uses in zone C-1 included "retail trade", which was defined as:

The use of land, buildings and structures for the purpose of buying commodities for resale to the general public for personal or household consumption and shall include food stores, department stores, variety stores, clothing stores, drygoods, hardware, furniture and appliance stores, drug stores, florists, stationery, jewellery and specialty stores, but excludes establishments selling aeroplanes, boats, trailers, junk and building supply dealers.

**11**  In November 1990, Bylaw 4475 was adopted by the defendant. It amended Bylaw 2750 by deleting the definition of "retail trade" that I just quoted and substituting a new definition. For the purposes of this action, the portion of the new definition which is of interest is the addition, to the excluded uses, of "Licensee Retail Stores as defined by the Liquor Control and Licensing Act".

**12**  Bylaw 4475 also created a new zone, C-1A, which expressly allowed, as one of its permitted uses, "Licensee Retail Stores as defined by Liquor Control and Licensing Act".

**13**  It is common ground between the parties that although the Liquor Licensing Regulations, promulgated under 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=), make reference to and use the term "licensee retail stores" in some places, neither the Act nor the Regulations define, strictly speaking, that term.

**14**  Therefore, the plaintiffs say, as their first argument, that Bylaw 4475, as it amends Bylaw 2750's definition of "retail trade", is void and should be quashed for vagueness and/or uncertainty. It is clear in law that bylaws can be declared void for vagueness and/or uncertainty.

**15**  The B.C. Court of Appeal has set out the test for vagueness in Service Corporation International (Canada) Ltd. v. City of Burnaby, [*[2001] B.C.J. No. 2576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M45J-00000-00&context=), [*2001 BCCA 708*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M45J-00000-00&context=) at para. 24 as follows:

It [the Supreme Court of Canada in R. v. Nova Scotia Pharmaceutical Society, *[1992] 2 S.C.R. 606*] established that the test for the degree of imprecision required before an enactment should be declared void for vagueness and uncertainty was whether, in all the circumstances, the provision in question gave "an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria."

**16**  The Court of Appeal, in the same decision, approved the reformulation of that test by Romilly J. in Sundher v. Surrey (City) [*(1995), 30 M.P.L.R. (2d) 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G26N-00000-00&context=) B.C.S.C. at para. 37:

...the test for vagueness is whether the provision in the by-law is so uncertain that it does not provide an adequate basis for reaching a conclusion about its meaning by reasoned analysis applying legal criteria and taking into account the context of the legislative enactment.

**17**  The question before me, then, is whether the expression "Licensee Retail Stores, as defined by Liquor Control and Licensing Act" provides an adequate basis for reaching a conclusion about its meaning by reasoned analysis applying legal criteria.

**18**  Clearly anyone reading the portion of Bylaw 4475 which is in question and considering its meaning and application would go first to the legislation referred to, namely the Liquor Control and Licensing Act. That Act must be considered together with its regulations.

**19**  Although there is, as I have said, no definition section which provides a definition expressly for the phrase "licensee retail store", the term is found in several places in the Regulations. Most significantly, in the section entitled "Regulations Applicable to Categories of Establishments" portion of the Regulations, and specifically s. 17, as it was prior to the enactment of Bylaw 4475, created and defined various classes of licences. Section 17 was amended in 1988 by adding s. 7 which read, at least in part, as follows:

1. A "G" licence may be issued for a licensee retail store to

...

1. a neighbourhood...pub...

and the following general regulations apply:

1. the sale of liquor shall be restricted to B.C. beer, wine, cider and coolers;
2. the hours of sale shall be between 9 a.m. and 11 p.m. from Monday to Saturday and between 11 a.m. and 11 p.m. on Sunday;
3. minors accompanied by a parent or guardian shall be permitted to be present;
4. packaged snacks and liquor related items may be sold;
5. the maximum allowable floor space (excluding refrigerated space) shall not exceed 1 000 square feet;
6. prior municipal approval for the licence obtained;
7. ...no games or entertainment shall be permitted.

**20**  In 2002, the Regulations, as they then stood, included provisions of two classes of licences for a licensee retail store, namely Class G and Class H, both of which were subject to general regulations similar to those promulgated in 1988 concerning hours of operation, maximum allowable floor space, permitting minors accompanied by parents or guardians to be present, prohibiting consumption of liquor within the premises and the like.

**21**  As far as I have been able to find, the only reference to licensee retail stores in the Act or the Regulations are references to such entities being permitted by the Liquor Control and Licensing Board through the issuance of a Class G or H licence.

**22**  It is clear, in my view, from a reading of the Regulations, that a licensee retail store is one which can be operated under a Class G or H licence issued to a licensee, which is a defined term, and which establishment is subject to the regulatory restrictions concerning its operation, to which I have referred.

**23**  It is of note, in my view, in a contextual review of the circumstances, that "licensee retail store" is also a term which appears to have a clear trade meaning within the liquor licensing field. The provincial government corresponded with "All Licensee Retail Store Applicants" about "new... applications for Licensee Retail Stores (LRS)". All of the applications completed and submitted by the plaintiffs for the Class G licence were entitled, or referenced, "Application for a Licensee Retail Store (LRS)". The plaintiffs' own cover letter to the provincial government referenced an "Application for a Licensee Retail Store".

**24**  In the context of the regulation and control of liquor-selling establishments, I am satisfied that Bylaw 4475, and specifically its reference to licensee retail stores, provided an adequate basis for determining its meaning. Consequently, I do not find that the bylaw is vague or uncertain such as to render it void or invalid.

**25**  The plaintiffs next submit that Bylaw 4475 is ultra vires the defendant on the basis that it is discriminatory in that it excludes licensee retail stores from C-1 zoned property, but it does not expressly exclude other kinds of retail liquor outlets, such as government liquor stores.

**26**  As the Court of Appeal stated in Petro-Canada v. North Vancouver (District) [*(2001), 17 M.P.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2M6-00000-00&context=) at 6:

Zoning bylaws by their very nature are inherently discriminatory. They are invalid only if they are unreasonably discriminatory...

The type of discrimination which is commonly found to be unreasonable or prohibited is discrimination against specific users versus discrimination against certain uses.

**27**  If the defendant's Bylaw 4475 purported to distinguish between and differently regulate or treat several neighbourhood pubs, for instance, or several cold beer and wine stores, then it might violate the principle of impartiality and non-discriminatory regulation of uses. However, all licensee retail stores are treated alike under Bylaw 4475. That other kinds of businesses, such as government liquor stores, may be permitted on C-1 zoned property does not make the bylaw unlawfully discriminatory, in my view. There may well be valid and legitimate municipal objectives which are met by distinguishing between the two, such as traffic issues, parking issues, issues related to hours of operation and other factors which may affect neighbourhoods generally. Consequently, I do not find that Bylaw 4475 is ultra vires on the ground of discrimination.

**28**  Finally, I turn to the plaintiffs' argument that the defendant should be estopped from enforcing Bylaw 4475 as against the plaintiffs. It is well-established law that even where a municipality has previously permitted non-compliance with a bylaw in the past, it is not estopped from subsequently enforcing its bylaws. As the Court of Appeal said in Langley (Township) v. Wood [*(1999), 2 M.P.L.R. (3d) 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1V8-00000-00&context=):

As a general rule, municipal rights, duties and powers, including the duty to carry out the provisions of a statute, are of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel...

The right of a Municipality to carry out its bylaws and policies is well established.

**29**  The case relied upon by the plaintiffs on the issue of estoppel, Harwood Industries Ltd. v. Surrey (District of) [*(1991), 60 B.C.L.R. (2d) 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X3D0-00000-00&context=) (B.C.S.C.) is, in my view, distinguishable. In that case, the court was asked to make a declaration as to the effect of a vote which had been taken at a Surrey council meeting where one alderman had declared a conflict of interest and left the room for the vote. The issue before the court was whether that alderman had abstained, which would lead to one outcome, or whether he was "not present and did not vote", which would lead to another outcome. The court in Harwood found the municipality was estopped from raising a certain defence in the action before the court. That case was not about the enforcement of bylaws, and I do not find it of assistance to me, where the plaintiffs before me are seeking a determination that the municipality is estopped from enforcing Bylaw 4475.

**30**  On the law, therefore, and not withstanding the admitted erroneous advice provided by the defendant to the plaintiffs, I have concluded that I must dismiss the plaintiffs' application for declaratory relief.

BEAMES J.

**End of Document**