[***Douez v. Facebook, Inc., [2014] B.C.J. No. 1051***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2P3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.A. Griffin J.

Heard: November 25-27, 2013; April 17, 2014; February 11,

March 7, March 10, April 2 and May 7, 2014 by additional

written submissions (Plaintiff); February 28 and May 12 by

additional written submissions (Defendant).

Judgment: May 30, 2014.

Docket: S122316

Registry: Vancouver

**[2014] B.C.J. No. 1051** | 2014 BCSC 953 | 53 C.P.C. (7th) 302 | 313 C.R.R. (2d) 254 | 2014 CarswellBC 1487

Between Deborah Louise Douez, Plaintiff, and Facebook, Inc., Defendant

(370 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Class or representative actions — Certification — Common interests and issues — Definition of class — Representative plaintiff — Application by B.C. Facebook user for certification of action against Facebook as class proceeding allowed — Privacy Act claims stemming from alleged unauthorized use of users' names and likenesses in advertising were triable in B.C. — Claims certified on behalf of users whose names and likenesses used in this manner between specific dates — Common issues identified relating to consent, damages and interest — Numerous claims best determined in class proceeding — Class Proceedings Act, ss. 4, 29.**

**Conflict of laws — Jurisdiction — Forum conveniens — Application by Facebook for order declining jurisdiction over proposed class proceeding by B.C. Facebook user dismissed — Facebook located in California and users had to agree to terms of use including forum selection clause indicating California had jurisdiction over disputes — Privacy Act trumped this clause, providing B.C. court with exclusive jurisdiction over claims Facebook used likenesses and names of B.C. users in advertising without consent — Privacy Act, ss. 1, 2, 3, 4, 5.**

**Information technology — Personal information and privacy — Protection of privacy — Privacy legislation — Application by B.C. Facebook user for certification of action against Facebook as class proceeding allowed — Privacy Act claims stemming from alleged unauthorized use of users' names and likenesses in advertising were triable in B.C. — Claims certified on behalf of users whose names and likenesses used in this manner between specific dates — Common issues identified relating to consent, damages and interest — Numerous claims best determined in class proceeding — Privacy Act, ss. 1, 2, 3, 4, 5.**

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| Application by Douez for certification of her action against Facebook as a class proceeding. Facebook asked the B.C. court to decline jurisdiction over the claim. Facebook operated a social networking website based out of California. Its users had to agree to terms of use providing that California law applied to disputes that would be dealt with in California courts. Douez was a B.C. resident and Facebook user. She took issue with the use of her name and likeness in certain Facebook advertising targeted to her network of Facebook friends, all without her knowledge and consent. She argued this violated her privacy. She sought certification of her action as a class proceeding. The proposed plaintiff class included all Facebook users resident in B.C. whose images and information were used in the same manner without their consent.  HELD: Application by Douez allowed; application by Facebook dismissed.  The Privacy Act conferred exclusive jurisdiction to the B.C. Court to hear Douez's claim brought in relation to the Act. The Act overrode the forum selection clause in the terms of use. It was more convenient to examine the circumstances of the plaintiff in B.C. than in California. It would be easier to review Facebook records in B.C. than to force Douez to travel to California to pursue her claim. The proposed plaintiff class was not overly broad but needed to be limited temporally. The plaintiffs, as long as they used their real names and likenesses, would be identifiable. Those who did not could be excluded from the plaintiff class. Common issues were identified as to whether the Privacy Act applied, whether users consented to the use of their names and likenesses as part of the Facebook terms of use, whether users were entitled to damages, whether punitive damages were appropriate, and whether Facebook was liable for interest on any damages award. A class proceeding was the preferable procedure, given the sheer number of individual claims that could overwhelm the court system unless a class proceeding was available. Douez was an appropriate representative plaintiff. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 11-2*, Rule 21-8

Business Corporations Act, *SBC 2002, CHAPTER 57*,

Business Corporations Act, [*S.N.B. 1981, c. B-9.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-4KF1-FBFS-S3J1-00000-00&context=),

Business Practices and Consumer Protection Act, [*SBC 2004, CHAPTER 2, s. 172*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JK4W-M0K8-00000-00&context=)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8

Class Proceedings Act, [*RSBC 1996, CHAPTER 50, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TBM-3RN1-FBV7-B0M1-00000-00&context=)(2), s. 29(1), s. 29(2)

Court Jurisdiction and Proceedings Transfer Act, [*SBC 2003, CHAPTER 28, s. 11*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FGJR-216V-00000-00&context=), s. 12

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

Infants Act, [*RSBC 1996, CHAPTER 223, s. 19*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FF1-DXWW-213K-00000-00&context=)

Interpretation Act, *RSBC 1996, CHAPTER 238, s. 29*

Marine Liability Act, [*S.C. 2001, c. 6, s. 46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9P1-JF75-M0R7-00000-00&context=)(1)

Privacy Act, [*RSBC 1996, CHAPTER 373, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B1KS-00000-00&context=), s. 1(2), s. 1(3), s. 2, s. 3(2), s. 4, s. 5

Securities Exchange Act, 15 U.S.C. s78a (1934),

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Counsel for Defendant: Tristram J. Mallett, Sandeep Joshi.

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**APPENDIX "A"**

**Reasons for Judgment**

Application for Certification

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| **S.A. GRIFFIN J.** |

**Introduction**

**1**  Do British Columbian users of social media websites run by a foreign corporation have the protection of BC's *Privacy Act*, *R.S.B.C. 1996, c. 373*? Do the online terms of use for social media override these protections? These are questions at the heart of this proceeding.

**2**  In January 2011 Facebook began making advertising revenue from a product called Sponsored Stories. The plaintiff says that Facebook took the names and images of Facebook users in British Columbia and featured them in advertisements sent to the users' contacts, without the knowledge or consent of the person featured in the ad. The plaintiff says this was a breach of the *Privacy Act* of BC. The plaintiff seeks to certify this proceeding as a class proceeding on behalf of all BC Facebook users featured in the Facebook Sponsored Stories.

**3**  Facebook says that it obtained the express consent of users to feature them in Sponsored Stories, through the terms of use accepted by every user when accessing a Facebook service and other conduct such as the setting of privacy settings. Furthermore, Facebook says that through its terms of use, Facebook users in BC agreed that the jurisdiction and law governing claims would be that of California. Facebook says that this Court ought not to exercise jurisdiction over it.

**Overview**

**4**  The plaintiff, Ms. Douez, is a videographer. She is a resident of Vancouver and has been a member of the Facebook website since June 2007.

**5**  The defendant Facebook, Inc. is a company incorporated in Delaware in the United States of America in 2004. It became a public company in 2012. It operates a social networking website located at www.facebook.com and makes a substantial majority of its revenues from internet advertising. Its head office is in California.

**6**  The plaintiff alleges that Facebook used the names and likenesses of people who were users of Facebook, without their permission, for advertising. It did so by creating a product called "Sponsored Stories".

**7**  Advertisers paid Facebook for Sponsored Stories, which would feature the name and likeness of Facebook users and the advertising logo and other product or service information of the entity which had purchased the advertising service.

**8**  These Sponsored Stories would be sent to the Facebook users' contacts, unbeknownst to the Facebook user whose likeness appears in the ad. For example, a Sponsored Story might go to Deborah Douez's contacts, saying that she liked a certain product, implying that she endorsed others using or buying the product.

**9**  Ms. Douez says that Facebook did not seek or obtain the consent from her or other Facebook users for the Sponsored Stories advertisements, and that this was a breach of s. 3(2) of the *Privacy Act*. That section provides:

It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

**10**  Ms. Douez brings a claim for damages under s. 3(2) of the *Privacy Act* on her behalf and seeks to have the claim certified as a class action for the following class:

All British Columbia Resident persons who are or have been Members of Facebook and whose name, portrait, or both have been used by Facebook in a Sponsored Story.

**11**  Noting that a corporation is a legal "person", and without delving into the question of whether or not s. 3(2) *Privacy Act* claims could even be brought on behalf of a corporation, the plaintiff has clarified that she intends by the above class definition to only include natural persons.

**12**  Facebook says all people using its service had to register as members and accept its terms of use as set out in what it now calls a "Statement of Rights and Responsibilities" (the "Terms of Use"). Facebook says that through the Terms of Use and other disclosure on its website, and by users' own actions such as in setting their "privacy settings", it obtained the express consent of Facebook users to use their names or likenesses in the Sponsored Stories products.

**13**  The plaintiff denies that the Terms of Use disclose the potential use of Facebook users' names and likenesses in Sponsored Stories, and denies that users gave their express consent to such use.

**14**  Facebook argues alternatively that Facebook members gave their implied consent to the use of their names and likenesses in Sponsored Stories. The plaintiff denies that implied consent is a defence under s. 3(2) of the *Privacy Act*. Further, the plaintiff says that no such implied consent was given.

**15**  Thus it is that the issue of consent will be front and centre in the trial of the plaintiff's claim.

**16**  In addition, as a first position Facebook argues that this Court should decline to exercise jurisdiction over this claim. This argument is primarily based on the allegation that under the Terms of Use, registered Facebook users have agreed to a choice of jurisdiction based in California. Further, Facebook argues that by the same clause in the Terms of Use users agreed that California law governs which is a factor the Court should weigh in declining jurisdiction.

**17**  The plaintiff argues that the choice of forum and choice of law clause does not supersede the *Privacy Act*, which grants exclusive jurisdiction to this Court over claims under the *Act*.

**Issues**

**18**  The issues I must decide are:

1. Should this Court decline jurisdiction? If not,
2. Should this Court certify the proceeding as a class proceeding? In this regard:
3. do the pleadings disclose a cause of action;
4. is there an identifiable class of two or more persons;
5. do the claims of the class members raise common issues;
6. would a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues; and
7. is there a representative plaintiff who
8. would fairly and adequately represent the interests of the class;
9. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
10. does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

**1. Jurisdiction**

**19**  Facebook makes a number of submissions in support of its application for an order that the Court decline jurisdiction and stay the action. However, its primary argument is that its standard-form online terms, the Terms of Use, contain a forum selection clause that binds users of the service to adjudicate disputes in the courts of California (the "Forum Selection Clause").

**20**  One of the more recent versions of the Forum Selection Clause provides:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

**21**  Earlier versions referred to a choice of Delaware law, but also referred to the courts of California being the choice of jurisdiction.

**22**  The primary answer of the plaintiff is that the claim is brought pursuant to s. 3(2) of the *Privacy Act*, and that statute confers exclusive jurisdiction on this Court pursuant to s. 4 which provides:

1. Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

**23**  Section 29 of the *Interpretation Act*, *R.S.B.C. 1996, c. 238*, provides that in any enactment "Supreme Court' means the Supreme Court of British Columbia.

**24**  Also relevant is the *Court Jurisdiction and Proceedings Transfer Act*, *S.B.C. 2003, c. 28* [*CJPTA*].

**25**  I pause to note that at times in oral submissions Facebook made assertions that suggested it was confused about the difference between territorial competence and the declining of jurisdiction. However, Facebook has not in fact disputed that this Court has territorial competence over it.

**26**  In the Form 108 Jurisdictional Response filed by Facebook pursuant to Rule 21-8 of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*, it did not check the box asserting that it disputes that this Court has jurisdiction over the defendant; rather, it checked the box submitting that this Court ought not to exercise jurisdiction over the defendant.

**27**  As well, Facebook's jurisdiction application is for an order that the Court decline jurisdiction, it is not seeking an order declaring that this Court does not have territorial competence. This point was previously noted in this proceeding on Facebook's sequencing application: see [*2012 BCSC 2097*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20M3-00000-00&context=) at para. 31.

**28**  In any event, it is clear based on the *Privacy Act* and the BC residency of the plaintiff that this Court does have territorial competence, also known as territorial jurisdiction, over the claim. The issue is whether or not this Court ought to decline to exercise jurisdiction.

**29**  The Court may decline jurisdiction on the basis of either the Forum Selection Clause or the *forum non conveniens* considerations codified by s. 11 of the *CJPTA.* These are separate inquiries: *Viroforce Systems Inc. v. R&D Capital Inc.,* [*2011 BCCA 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S268-00000-00&context=) [*Viroforce*] at para. 14; *Preymann v. Ayus Technology Corp*., [*2012 BCCA 30*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1KG-00000-00&context=) [*Preymann*] at paras. 48-49. Facebook argues both grounds here.

**30**  I will examine the two prongs of Facebook's argument in turn.

**The Forum Selection Clause**

**31**  The British Columbia Court of Appeal in *Preymann* set out the steps in the analysis of whether a court should decline jurisdiction based on a forum selection clause at paras. 43-44:

1. the respondent party relying on the forum selection clause must first establish that it is:
2. valid,
3. clear,
4. enforceable,
5. and that it applies to the cause of action before the court;
6. once that is established, the plaintiff must show "strong cause" as to why the court should not enforce the forum selection clause.

**Has the Defendant Shown that the Clause is Valid, Clear and Enforceable?**

**32**  As for the validity and enforceability of the Forum Selection Clause, the evidence establishes that many members of the proposed class will like be infants, as Facebook allows children to sign up as users from age 13 on. The plaintiff says that at a minimum, the Forum Selection Clause is not valid and enforceable as against infants who will be members of the class.

**33**  However, the defendant submits that the plaintiff herself is an adult and was at the material times in issue in this case. Facebook says that when determining whether to decline jurisdiction, this Court should consider only the plaintiff's claim as it is pre-certification, and that any other potential claims if certified are irrelevant.

**34**  In *Ezer v. Yorkton Securities Inc.*, [*2004 BCSC 487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B28X-00000-00&context=) at para. 29, the court rejected the argument that procedural advantages of the BC *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* [*CPA*], provided "strong cause" to overcome an exclusive jurisdiction clause in a securities contract entered into by the plaintiff. The court's analysis suggested that jurisdiction was to be determined on the basis of the plaintiff's claim, not on the basis of others in the class who might not be subject to the exclusive jurisdiction claim.

**35**  On the other hand, the prospect of a multiplicity of proceedings where the forum selection clause is enforced with respect to only one aspect of a claim can be a factor when considering whether or not to decline jurisdiction on the basis of a forum selection clause: *Magill v. Expedia Canada Corporation and Expedia.ca*, [*2010 ONSC 5247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFC1-FG12-618C-00000-00&context=) at para. 53.

**36**  As for the clarity of the clause, it is found within Facebook's Terms of Use.

**37**  A user must agree to Facebook's Terms of Use when the user registers for a Facebook account. I have not been given an online demonstration, but one version of the Terms of Use, when printed, runs 13 pages long, with the portion dealing with "Governing Law: Venue and Jurisdiction" commencing ten pages after the first page.

**38**  Another version of the Terms of Use as of April 26, 2011, appears to be in very small font and comprised of approximately 18 sections. The Forum Selection Clause set out above in these Reasons is towards the end of these tiny terms, as item 15 under the heading "Disputes".

**39**  I have not heard evidence as to how long it would take the average reader to read Facebook's Terms of Use, or for that matter, the context of that time in relation to every "terms of use" facing an internet user on a daily basis.

**40**  But the obscure nature of a clause in online terms of use has been found in some other cases not to defeat a forum selection clause: see *Rudder v. Microsoft Corp.*, [*[1999] O.J. No 3778*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD81-JX8W-M4WY-00000-00&context=) (Ont. S.C.J.), Supplemental Reasons for Judgment (12 November 1999), Doc. 97-CT-046534CP (Ont. S.C.J.) [*Rudder*]. The *Rudder* case dealt with an intended class proceeding against Microsoft in relation to its MSN service. The claim alleged that Microsoft had charged members and taken payments from their credit cards in breach of contract.

**41**  In *Rudder*, the court rejected the argument that the forum selection clause was too buried within the terms of use to be binding on the plaintiffs. Users were required to click "I agree" accepting the terms of use for the MSN service.

**42**  There was evidence in *Rudder* that Mr. Rudder had the ability to scroll through the entire terms of use when he signed up to use the site. The terms of use contained a forum selection clause in favour of the State of Washington, U.S.A. The court rejected the idea that the plaintiffs could advance a claim based on breach of contract, but then seek to ignore the forum selection clause in the same contract. The court expressly rejected the notion that contracts formed by accepting online terms of use should be any less enforceable than agreements in writing: see paras. 16-17.

**43**  The result in *Rudder* was that the Ontario action was stayed based on the forum selection clause in favour of Washington State.

**44**  It must be kept in mind that *Rudder* was not dealing with a non-contract claim based on a statutory tort where the statute provides that the local court has exclusive jurisdiction. This is the situation we have here.

**45**  In *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, [*2011 BCSC 1196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-623K-00000-00&context=) [*Century 21*], the defendant, a sophisticated media company, argued that giving effect to the plaintiff's "terms of use" would cripple the internet because it would hamper public access. This argument was given short shrift by Punnett J. of this court who held at paras. 118-119:

The defendants argue that what Century 21 provides, in making their Website available to the public, (as opposed to an internal "Intranet"), is merely a grant of access to the site. The defendants' argument may be correct in part; however, when a user accesses a main page that merely places the user at Century 21's door. Entry is an additional step and one that website owners clearly control and users can undoubtedly choose to take.

Taking the service with sufficient notice of the Terms of Use and knowledge that the taking of the service is deemed agreement constitutes acceptance sufficient to form a contract. The act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the Terms of Use if those terms are provided with sufficient notice, are available for review prior to acceptance, and clearly state that proceeding further is acceptance of the terms.

**46**  The court in *Century 21* emphasized that the online contract was between sophisticated commercial parties who employ similar terms of use themselves and who had conceded the reasonableness of the terms of use at issue (at para. 120). The court noted that it was not addressing issues that may face other courts in the future, such as the reasonableness of the terms or the sufficiency of notice. I note that the latter concerns are potential issues in this case.

**47**  Here the defendant has filed evidence indicating that Facebook users must register for an account in order to become Facebook members and that when they do so, they must agree to Facebook's Terms of Use.

**48**  Having considered the evidence and leaving aside the arguments based on the *Privacy Act*, I accept at least on a *prima facie* basis subject to the evidence and arguments at trial, the defendant has shown a case for the validity, clarity and enforceability of the forum selection clause in the Terms of Use as against the plaintiff.

**Has the Defendant Shown that the Forum Selection Clause Applies to Claims under the *Privacy Act*?**

**49**  The defendant also has the burden of showing that the Forum Selection Clause applies to the cause of action, as identified in *Preymann*, above.

**50**  Here the Forum Selection Clause includes any claim, cause of action or dispute the user has with Facebook arising out of or relating to the Terms of Use or Facebook. This language is very wide and is not limited to claims in contract.

**51**  In interpreting the Forum Selection Clause, the ordinary principles of contract interpretation will require consideration of the whole of the contract.

**52**  There is other language in the Terms of Use indicating that Facebook promises to respect local laws. For example, one version of the Terms of Use includes this language:

We [Facebook] strive to create a global community with consistent standards for everyone, but we also strive to respect local laws ... ."

[Emphasis added.]

**53**  The plaintiff argues in effect that this is contractual recognition by Facebook that where local laws oust the contract or are inconsistent with the contract, then the local laws apply. Since the local law here, the *Privacy Act*, confers exclusive jurisdiction on this Court and such claims could not be brought in California, and this is inconsistent with the selection of a California forum, the Forum Selection Clause must give way to the *Privacy Act*.

**54**  In my view, the plaintiff has at least a triable issue on her argument that the Forum Selection Clause does not apply to the *Privacy Act* cause of action, based on a full interpretation of the Terms of Use. However, it is not necessary to decide this issue, as I am able to decide the jurisdictional issue on other grounds.

**Has the Plaintiff Shown Strong Cause?**

**55**  As mentioned, even if the Forum Selection Clause might otherwise apply to the cause of action, the court may exercise its discretion not to enforce it by declining jurisdiction where a statute confers exclusive jurisdiction on the court and where the plaintiff has met the burden of showing "strong cause" for not enforcing the clause.

***Privacy Act Torts and Exclusive Jurisdiction***

**56**  I return to s. 4 of the *Privacy Act* which provides that actions under it "must be heard and determined" by this Court.

**57**  Facebook submits that s. 4 of the *Privacy Act* only confers exclusive jurisdiction on this Court in preference to other decision-making bodies in British Columbia.

**58**  The argument Facebook asks this Court to accept is that the legislature intended any court outside British Columbia to have jurisdiction to try a *Privacy Act* claim; but within British Columbia, only the Supreme Court of British Columbia has this jurisdiction, instead of a tribunal or the Provincial Court, for example.

**59**  Facebook has not provided any authority for this proposition, even by analogy, despite the wide number of statutes creating claims.

**60**  A similar argument that the legislature was simply identifying which local court had jurisdiction and was not excluding courts outside the province from exercising jurisdiction, was advanced and rejected by the New Brunswick Court of Queen's Bench in *Nord Resources Corp v. Nord Pacific Ltd*, [*2003 NBQB 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-JPGX-S31C-00000-00&context=) at para. 17. That argument was made in respect of claims pursuant to the New Brunswick *Business Corporations Act*, [*S.N.B. 1981, c. B-9.1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-4KF1-FBFS-S3J1-00000-00&context=).

**61**  Facebook's argument is inconsistent with multiple authorities considering claims established by statute, including *Gould v. Western Coal Corp*, [*2012 ONSC 5184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFR1-JS5Y-B2T7-00000-00&context=) [*Gould* ], a decision of Strathy J., as he then was. In that case the Ontario Superior Court of Justice was faced with a claim that was premised, *inter alia*, on an oppression remedy under the British Columbian *Business Corporations Act*, *S.B.C. 2002, c. 57*. The plaintiff argued that she it should be allowed to pursue the claim in Ontario, notwithstanding the language of the BC statute which provided it "may" apply to the Supreme Court of British Columbia for this relief.

**62**  The plaintiffs in *Gould* claimed that the Ontario court could take jurisdiction over the claim on the basis that the statute did not confer exclusive jurisdiction on the BC court. Strathy J. reviewed all the relevant jurisprudence and disagreed, holding at para. 339:

The oppression remedy applicable to this dispute is a creation of a British Columbia statute. The statute confers the remedy and describes the manner in which it is to be enforced. I have no jurisdiction to grant the remedy because the statute expressly grants jurisdiction to the British Columbia Superior Court. It is irrelevant that the defendants may be otherwise subject to this court's jurisdiction, or may have attorned to the jurisdiction. I have no jurisdiction over the subject matter. The oppression claim should therefore be struck.

[Emphasis added.]

**63**  Facebook argues that *Gould* and the cases cited in it can be distinguished on the basis that the statutes at issue involved corporate or securities legislation, where the legislature expected local courts to develop a local expertise.

**64**  Facebook argues that there are public policy reasons for having local courts develop the law on local corporations, but these same reasons do not apply to the development of the law affecting local individuals. Facebook submits:

Legislation governing securities and corporations provide for broad remedies, and their application has far-reaching consequences. Decisions under such statutes have the potential to affect every corporation in a jurisdiction. From the standpoint of comity and public policy, it is important that statutes of such broad application be interpreted with consistency, by courts with particular experience and expertise in applying the legislation. By contrast, the British Columbia *Privacy Act* creates a rarely applied statutory tort.

**65**  I do not accept Facebook's argument. I see no public policy reason why legislatures would want to prefer corporations over individuals when creating a statutory cause of action that grants jurisdiction to this Court.

**66**  The cases involving corporations and this case involving *Privacy Act* claims all deal with claims affecting residents of the jurisdiction where the statute has been enacted. The logic that the legislature intended to grant remedies in respect of local residents and to have local courts determine those claims applies to both the situation of local individuals and local corporations.

**67**  Strathy J. in *Gould* noted that the constraint on other courts, where the legislature selects a local court to hear disputes, goes beyond comity, it is a matter where the other courts do not have constitutional competence to hear the matter (at para. 338).

**68**  Also relevant is the Supreme Court of Canada decision of *Seidel v. TELUS Communications Inc*, [*2011 SCC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1WM-00000-00&context=) [*Seidel*]. In that case the Supreme Court held that a statutory conferral of jurisdiction upon the Supreme Court of British Columbia precluded a stay of proceedings in the face of an exclusive arbitration clause.

**69**  The cause of action in *Seidel* arose pursuant to the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* [*BPCPA*], which provides at s. 172 that a person "may bring an action in Supreme Court" for breach of that Act.

**70**  Telus's contract at issue in *Seidel*, on the other hand, provided that "[a]ny claim, dispute or controversy" shall be referred to "private and confidential mediation" and thereafter, if unresolved, to "private, confidential and binding arbitration".

**71**  The majority decision of the Supreme Court of Canada in *Seidel* found that the *BPCPA* evidenced clear legislative intent that such actions must be brought in this Court. The permissive language in the statute, "may bring an action in Supreme Court", allowed the complainant to choose whether or not to make a claim, but if one was brought, the Supreme Court of Canada said it must be brought in the British Columbia Supreme Court.

**72**  Facebook argues that *Seidel* turns on a procedural right, as the tension was between a contractual choice of arbitration and a claim litigated in court. Facebook points out that the Supreme Court of Canada was influenced in that case by the public policy objective that it interpreted was behind the statutory claim, namely, that such consumer claims be heard in open court where they can be publicized rather than in the confidential process of arbitration: see *Seidel* at paras. 36-37.

**73**  I am not persuaded that the point Facebook makes distinguishes the present situation from that in *Seidel*.

**74**  The language in the *Privacy Act* is even stronger than the *BPCPA* in mandating that claims under it must be brought in this Court: s. 4 states "an action under this Act must be heard and determined by the Supreme Court" (emphasis added). The "determination" of a claim is a substantive determination on the merits, not a procedural one.

**75**  The legislature's intention in establishing privacy causes of action for individuals through the *Privacy Act* can be seen as aligned with an objective in conferring exclusive jurisdiction on this Court as follows:

1. the actions do not require damages to be shown. This is recognition that even where there are no damages, there is a harm caused by these statutory torts and there is a public interest in protecting the privacy of and misappropriation of personality of BC residents;
2. cases where damages are not shown are likely to be cases where the expense of prosecuting the claim may outweigh an award of nominal damages. Providing for a local forum is one way of attempting to control and minimize the cost of bringing such claims, in contrast to having the claims heard in distant jurisdictions;
3. ensuring that such claims are brought locally also increases the likelihood that there will be notoriety and a general deterrent effect locally, thus furthering the public policy goal of protecting the privacy rights of British Columbians; and,
4. local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this.

**76**  On the latter point, there are cultural differences in the ways various jurisdictions think of a right to privacy. As summarized by Bryce Newell in "Rethinking Reasonable Expectations of Privacy in Online Social Networks" (2011) 17:4 Rich. J.L. & Tech. 1 at 5-6:

Present United States privacy law - despite being made up of a patchwork of federal and state constitutional, statutory, and common law - is predominantly based on the ideals of individual control, autonomy, and liberty from governmental intrusion, despite the fact that its inspiration was an idea grounded on the importance of protecting human dignity and an "inviolate personality." Comparatively, Europe has predominantly taken the second position - that privacy protects human dignity and fosters personal relationships. The European view also promotes individual autonomy, although it does so in a different fashion and perhaps to a greater extent, as this Article suggests. This view of privacy and individual autonomy embeds an element of human dignity into its analysis of an individual's reasonable expectation of privacy, rather than strictly tying reasonableness to ideas of control and waiver. This conception is also more in line with the view that "[w]ithout our privacy, we lose 'our very integrity as persons' ...." Privacy may signify a fundamental human right, although this view has been challenged.

[Footnotes omitted.]

**77**  The result in *Petrov v. B.C. Ferry Corp.*, [*2003 BCSC 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G06C-00000-00&context=), confirms that this Court has exclusive jurisdiction over *Privacy Act* claims even in the face of a contract covering all other disputes. There the court declined jurisdiction over an employee's claims for a wide variety of causes of action, including harassment, ***negligence***, breach of fiduciary duty and breach of contract. The court held that the collective agreement to which the employee was subject applied to the substance of all disputes (at para. 39). There was one exception however, and that was with respect to the *Privacy Act* claim. The court held that the *Privacy Act* gave exclusive jurisdiction to the court and it was not covered by the collective agreement (at paras. 47-48), although the claim failed on other grounds.

**78**  I conclude that the *Privacy Act* does confer exclusive jurisdiction on this Court to hear claims brought in respect of the statutory torts conferred by that *Act*. This means that if the present claim is stayed, the plaintiff will have no other forum to bring this claim. I discuss the implications of this below.

***What Is Meant by Strong Cause***

**79**  There is considerable case law on the question of what is "strong cause" for not enforcing a forum selection clause.

**80**  The oft-cited source of the "strong cause" test is the English case of *The Eleftheria (Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v. Owners of Ship or Vessel Eleftheria)*, [1969] 2 All E.R. 641 (Eng. P.D.A.) at 645. The strong cause goes beyond mere balance of convenience: *Sarabia v. Oceanic Mindoro (The)* [*(1996), 26 B.C.L.R. (3d) 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S18W-00000-00&context=) (C.A.) at para. 38.

**81**  The "strong cause" test was affirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.,* [*2003 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4G5-00000-00&context=) [*Pompey*].

**82**  The facts in *Pompey* involved sophisticated commercial parties contracting for shipment of cargo pursuant to a bill of lading. The bill of lading contained a choice of law and forum selection clause in favour of the courts of Antwerp, Belgium. The cargo was shipped from Antwerp to Montreal by sea, and then by rail from Montreal to Seattle where it was found to be damaged. A claim was filed by the plaintiff in the Federal Court of Canada alleging that the cargo was damaged while in transit by rail. The defendant goods carrier sought a stay of proceeding on the basis of the bill of lading and forum selection clause. The Supreme Court of Canada held that a stay should be granted based on the clause.

**83**  The Supreme Court of Canada in *Pompey* reinforced the importance of holding commercial parties to their bargains, for commercial certainty and order and fairness, at para. 20:

Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": Décary J.A. in *Jian Sheng, supra*, at para. 7. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [*[1990] 3 S.C.R. 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-601H-00000-00&context=), at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [*[2001] 3 S.C.R. 907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4B1-00000-00&context=), [*2001 SCC 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4B1-00000-00&context=), at paras. 71-72. The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

[Emphasis added.]

**84**  It was a factor important enough for the Court in *Pompey* to mention in the above passage that the forum selection clause was not an exclusion of liability clause in disguise. The relevance of this has to be that the Court did not consider that the plaintiff would be without a remedy if forced to comply with the forum selection clause and bring the claim in the foreign jurisdiction. In other words, there was no juridical disadvantage in that case from enforcing the foreign selection clause.

**85**  In contrast, in the present case if the Forum Selection Clause was applied it would have the effect of being an exclusion of liability clause, given that the BC *Privacy Act* cause of action only applies in British Columbia.

**86**  Furthermore, the Court in *Pompey* recognized that legislatures may override forum selection clauses, and in such case, the legislation will prevail and the strong cause test is unnecessary. In that case certain legislation had been enacted subsequent to the lower court decision, namely s. 46(1) of the *Marine Liability Act*, [*S.C. 2001, c. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S222-00000-00&context=), which the Court concluded meant that it would have the effect in future cases of overriding forum selection clauses in favour of the Federal Court where the port of loading or discharge was in Canada (at para. 37).

**87**  Interestingly, the Court in *Pompey* was of the view that the subsequent legislation would override the forum selection clause even though the legislation at issue, s. 46(1) of the *Marine Liability Act*, was permissive in that it provided that a claimant "may" bring the claim in Canada in certain circumstances.

**88**  The language in the *Privacy Act* is much stronger than the legislation at issue in *Pompey*, in that an action under the *Privacy* *Act* "must" be heard and determined in this Court. Applying the reasoning in *Pompey*, this language overrides the Forum Selection Clause.

**89**  The Court in *Pompey* held at para. 39:

I am of the view that, in the absence of applicable legislation, for instance s. 46(1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading remains as stated in *The "Eleftheria"*, which I restate in the following way. Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties , the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. See *The "Eleftheria"*, at p. 242; *Amchem*, [*[1993] 1 S.C.R. 897*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60BM-00000-00&context=), at pp. 915-22; *Holt Cargo*, at para. 91. Disputes arising under or in connection with a contract may not be regarded by a court in determining whether "strong cause" has been shown that a stay should not be granted.

[Emphasis added.]

**90**  The examples given by the Court in *Pompey* in the above passage of circumstances where, in the absence of legislation giving the court exclusive jurisdiction the court might nevertheless exercise discretion not to enforce a forum selection clause, include those mentioned in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [*2001 SCC 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4B1-00000-00&context=) at para. 91, which held:

Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[Emphasis added.]

**91**  Besides the differing commercial context of the contract at issue in that case, compared to the consumer contract of adhesion here, there are two relevant factors in this case which arise from *Pompey*:

1. the plaintiff will lose a juridical advantage if the action is stayed in favour of the foreign jurisdiction, as the foreign jurisdiction will not have jurisdiction to determine the *Privacy Act* claim; and,
2. this juridical advantage does not arise because of forum shopping, but because the plaintiff and putative class members all reside in British Columbia.

**92**  In *Expedition Helicopters Inc. v. Honeywell Inc.*, [*2010 ONCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22YR-00000-00&context=), which was cited with approval in *Viroforce*, Juriansz J. identified a number of factors to be considered in establishing a "strong cause" not to enforce a forum selection clause, including at para. 24:

1. the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim;
2. enforcing the clause in the particular case would frustrate some clear public policy.

**93**  It is therefore clear that the availability of a statute-based claim in the court's own jurisdiction, which confers exclusive jurisdiction on that court, can on its own be a basis for overriding a forum selection clause, but also can support two other "strong causes" for not enforcing a forum selection clause, namely, juridical advantage and public policy. This is because where a claim is established by the legislature it reflects the fact that such claims are an important aspect of public policy in the jurisdiction. Consistent with this analysis is the analysis of the Alberta Court of Queen's Bench in *Zi Corp v. Steinberg*, [*2006 ABQB 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-F27X-61T6-00000-00&context=) at paras. 77-83; see also *Niedermeyer v. Charlton*, [*2014 BCCA 165*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2C6-00000-00&context=) [*Niedermeyer*].

***Juridical Advantage***

**94**  Facebook argues that there is no evidence that the court in California will refuse jurisdiction if the present action is stayed. I find that it is not necessary to have evidence from the plaintiff on this point given that the *Privacy Act* is clear that another court outside of this Court does not have jurisdiction. There is no support for the assertion by Facebook that a California court would or could exercise jurisdiction under the *Privacy Act*.

**95**  The loss of the ability to sue in this Court in BC will mean the loss of the ability of the plaintiff to advance her *Privacy Act* claim anywhere. This loss of the right to bring this claim is strong cause for not enforcing the Forum Selection Clause.

***Public Policy***

**96**  Facebook argues that the *Privacy Act* should be interpreted narrowly because it pre-dated the internet and class action legislation, and that it should not be interpreted as evidencing any public policy. Facebook makes this bald assertion without referring to any authorities as to the origins of the legislation or the public interest in protecting privacy.

**97**  The *Privacy Act* was passed in 1968. While this was not the internet age, the passage of the *Act* did not pre-date social concern over technology interfering with privacy interests; nor did it pre-date photographs, television, recording devices or newspapers, or advertisers using images to sell products.

**98**  An article published by Warren and Brandeis in 1890 (see Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" (1890) 4:5 Harv. L.R. 194) is often cited as one of the origins of modern protection of privacy law. This article was an early plea for the protection of privacy in the face of invasive technology.

**99**  In *Jones v. Tsige*, [*2012 ONCA 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4PK-00000-00&context=), the Ontario Court of Appeal reviewed the history of the legal protection of privacy as follows at paras. 16-18:

Canadian, English and American courts and commentators almost invariably take the seminal articles of S.D. Warren & L.D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. R. 193 and William L. Prosser, "Privacy" (1960), 48 Cal. L. R. 383 as their starting point.

Warren and Brandeis argued for the recognition of a right of privacy to meet the problems posed by technological and social change that saw "instantaneous photographs" and "newspaper enterprise" invade "the sacred precincts of private life" (at p. 195). They identified the "general right of the individual to be let alone", the right to "inviolate personality" (at p. 205), "the more general right to the immunity of the person" and "the right to one's personality" (at p. 207) as fundamental values underlying such well-known causes of action as breach of confidence, defamation and breach of copyright. They urged that open recognition of a right of privacy was well-supported by these underlying legal values and required to meet the changing demands of the society in which they lived.

Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the seventy years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

**100**  The *Privacy Act* by its very structure categorizes two torts: under s. 1, invasion of privacy, which could include the first three of the above categories identified by Prosser; and, under s. 3(2), misappropriation of the name or likeness of a person for commercial purposes, the fourth category identified by Prosser. It is the latter tort which is at issue here.

**101**  The article by Warren and Brandeis was prescient in describing the desire for privacy as nuanced: it is not an all or nothing right. People have an innate desire to control how much private information they share and with whom and in what form. This passage from the Warren and Brandeis article could be written for today's social media user:

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece.

(at 198-199) [Footnotes omitted.]

**102**  Clearly the BC legislature thought it a matter of important public policy to protect the privacy interests of BC residents by the creation of statutory torts. While the *Privacy Act* was introduced in 1968, the policy reasons behind protecting the privacy rights of British Columbians have only expanded since that time.

**103**  The protection of privacy rights are now found to be consistent with the values of Canadians as expressed in the Canadian Charter of Rights: ss. 7, 8 of the *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (see *Hunter v. Southam Inc.*, [*[1984] 2 S.C.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233J-00000-00&context=); *R. v. Wong*, [*[1990] 3 S.C.R. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-600X-00000-00&context=); *R. v. O'Connor*, [*[1995] 4 S.C.R. 411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3M7-00000-00&context=); *Schreiber v. Canada (Attorney General)*, [*[1998] 1 S.C.R. 841*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3YJ-00000-00&context=)).

**104**  Furthermore, with the creation and growth of the internet the potential implications for a loss of privacy are greater than ever. The difficulty in proving quantifiable damage remains great for an individual whose privacy is lost, but the social harm can be monumental if the loss of privacy includes publicity over the internet with its almost infinite reach and timelessness.

**105**  I conclude that the legislative conferral of exclusive jurisdiction on this Court for claims under the *Privacy Act* evidences both a legislative intention to override any forum selection clause to the contrary, and a strong public policy reason for not enforcing the Forum Selection Clause.

**106**  I conclude that the plaintiff has shown strong cause why the Forum Selection Clause should not cause this Court to decline jurisdiction.

**The *CJPTA* s. 11 Factors**

**107**  Facebook also argues that the Court should decline jurisdiction based on the *forum non conveniens* factors in s. 11 of the *CJPTA*.

**108**  The *CJPTA* provides at s. 11:

11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

1. A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
2. the comparative convenience and expense for the parties to the proceedings and for their witnesses, in litigating in the court or in any alternative forum,
3. the law to be applied to the issues in the proceeding,
4. the desirability of avoiding multiplicity of legal proceedings,
5. the desirability of avoiding conflicting decisions in different courts,
6. the enforcement of an eventual judgment, and
7. the fair and efficient working of the Canadian legal system as a whole.

**109**  Facebook submits that California is the more convenient jurisdiction for the hearing of the claim for all of the reasons outlined in s. 11, except for the reasons having to do with avoiding multiplicity of proceedings and conflicting decisions.

***Convenience of Witnesses***

**110**  Facebook submits that its head office is in California. It says that it does not keep books and records in BC.

**111**  Facebook has not described the form of its books and records but it would surprise me if it does not have electronic records which can readily be made available in British Columbia. Even in paper form, there is no barrier to bringing paper from California to BC, and there is a common language in the two jurisdictions.

**112**  There is no evidence that it would be difficult for Facebook witnesses to attend court in BC.

**113**  In September 2012, Facebook filed affidavit evidence that it does not have any business operations in British Columbia. Since then, the plaintiff filed hearsay evidence of a newspaper article in Vancouver, BC in March 2013 reporting that Facebook intended to open an office in Vancouver in May 2013. Facebook has not filed any responsive evidence on this point but I note that counsel for Facebook did not argue orally that Facebook has no business operations in British Columbia, just that the relevant books and records are with head office.

**114**  The plaintiff points out that she lives in BC, and so do the many members of the putative class.

**115**  I find that it will be more convenient to examine the circumstances of the plaintiff in a BC court than in a California court. There will likely be less inconvenience in having the books and records of Facebook made available for inspection here in BC than in having the plaintiff travel to California to advance her claim.

***The Law to be Applied***

**116**  Facebook argues that the Forum Selection Clause also contained a choice of law clause, the most recent iteration of which is a choice of the law of the State of California.

**117**  Facebook did not advance the argument that the choice of law clause should influence the Court's analysis of whether or not the Forum Selection Clause should be enforced. However, it argues that it is a significant factor under the *forum non conveniens* test set out in s. 11 of the *CJPTA*.

**118**  Facebook argues that not only will the *Privacy Act* not apply to the plaintiff based on her contract with Facebook as set out in the Terms of Use, it also could not apply to the defendant as that would give the *Act* extra-territorial effect.

**119**  The issue of whether or not the contractual choice of law will apply to defeat the merits of the claim is a complex one, as is the question of whether or not the *Privacy Act* can be found to apply to Facebook, a foreign defendant interacting through the internet with BC residents.

**120**  The plaintiff argues that if there is an enforceable contract between her and Facebook, the scope of the choice of law clause remains circumscribed by the agreement by Facebook that it will respect local laws, and so the *Privacy Act* will still apply.

**121**  Even if that argument by the plaintiff is not accepted, the contract choice of law clause still might be unenforceable to defeat claims under the *Privacy Act*. The recent decision of the British Columbia Court of Appeal in *Niedermeyer* affirmed that there are instances when a contract clause will be found unenforceable as in violation of public policy. The evidence of public policy can be found in a statute which provides a benefit for the public interest.

**122**  In *Niedermeyer*, Garson J.A. for the majority allowed an appeal on the basis that to the extent a release purported to exclude liability for motor vehicle accidents, it was contrary to public policy and unenforceable: see para. 114. This was because of the statute providing universal and compulsory insurance coverage for motor vehicle accidents, which was seen as conferring a public benefit and addressing a public safety problem: see paras. 101-107.

**123**  The dissenting judgment of Hinkson J.A. (as he then was) in *Niedermeyer* identifies that there can be room for disagreement as to when a contract clause will be found to be unenforceable as contrary to public policy: see paras. 40-68.

**124**  The issue of the applicability and enforceability of the choice of law clause and of the *Privacy Act* to Facebook in relation to BC residents are issues that go to the substantive merits of expected defences to the claim.

**125**  The argument advanced by the defendant that the *Privacy Act* does not apply because the parties agreed to be governed by the law of California can still be determined by this Court if this Court exercises jurisdiction. If the Court concludes that California law applies, then presumably the claim will be at an end. In contrast, the California court cannot determine that the *Privacy Act* does apply as those determinations are solely for this Court's jurisdiction. This weighs the balance heavily in favour of this Court exercising jurisdiction.

***Multiplicity of Proceedings***

**126**  The plaintiff argues that the avoidance of multiplicity of proceedings favours hearing the claim in BC. This is because, if the action is certified as a class action, the plaintiff says the proposed class will include both adults and children.

**127**  The plaintiff says that the *Infants Act*, [*R.S.B.C. 1996, c. 223, s. 19*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FF1-DXWW-213K-00000-00&context=) provides that, except in limited circumstances, "a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her". Thus the plaintiff argues that claims brought by Facebook users who were children in BC at the relevant time will survive any attempt by Facebook to rely on contractual terms as a defence.

**128**  However, two points arise from this submission. First, if the adults who are members of the class are precluded by the contract from bringing claims in BC, they will have nowhere to bring their claims: therefore the remaining claims of children will not give rise to a multiplicity of proceedings. Second, the plaintiff has not yet taken the steps necessary for the creation of a subclass of minors.

**129**  Regardless, I am persuaded based on a weighing of all of the other factors in s. 11 of the *CJPTA* already mentioned that the courts of California are not more appropriate than this Court for determining the plaintiff's claim based on BC's *Privacy Act*.

***CJPTA s. 12***

**130**  Before I complete the analysis of *forum non conveniens* factors codified in s. 11 of the *CJPTA*, s. 12 of that *Act* must be addressed. It provides as follows:

If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

1. confers jurisdiction or territorial competence on a court, or
2. denies jurisdiction or territorial competence to a court, that other Act prevails.

[Emphasis added.]

**131**  The plaintiff argues that this reinforces the overriding principal in the common law that where the legislature confers exclusive jurisdiction on a court, that prevails over any other considerations in respect of jurisdiction.

**132**  Here, the *Privacy Act* by its terms confers exclusive jurisdiction on this Court and thereby denies jurisdiction to another court. The section conferring exclusive jurisdiction, s. 4, also states that it is "despite anything contained in another *Act"*.

**133**  I find that an analysis of s. 4 of the *Privacy Act* together with the *CJPTA* and the common law makes it clear that the statutory conferral of jurisdiction on this Court for *Privacy Act* claims prevails over any Forum Selection Clause in the Facebook Terms of Use and over any other considerations in s. 11 of the *CJPTA*.

**Conclusion on Jurisdiction**

**134**  Having considered all of the circumstances relating to declining jurisdiction, the strongest factor here is the fact that the claim is brought by a resident of BC based on a statutory cause of action that is unique to BC and for which only this Court has jurisdiction.

**135**  The application by Facebook to have this Court decline jurisdiction is therefore refused.

**2. Certification**

**136**  I turn now to the plaintiff's application to have the proceeding certified as a class proceeding pursuant to the *CPA.*

**137**  The *CPA* mandates that a court must certify an action as a class proceeding if all of the following requirements set out in s. 4(1) are met:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of two or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
5. there is a representative plaintiff who
6. would fairly and adequately represent the interests of the class;
7. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
8. does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

**138**  The standard of proof on an application for certification is that the plaintiff must show "some basis in fact" that each of the requirements of certification are met, other than the requirement of pleading a cause of action. However, the certification stage is not meant to test the merits of the action. While evidence is required, it is not necessary for the plaintiff to prove each requirement on a balance of probabilities: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2013 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X247-00000-00&context=) [*Pro-Sys*] at paras. 99-102.

**139**  The certification judge is required to consider the evidence and serve a screening role, but is not required to engage in an "extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial": *Pro-Sys* at paras. 102-105.

1. **Cause of Action**

**140**  Whether or not a cause of action is properly pleaded is judged on the pleadings in the same way as a motion to strike. The test is, assuming the facts as pleaded are true, is it plain and obvious that the plaintiff's claim cannot succeed: *Pro-Sys* at para. 63.

**141**  The plaintiff's claim is based on the allegation that Facebook used her name or portrait, and those of the Class Members, in what Facebook calls the "Sponsored Stories", for the purpose of advertising. She alleges that it did so without seeking or obtaining consent of the person's whose names or portraits were used. These are the elements of a cause of action under s. 3(2) of the *Privacy Act*.

**142**  The defendants do not contest that the plaintiff has pleaded a valid cause of action under the *Privacy Act*.

1. **Identifiable Class**

**143**  The requirement for an identifiable class was described by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=) [*Western Canadian*] at para. 38:

While there are differences between the tests, four conditions emerge as necessary to a class action [from a review of the class proceedings statutes that then existed in Ontario, British Columbia and Quebec]. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[Emphasis added.]

**144**  To repeat, the proposed class here is:

All British Columbia Resident persons who are or have been Members of Facebook and whose name, portrait, or both have been used by Facebook in a Sponsored Story.

**145**  The defendant argues that the proposed class definition is overly broad and has several problems:

1. it has no temporal limitations;
2. it does not address the fact that many Facebook users use false names or unidentifiable portraits;
3. it does not address the fact that Sponsored Stories were used for non-commercial entities as well as for businesses, such as for charities or political parties;
4. it does not and cannot address the necessary element of lack of consent; and,
5. it includes people who do not have a plausible claim and who therefore have no rational connection to the common issues, and people will not be able to self-identify as to whether they are or are not in the class.

**146**  I will address these points in turn.

***i. Temporal Scope***

**147**  I agree with Facebook's submission that the proposed class definition is flawed because it does not have a defined temporal scope. However, this can be corrected.

**148**  The starting point of the time period is already defined in that the period only covers the use of Sponsored Stories. On Facebook's evidence, the Sponsored Stories program began in January 2011. For purposes of giving notice to potential class members, I consider that it would be helpful if the class definition included a start date. Otherwise people who were Facebook users before January 2011 but not afterwards might think they are included in the class when they are not.

**149**  If the evidence turns out to be that Facebook in fact started its Sponsored Story program earlier than asserted in this hearing, amendments can always be made.

**150**  The end point of the time period, it seems to me, must be the date of the present judgment. This was one of two choices mentioned in *Heward v. Eli Lilly & Company* [*(2007), 47 C.C.L.T. (3d) 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDW1-F57G-S132-00000-00&context=) (Ont. S.C.J.) at para. 73, aff'd [*(2008), 91 O.R. (3d) 691*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64K5-00000-00&context=) (Ont. S.C.J.), the other choice being to have the end date as at the commencement of the claim. The plaintiff prefers the end date to be the date of this judgment and I know of no reason to consider this inappropriate.

**151**  Thus, the class definition should be amended to include the words "at any time in the period from January 1, 2011, to the date of this judgment, namely May 30, 2014".

***ii. False Names or Unidentifiable Portraits***

**152**  Facebook has submitted evidence that many Facebook users create a false identity when they sign up to be Facebook members, using a false name and unrecognizable portrait.

**153**  A claim under s. 3(2) of the *Privacy Act* must be based on use of the claimant's name or portrait.

**154**  The class definition as proposed attempts to follow the language of the *Privacy Act*, by referring to the person's name or portrait.

**155**  The plaintiff explains that this definition attempts to exclude from the class those Facebook users who used false names and any portraits other than that of themselves.

**156**  If a person registered under a false name and did not use a self-likeness as a portrait, which is the case for many Facebook users, then that person's name or portrait will not have been featured in a Sponsored Story.

**157**  Some Facebook users change their portraits over time, and so at one time may have used a personal portrait, and another time not, and will only have a claim if the Sponsored Story they were featured in was at a time when the person's actual name or portrait was used.

**158**  If the action is certified and hypothetically, if liability was established, no doubt there are means available to ensure that only people whose actual name or portrait was featured in a Sponsored Story could participate in relief, and this is the goal of the proposed class definition.

**159**  I am satisfied that the goal of this aspect of the proposed class definition is appropriate and not overly broad. However, given the evidence of the predominance of use of false names and use of alternative images by Facebook users, I am of the view that the definition could be further clarified for members of the class as follows:

All British Columbia Resident natural persons who are or have been Members of Facebook at any time in the period from January 1, 2011, to May 30, 2014 and:

1. who at any time during this period registered with Facebook using either their real name or a portrait that contained an identifiable self-image or both; and
2. whose name, portrait, or both have been used by Facebook in a Sponsored Story.

**160**  I am satisfied that the above revisions to the class definition will capture what was intended by the plaintiff and that the definition is suitably tailored to capture only those whose actual name or likeness was featured in a Sponsored Story.

***iii. Sponsored Stories for Charities or Political Parties***

**161**  Facebook submits that s. 3(2) of the *Privacy Act* should be interpreted as limited to commercial use of a name or portrait.

**162**  Facebook submits that sometimes Sponsored Stories were used for charities or political parties, that this is a non-commercial use that would not violate the *Privacy Act*, and so the class is overly broad by including all types of Sponsored Stories. Or, to put it another way, Facebook's position is that non-commercial Sponsored Stories should be excluded from the scope of the class.

**163**  The s. 3(2) *Privacy Act* claim is limited to use of a name or portrait "for the purpose of advertising or promoting the sale of, or other trading in, property or services" (emphasis added).

**164**  There are two possible ways to read s. 3(2) of the *Privacy Act*:

1. the purpose of both advertising or promoting is qualified by the words "the sale of, or other trading in, property or services";
2. advertising stands alone; the "or" separates it from promoting, and means that on its own it can found a claim regardless of whether or not the advertising is in relation to the sale or other trading in of property or services.

**165**  One does not need evidence to take judicial notice of the fact that political parties and charities advertise their messages in a variety of ways. The fact that a billboard or newspaper advertisement is not for a commercial purpose does not make it any less an advertisement. The advertisement is published for the purpose of spreading the sponsoring entity's message or brand.

**166**  The evidence is that Facebook was paid by third parties for circulating Sponsored Stories as a marketing feature. This seems on its face quite like an advertisement. The very word "Sponsored" was presumably to identify that the messages were "sponsored" by someone paying money to Facebook.

**167**  Facebook does not appear to dispute that Sponsored Stories are advertisements.

**168**  It may be that some uses of Sponsored Stories related to charities or political parties and were not promoting the sale of or other trading in, property or services. However, if they were advertisements, then the question is whether they would still fall within the ambit of s. 3(2) of the *Privacy Act*.

**169**  This is a question in my view better answered on the merits in the course of the lawsuit and not at the stage of the class definition.

**170**  I do not consider it necessary to narrow the class by excluding people who were featured in "non-commercial" Sponsored Stories, because these people may still have a claim that they were featured in an advertisement. The class definition is not overly broad in this regard.

***iv. Lack of Consent***

**171**  As already noted, s. 3(2) of the *Privacy Act* makes it a tort to use someone's name or portrait in the ways described "unless ... a person ... consents to the use for that purpose".

**172**  Facebook argues that the fact that lack of consent is a critical element of a *Privacy Act* claim defeats certification here as it makes it impossible to have a suitable class definition. It argues that it creates the following dilemma for the plaintiff:

1. without including the element of a lack of consent as a necessary element of the class, as in the present proposed class definition, the class is overly broad and includes people who did consent and so who therefore do not have a claim;
2. if the lack of consent was included as an element of the proposed class definition, it would make the definition merits-based, which is not suitable for certification.

**173**  With respect to the latter point, Facebook relies on *Keatley Surveying Ltd. v. Teranet Inc.*, [*2012 ONSC 7120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFT1-F7ND-G05S-00000-00&context=) [*Keatley*]. In *Keatley*, the proposed class definition included people who were owners of copyright of plans of survey, and who did not consent to use of plans of survey by the defendant. Horkins J. of the Ontario Superior Court found that both ownership of copyright and consent to use were essential to a determination of the merits of the claim, and to include these terms in the class definition was "circular and inherently unworkable" and could result in a judgment that "binds no one" (at para. 165). For this and other reasons, the proceeding was not certified as a class proceeding.

**174**  However, the plaintiff's case was recast on appeal to the Ontario Divisional Court in *Keatley* and was certified: [*2014 ONSC 1677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S2F1-00000-00&context=) [*Keatley Appeal*]. The revised class definition was comprised of people who were authors of a plan of survey or employer of the land surveyor, or assignees of either, whose plan of survey appeared in the defendant's electronic database (at para. 48). The Divisional Court held that the class definition was now suitable as it was no longer merits-based.

**175**  The Divisional Court in the *Keatley Appeal* rejected the argument that the revised class definition was overly broad, as it might include people who did not own copyright or whose claim was statute-barred. It concluded that the class could not be more narrowly defined without potentially excluding some people who share the same interest in the resolution of the common issues, or introducing a merits-based analysis, applying the approach of the Supreme Court of Canada in *Hollick v. Toronto (City)*, [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) [*Hollick*]: see *Keatley Appeal* paras. 53-60.

**176**  I am of a similar view in the present case as the Ontario Divisional Court in the *Keatley Appeal*.

**177**  I accept the defendant's submission that if the class definition were amended to include as an element that the members "did not consent" to the use of their names or portraits in Sponsored Stories, the definition would be merits-based.

**178**  However, this does not mean that the class as currently defined is overly broad, as the class cannot be more narrowly defined without excluding people who share the same interest in the resolution of the common issues. I consider the plaintiff's proposed class definition here, as including all people whose name or portrait or both was used by Facebook in a Sponsored Story, as similar to the class definition that was approved in the *Keatley Appeal*.

**179**  In my view, it is not necessary to narrow the class out of concern that it might include some people who consented to use of their names or portraits in a Sponsored Story. If this is the case, consent will be a defence to those persons' claims.

**180**  There is a strong possibility in this case, given that standard Terms of Use were used and Facebook users did not have unique individual contract negotiations with Facebook, that the issue of consent will be determined by the outcome of the common issues. If not, the process for determination of the consent issue can then be re-assessed by considering such things as: will it be assisted by categorizing class members into subclasses, depending on the actions taken by Facebook users or any material differences in the relevant Terms of Use; will it be assisted by test cases; or will it be necessary to have individual determinations.

**181**  I am satisfied that the class definition is not overly broad simply because it includes all people who appeared in Sponsored Stories.

**182**  There is an alternative approach to this issue that I have considered.

**183**  The concern over a class definition that depends on success on the merits of the underlying action is that the defendant will not be able to rely on a successful defence of a class action when subsequently having to defend an individual claim of the same nature.

**184**  For example, Facebook's logic is that if the class definition here was narrowed to include as an element that that the members of the class did not consent; and Facebook was able to show that consent was given through acceptance of Terms of Use, the class action would be defeated but it would bind no one and Facebook would still be vulnerable to individual plaintiffs suing it on the same basis.

**185**  I am not persuaded that this argument goes as far as Facebook argues.

**186**  It has been pointed out that there is less than compelling logic behind the argument that a class definition is flawed if it will bind no one if the defendant is successful. This problem will often be the case where the defendant is successful in defending a class proceeding: see *Merck Frosst Canada Ltd. v. Wuttunee*, [*2009 SKCA 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K741-K0BB-S4YV-00000-00&context=) [*Merck Frosst*].

**187**  I note that one of the policy reasons behind class actions is that where individual claims will be uneconomic a class action may be the only way small claims will have access to justice. That is certainly a significant factor in this case. In a case like this where the individual claims are likely small, there is going to be little risk that an individual plaintiff will choose to sue a defendant which has been successful in defending a class action for similar claims. Furthermore, regardless of the fact that *res judicata* might not apply to a new claim, *stare decisis* would apply if there are similar legal issues which defeated the class action.

**188**  As pointed out in *Merck Frosst*, citing the comprehensive judgment of Winkler J., as he then was, in *Attis v. Canada (Minister of Health)*, [*[2007] O.J. No. 1744*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDY1-F30T-B0D4-00000-00&context=), amongst other authorities, one way of addressing the concern about merits-based class definitions is to substitute a claims-based definition. Defining people who assert a claim as including those who in the future may assert a claim gets around the concern that defendants will not be able to rely on a successful result in the class proceeding to defeat future individual claims. This type of class definition would capture people who later make a claim based on the same criteria.

**189**  In *Merck Frosst*, the Court noted that the Supreme Court of Canada in *Rumley v. British Columbia*, [*2001 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=) [*Rumley*], took no issue with the claims-based class definition in that case, which was:

Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.

**190**  Thus the class definition in *Rumley* included several essential elements of the cause of action: damage and causation and sexual misconduct. The merits of these elements would have to be proved as part of the substantive lawsuit. But by defining the class as people who made claims asserting these three elements, the class was defined sufficiently narrowly and was not offending the rule against a merits-based class definition.

**191**  As held in *Merck Frosst*, after reviewing the authorities, at para. 103:

In my view, what emerges from this review is a requirement for careful scrutiny of the facts and circumstances of a particular case prior to deciding: (1) whether a particular class definition is too broad to satisfy the requirement that it be rationally connected to the causes of action and common issues identified in the case; (2) that a merits based definition will necessarily lead to circularity or otherwise be objectionable; and (3) whether a claims based class definition sufficiently meets the requirements of objectivity and certainty, in light of the established purposes of class definition.

**192**  It is therefore worth considering whether or not there is any benefit to refining the proposed class by referring to people who assert or who in the future assert they did not give consent to the use of their names or portraits in a Sponsored Story.

**193**  While this is a possible option, in my view it will do little to truly narrow the class or assist in the determination of issues in this case.

**194**  The question of whether or not Facebook's online Terms of Use provided sufficient information to enable a Facebook user to give express consent to the use his or her name or portrait of in Sponsored Stories, as asserted by Facebook in the hearing before me, in my view will ultimately be determined as a common issue for all members of the class.

**195**  If Facebook succeeds in establishing that all users gave their consent just by their decisions to use the Facebook service, then this will be a defence for any resident in BC who in future asserts such a use, within the time period.

**196**  I thus see little benefit to narrow the proposed class definition to refer to the additional element that class members assert that they did not consent to the use of their names or portraits in Sponsored Stories.

**197**  There is one further point to address in relation to the Facebook argument. Facebook argues that the onus of proving a lack of consent will be on the plaintiff and class members as a necessary element of the *Privacy Act* tort. I am not so sure. Facebook has no authority to support this position, other than its own interpretation of the *Privacy Act*.

**198**  It may well be that the onus of proving an appropriation of personality will be on the plaintiff, but one possible interpretation of the *Privacy Act* is that the onus will then shift to the defendant to affirmatively prove consent as a defence. Who has the onus of either proving a negative (a lack of consent) or an affirmative (consent) does not need to be decided on the present application.

**199**  I conclude that it is appropriate for the proposed class definition to not address the element of lack of consent.

***v. Inability to Self-Identify***

**200**  Another argument advanced by Facebook in its challenge to the definition of the class, is that members of the class will not be able to self-identify. This is because, on the evidence, Sponsored Stories were not sent by Facebook to the people whose name or portrait appeared in them, but rather, they were sent to the person's Facebook "friends". Not every Facebook user was in a Sponsored Story.

**201**  In support of this argument, Facebook relies on *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [*2013 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X248-00000-00&context=) [*Sun-Rype*]. That case involved a proposed class action on behalf of direct and indirect purchasers of products containing high fructose corn syrup ("HFCS"). It was brought against parties who were alleged to have engaged in price fixing of HFCS.

**202**  The majority judgment of the Supreme Court of Canada in *Sun-Rype* held that an identifiable class could not be established for indirect purchasers, and so that category of claims could not be certified.

**203**  In *Sun-Rype* the defendants argued that it was going to be impossible to determine in which products contained HFCS, and what consumers may have purchased them in the time period covered by the class (at para. 55). This is because product manufacturers used liquid sugar and HFCS interchangeably.

**204**  In accepting the argument of the defendants, the Supreme Court of Canada in *Sun-Rype* did not say it was necessary for potential class members to be able to self-identify at time of certification. Rather, it described the test prospectively: "there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class" (at para. 58).

**205**  The Court in *Sun-Rype* was concerned that the question of who was an indirect purchaser might never be determinable. There seemed no ready source of data as to in what products HFCS was used, and when, and who purchased the products with the HFCS as opposed to with other sugar.

**206**  The facts of this case are unlike the facts in *Sun-Rype*. From the evidence filed by Facebook it is clear that Facebook is able to identify which users identify themselves as having a BC address, and which ones were featured in Sponsored Stories.

**207**  The plaintiff says that once Facebook produces in the course of this lawsuit the data as to users featured in Sponsored Stories, then class membership will be objectively determinable: if the Facebook user featured in a Sponsored Story otherwise meets the definition of the class (is a BC resident, registered under his or her name or portrait or both and within the applicable time parameters) then he or she will be a member of the class.

**208**  I accept the plaintiff's submission. I find that the class members will be identifiable.

***vi. Two or More Persons***

**209**  A related issue is whether or not the plaintiff has shown an identifiable class of "two or more" persons.

**210**  Facebook argues that this requirement means that the plaintiff must show evidence of two or more people who are interested in pursuing a claim and that the plaintiff has not done so. The plaintiff argues that she has evidence of this, but that it is not a necessary requirement of certification.

**211**  The evidence required to show there is an identifiable class of two or more persons was discussed by the British Columbia Court of Appeal in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, [*2014 BCCA 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1CY-00000-00&context=) [*Wakelam*] at paras. 96-105. There the certification judge had relied on an affidavit of the lawyer for the plaintiff stating he had been informed by other named persons that they were interested in and supported the class proceeding. The Court of Appeal concluded that the certification judge did not err in relying on this evidence and that the affidavit did "demonstrate the existence of an identifiable class of two or more persons" (at para. 105).

**212**  The Court of Appeal's analysis in *Wakelam* did not conclude one way or the other that it was legally necessary to have evidence that more than one person is desirous of pursuing the claim. The certification judge had proceeded on the basis that it was necessary to show that there is at least more than one "identifiable class member who shares her complaint": [*2011 BCSC 1765*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B19V-00000-00&context=) at para. 130 (emphasis added). In that case the claim was based on the allegation that the defendant manufacturers had marketed cough medicine for use in children which was ineffective and a waste of money. I note that the certification judge decided the issue before the Supreme Court of Canada clarified the requirement of an identifiable class in *Sun-Rype*. Also, while the Court of Appeal in *Wakelam* referred to some Ontario case law dealing with the point, the *Keatley Appeal* casts new light on those authorities.

**213**  Also, in deferring to the certification judge on the identifiable class requirement in *Wakelam*, the Court of Appeal was proceeding on the basis that there was a higher standard of review for the requirement of an "identifiable class of 2 or more persons", requiring an overriding error of fact or principle (at para. 9).

**214**  The Ontario Divisional Court undertook a lengthy analysis of the issue in the *Keatley Appeal*, at paras. 61-91, before concluding that it was not a requirement of certification to show that there is someone in addition to the plaintiff who is "desirous" of pursuing a claim.

**215**  As stated in the *Keatley Appeal* at paras. 84-88:

Section 5(1)(b) of the *CPA* does not explicitly require evidence of a desire among class members to pursue an action. It simply requires that "there is an identifiable class of two or more persons that would be represented by the representative plaintiff or the defendant".

In short, the "desirous" component of the identifiable class criterion is not mentioned in the legislation, not required to achieve the purposes of the criterion and not mentioned in the Supreme Court of Canada jurisprudence that discusses the issue.

Further, requiring evidence that two persons *seek to employ the class proceeding* vehicle, rather than simply requiring evidence that those people have a claim, may be problematic for the same reasons articulated in support of the opt-out class actions regime legislated in Ontario.

These reasons were set out in the Ontario Law Reform Commission, *Report on Class Actions* (1982), at p. 132:

If persons are required to opt in to a class action ... there is thus no immediate, material incentive to class members that may help to override the operation of the social and psychological barriers, previously identified, that may operate to discourage individual litigation. Fear of involvement in the legal process, an ill-founded concern over the amount of legal costs, fear of sanctions from employers or others in a position to take reprisals, or even the demands of everyday life, may prevent a class member from taking the steps necessary to opt in.

The danger of entrenching a requirement that two class members provide evidence of their desire to proceed with a class action is apparent in, for example, an employment context. One could imagine the situation of a proposed class action brought by employees, where all putative class members, other than the representative plaintiff, are reticent to give evidence at an early stage that they are in favour of a class action. Their reluctance could be for any number of the reasons set out above, e.g., fear of retaliation by the employer. This reluctance would thus prevent the launching of the class action, even where the class members have strong claims for recovery.

[Emphasis added.]

**216**  As noted in *Sun-Rype* at para. 69, it is not necessary for each individual class member to be identified at the outset of the litigation. But there must be some evidence to show some basis in fact that two or more people could prove they were members of the class. The Supreme Court of Canada in *Sun-Rype* did not import an additional requirement into the *CPA* of showing that more than just the plaintiff is interested in pursuing the claim.

**217**  In the case at bar, there is evidence of two people who say they were featured in ads without their consent. One of the persons, Ms. Douez, clearly was featured in Sponsored Stories.

**218**  The evidence of the other person, Mr. Caputa, is less clear. He appears to believe he appeared in a Sponsored Story in March 2012. Facebook's evidence is that it began the Sponsored Story program in January 2011. Facebook's evidence is that its records indicate that Mr. Caputa has not appeared in any Sponsored Story between September 10, 2012, and March 10, 2013.

**219**  Facebook argues that the inference can be drawn that Mr. Caputa was not in a Sponsored Story; the plaintiff argues that the inference can be drawn that Mr. Caputa was in a Sponsored Story before September 10, 2012, otherwise Facebook would have clearly identified that he was not.

**220**  At the very least, the evidence of Mr. Caputa permits of the inference that if he was in a Sponsored Story, he would wish to pursue a claim in relation to it.

**221**  There is also the evidence in Facebook's own records, as disclosed in its evidence on this motion, of a number of BC residents who were featured in Sponsored Stories: 1.8 million between September 9, 2012, and March 10, 2013.

**222**  The evidence that Sponsored Stories were advertisements from which Facebook profited seems uncontested.

**223**  There is the evidence of the Facebook Terms of Use, which the plaintiff argues do not obtain the consent of Facebook users to being featured in the advertisements known as Sponsored Stories.

**224**  Also, there is evidence that a class action was commenced against Facebook in the United States District Court, Northern District of California, San Francisco Division, in which preliminary approval of a class settlement and class certification was granted on December 3, 2012. This class action is based on a theory similar to that advanced herein, and is on behalf of the following class and minor subclass:

Class: All persons in the United States who have or have had a Facebook account at any time and had their names, nicknames, pseudonyms, profile pictures, photographs, likenesses, or identities displayed in a Sponsored Story, at any time on or before the date of entry of the Preliminary Approval Order.

Minor Subclass: All persons in the Class who additionally have or have had a Facebook account at any time and had their names, nicknames, pseudonyms, profile pictures, photographs, likenesses, or identities displayed in a Sponsored Story, while under eighteen (18) years of age, or under any other applicable age of majority, at any time on or before the date of entry of the Preliminary Approval Order.

**225**  The United States class action against Facebook indicates that other people outside of this jurisdiction who were Facebook users have made a complaint about having their name or portrait displayed in a Sponsored Story without their consent.

**226**  The procedural model developed under the *CPA* discourages discovery before the certification hearing takes place. Where, as here, the source of information regarding who is in the class lies predominantly in the hands of the defendant, but will be producible on discovery, the burden on the plaintiff should not be higher than that described in the *Act*.

**227**  I am satisfied that through the process of discovery and notice, membership in the class will be objectively determinable. In this case there is not the complete absence of evidence that was the case in *Sun-Rype*.

**228**  I find the reasoning in the *Keatley Appeal* compelling:

1. the *CPA* does not impose a requirement that the plaintiff must show that there are two or more people in the proposed class that are desirous of pursuing such a claim;
2. Supreme Court of Canada jurisprudence also does not import such a requirement; and,
3. entrenching such a requirement could undermine the goals of the *CPA*.

**229**  On the latter point, it can often take some courage to come forward to advance a claim in the courts. Individuals who have been wronged can fear that the social or political or economic repercussions of bringing forward a claim will outweigh the potential benefits to them personally, even if the wrong on a global scale is quite large. As an example here, there appears to have been some online social ridicule of the plaintiff in this case as a result of bringing the claim, in part based on what the plaintiff would argue is a mistaken assumption that Facebook had obtained users' consent to being used in paid advertisements known as Sponsored Stories.

**230**  I conclude that showing some basis in fact that two or more persons are in the proposed class is all that is necessary under the *CPA* and there is no additional requirement of showing that two or more persons are interested in pursuing a claim. The courts' role as gatekeeper can be adequately performed based on the existing requirements of the *CPA*.

**231**  There is sufficient evidence that more than one Facebook user resident in BC was featured in advertisements by Facebook known as Sponsored Stories without the users' consent. I am persuaded that the plaintiff has met the test for proving some basis in fact for an identifiable class of two or more persons.

***vii. Revised Class Definition***

**232**  Based on the Reasons above, the proposed class definition should be revised so that it has temporal limits, and so that it more clearly only includes people who registered with Facebook using their real name or actual portrait. These revisions are reflected as follows:

All British Columbia Resident natural persons who are or have been Members of Facebook at any time in the period from January 2011 to May 30, 2014 and:

1. who at any time during this period registered with Facebook using either their real name or a portrait that contained an identifiable self-image or both; and,
2. whose name, portrait, or both have been used by Facebook in a Sponsored Story.

[Amendments underlined.]

**233**  In my view, these revisions do not change the nature of the proceeding which the plaintiff seeks to certify as a class proceeding. The core of the cause of action and the factual and legal issues between the parties on the merits remain the same. However, these revisions tighten up the class definition and address some of the concerns raised by the defendant before me.

**234**  I am therefore of the view that the above revised class definition meets the requirements of the *CPA*.

1. **Common Issues**

**235**  The requirement that the class proceeding involve issues common to members of the class is concerned with procedural efficiencies and avoidance of duplication of judicial fact-finding that can be gained by a class action as opposed to multiple individual actions involving similar issues. This requirement was described in *Western Canadian*, and cited in *Pro-Sys* at para. 108 as follows:

In *Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), this Court addressed the commonality question, stating that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

1. The commonality question should be approached purposively.
2. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
3. It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
4. It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
5. Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

**236**  The plaintiff proposes the following as common issues:

1. Did the Defendant commit the statutory tort set out in section 3(2) of the *Privacy Act*, *R.S.B.C. 1996, c. 373*, by featuring Class members' names or portraits in connection with its Sponsored Stories advertising program?
2. If the Defendant committed the statutory tort referred to in paragraph 1, then:
3. Is the Defendant liable to pay damages to the Class; if so, in what amount?
4. Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount?
5. Is the Class entitled to damages assessed in the aggregate pursuant to section 29(1) of the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50*; if so, in what amount?
6. Is the Defendant liable to pay interest pursuant to the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*; if so, in what amount?
7. Is the Class entitled to an Order enjoining the Defendant from future use of Class members' names or portraits to advertise or promote goods or services without Class members' express consent to such use?

**237**  I note that the plaintiff's proposed common issues were advanced without having the advantage of knowing what Facebook's defences might be, as Facebook had not yet filed a Response to Civil Claim.

**238**  However, Facebook raised many issues in the course of this hearing that reveal its expected defences to the issue framed by the plaintiff as common issue 1. The plaintiff argued orally that many of the arguments advanced by Facebook can also be determined as common issues.

**239**  This gives rise to a question of what is the role of the certification judge when the parties' submissions during the certification application give rise to the possibility of additional common issues, but they have not been formally advanced in the plaintiff's motion for certification as common issues.

**240**  In *Halvorson v. British Columbia (Medical Services Commission),* [*2010 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-221P-00000-00&context=), the British Columbia Court of Appeal emphasized that judges tasked with case management of class actions have to keep in mind the purposes of the *CPA* and allow for procedural flexibility, appreciating that plaintiffs in proposed class actions may re-cast their cases. The Court held, at para. 23:

To hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the *Act* - judicial economy, access to justice, and behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [*2001 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), [*[2001] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46D-00000-00&context=), at paras. 26-29; *Hollick v. Toronto (City)*, [*2001 SCC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=), [*[2001] 3 S.C.R. 158*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M497-00000-00&context=) at para. 15. In *Bendall v. McGhan Medical Corp.* [*(1993), 14 O.R. (3d) 734*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X1NF-00000-00&context=) at 747 (Gen. Div.), leave to appeal ref'd [*[1993] O.J. No. 4210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD31-JGHR-M4TS-00000-00&context=), in a passage adopted in *Endean v. Canadian Red Cross Society* [*(1997), 36 B.C.L.R. (3d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-614D-00000-00&context=) at para. 58 (S.C.), appeal allowed in part [*(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.), the court described certification as "a fluid, flexible procedural process". There must be procedural flexibility in order to facilitate realization of the statutory purposes and, contrary to the view that has been causing the case management judge such consternation, there is nothing wrong with plaintiffs reformulating their approach on appeal. As was stated in *Markson v. MBNA Canada Bank* [*(2007), 85 O.R. (3d) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1WJ-00000-00&context=) at para. 39 (C.A.), leave to appeal ref'd [*[2007] S.C.C.A. No. 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F57G-S301-00000-00&context=),

[39] Provided the defendant is not prejudiced, it is open to a plaintiff to recast its case to make it more suitable for certification: see *Kumar v. Mutual Life Assurance Co. of Canada*, *[2003] O.J. No. 1160*, *226 D.L.R. (4th) 112* (C.A.), at paras. 30-34 and *Rumley v. British Columbia*, [*[2001] 3 S.C.R. 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M486-00000-00&context=), [*[2001] S.C.J. No. 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S15P-00000-00&context=), [*205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGM1-JG02-S15P-00000-00&context=) D.L.R. (4th) 39, at para. 30.

**241**  The courts in Ontario have stressed that a certification judge should exercise caution and restraint in amending the common issues, noting that the burden at first instance lies on the plaintiff for adducing evidence that the common issues exist: *McCracken v. Canadian National Railway Company*, [*2012 ONCA 445*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4XW-00000-00&context=) at paras. 125, 144.

**242**  In my view the important question for the certification judge in deciding whether or not issues are common issues, when they have not been precisely identified in the plaintiff's notice of application, is whether the parties have had the opportunity to address these issues in their submissions.

**243**  Here Facebook argued extensively that the issue of whether or not a class member consented to being featured in a Sponsored Story is an individual issue. Facebook cannot therefore be prejudiced if I reject that argument, and find to the contrary that the question of consent gives rise to one or more common issues.

**244**  Facebook also advanced other arguments as to why a *Privacy Act* claim based on Sponsored Stories might fail. Again, Facebook cannot be prejudiced if I find that those arguments give rise to common issues.

**245**  I will now review the various plaintiff and Facebook arguments on the question of common issues in this context.

***The Elements of the Statutory Tort***

**246**  The first proposed common issue by the plaintiff is "Did the Defendant commit the statutory tort set out in section 3(2) of the *Privacy Act*, R.S.B.C. 1998, c. 373 by featuring Class members' names or portraits in connection with its Sponsored Stories advertising program?"

**247**  The plaintiff's first proposed common issue rolls into it the two main elements of the statutory tort:

1. the use of class members' names or portraits in advertising or promoting the sale of, or other trading in, property or services; and,
2. the lack of consent of class members for such use.

***Element of Consent***

**248**  I will deal with the consent issue first.

**249**  Facebook submits that this case is primarily going to be about consent, and that individual issues of consent will overwhelm any potential common issues.

**250**  The plaintiff says that on the contrary, if consent is going to be an issue, it is going to be a common issue.

**251**  To understand the consent issue, one has to understand the details of how Facebook works. When Facebook users sign up for the service, Facebook submits that they must first accept the Terms of Use. Then, when registered and engaging the service, each user has a choice on how to set that user's "privacy settings" to limit the extent to which that user's online information is shared with others. Also, one of Facebook's features is the "like" feature, by which a user can voluntarily identify that the user "likes" someone or something. Facebook calls this a "social action".

**252**  Facebook asserts that each user featured in a Sponsored Story gave consent to this use of their name or portrait when they accepted Facebook's Terms of Use upon registering for the Facebook service, and through taking other online actions such as taking an action to click on the icon for "like" and through the person's failure to set, or setting of, the user's "privacy settings" for the service.

**253**  Facebook argues that its Terms of Use provided information to users as to how they could set their privacy settings in a way that would limit those who could see their "likes", and that this would also limit the use of the person's name or portrait in Sponsored Stories.

**254**  The plaintiff disagrees.

**255**  The plaintiff has provided evidence of the Facebook Terms of Use and argues that nowhere in it did Facebook clearly tell its users that Facebook would be free to use that person's name or portrait in paid advertisements known as Sponsored Stories. The plaintiff says users were also not clearly given a choice of opting out of use of their name or portrait in Sponsored Stories.

**256**  As such, the plaintiff argues that there is no way a user, by simply accepting Facebook's Terms of Use, would have been consenting to use of their name or portrait in a Sponsored Story, regardless of whatever "privacy settings" the user decided to choose or "like" actions a user might have taken. Without notice there can be no consent.

**257**  As for the implications of the action of clicking on a "like" action, it is one thing, according to the plaintiff's theory of the case, for a Facebook user to choose to share information with friends about things the user "likes"; it is quite another for that user to agree that his or her preferences can be sold as advertisements to his or her friends. The air of paid advertising can change the perceived sincerity and authenticity of the message and of the messenger and that is why it needs express consent.

**258**  Facebook, in its effort to create profit from the service it provides, understandably wishes to maximize the advertising revenues it can generate from these social connections. The evidence before me suggests that it is against Facebook's commercial interests to make it too easy for Facebook users to opt-out of having their relationships "monetized" and turned into marketing tools.

**259**  Without weighing the relative strengths and weaknesses of each side's case, on the plaintiff's interpretation of the evidence there is a basis in fact for the claim that Facebook did not obtain the express consent of Facebook users to use of their names or portraits in Sponsored Story.

**260**  The evidence before me suggests that the modern social media user is attracted to Facebook's service in order to communicate with friends. How much is communicated and to which friends and in what form is something the modern user wishes to control. This is as much an aspect of privacy as described by Warren and Brandeis above.

**261**  The issue of whether Facebook's standard form Terms of Use, if accepted by a user, constitute express consent, on their own or in combination with other actions taken by a Facebook user on a Facebook site, is very similar to those cases where the issue turns on the interpretation of a standard form contract.

**262**  In *Lam v. University of British Columbia*, [*2010 BCCA 325*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C7-00000-00&context=) at paras. 55-60, the British Columbia Court of Appeal held that the interpretation of a standard form contract was an issue that was a common issue in a class proceeding.

**263**  I agree with the plaintiff that to the extent a user's consent to be featured in a Sponsored Story could be obtained by Facebook based on a user accepting its standard form Terms of Use, alone or in combination with that user's setting of privacy settings and taking of "like" actions, is a common issue for the class.

**264**  Facebook also argues that there were a number of ways users could have given implied consent to the use of their names or portraits in a Sponsored Story.

**265**  It is to be remembered that in this online relationship, Facebook did not have individual unique contracts or communications with users. All relationships were governed by standard terms or a limited set of user actions. The user actions that Facebook relies on to suggest that express consent was given include the same ones relied on for implied consent, such as actions taken by the user in setting or not setting "privacy settings", and in clicking on a "like" icon.

**266**  The plaintiff says firstly, the issue of whether or not implied consent is sufficient to defeat a s. 3(2) *Privacy Act* claim is a common issue. The plaintiff argues that s. 3(2) of the *Privacy Act* should be interpreted to require express consent in order to defeat a claim, rather than implied consent.

**267**  The plaintiff says, secondly, to the extent that implied consent may be a defence, and to the extent Facebook argues that consent can be implied based on actions taken online, this too will be a common issue.

**268**  I agree with the plaintiff. There are a limited number of online actions that could be taken by a Facebook user to support Facebook's argument that the user implicitly consented to the use of his or her name or portrait in a Sponsored Story. The question of whether or not these online actions can constitute implied consent will be the same for each Facebook user who took the same online actions. It is not necessary that each class member be identically situated.

**269**  If, as the plaintiff argues, Facebook's Terms of Use did not sufficiently disclose that Facebook would use the Facebook user's name or portrait in Sponsored Stories or did not sufficiently disclose how users could opt out of this through the setting of "privacy settings", and that therefore Facebook did not obtain consent, then the resolution of this issue will significantly the interests of all the class members.

**270**  I have concluded that the question of whether online actions taken by a user of the Facebook service can constitute consent under s. 3(2) of the *Privacy Act* is a common issue. One possible way to phrase the common issue within the context of the timeframe covered by the class is as follows:

*Issue 1*

What if any Online Actions taken by a Class Member on the Facebook service would constitute express or implied consent to the Class Member's name or portrait being used in a Sponsored Story, such that it constitutes consent within the meaning of s. 3(2) of the *Privacy Act*, *R.S.B.C. 1996, c. 373*?

**271**  "Online Actions" would then need to be defined by the parties along the lines of: accepting Facebook's Terms of Use; setting of the user's "privacy settings"; and taking a "like" action.

**272**  If the answer to issue 1 is that no online actions could constitute express or implied consent, then these answers will significantly advance the claims of the class. Success for one would be success for all.

**273**  In contrast, if there were some online actions taken by users of the Facebook service that could constitute consent, express or implied, the existence of these actions could defeat all or some of the claims of class members. Determining this issue will also avoid the duplication of fact-finding that would arise if class members were to sue individually.

**274**  Finding out these answers would still be efficient in a class proceeding context, as there would be objective and efficient ways to determine which class members took the actions that would constitute consent, and which did not, and the claims could be dealt with accordingly.

**275**  I also note that according to Facebook's evidence, it changes its Terms of Use from time to time. In this regard, the Terms of Use that it had in effect when it started Sponsored Stories were revised on December 11, 2012. The consent common issue as framed can address any relevant material differences in the differing forms of standard Terms of Use.

***Individual Motivations and Circumstances***

**276**  Facebook further argues that it should be entitled to challenge any class member's assertion that he or she did not give consent through exploring that class member's individual circumstances and motivations behind taking online actions on the Facebook service. As examples, Facebook says it would explore whether a Facebook user clicked on the "like" icon for a product because she wanted her friends to see that she had an affiliation for a product she perceived would make her more popular; or to obtain an online coupon; or to promote her own products; or to support a local business.

**277**  Facebook's theory about the relevance of individual motives is based on importing ss. 1(2) and (3) of the *Privacy Act* into s. 3(2).

**278**  Sections 1 and 2 of the *Privacy Act* provide:

1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

1. The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
2. In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
3. Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.
4. In this section:

"court" includes a person authorized by law to administer an oath for taking evidence when acting for the purpose for which the person is authorized to take evidence;

"crime" includes an offence against a law of British Columbia.

1. An act or conduct is not a violation of privacy if any of the following applies:
2. it is consented to by some person entitled to consent;
3. the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
4. the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;
5. the act or conduct was that of
6. a peace officer acting in the course of his or her duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime, or
7. a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia,

and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

1. A publication of a matter is not a violation of privacy if
2. the matter published was of public interest or was fair comment on a matter of public interest, or
3. the publication was privileged in accordance with the rules of law relating to defamation.
4. Subsection (3) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy.

[Emphasis added.]

**279**  Thus, Facebook submits as follows:

In summary, in order to succeed in a claim under section 3(2) of the *Privacy Act*, a plaintiff must establish that:

1. her name or portrait was used by another person;
2. for:
3. the purpose of advertising or promoting
4. the sale of, or other trading in,
5. property or services;
6. she did not consent to the use of her name or portrait for the purpose set out in (b);
7. the use of her name or portrait for the purpose set out in (b) was a violation of the privacy to which she was reasonably entitled to in the circumstances; and
8. the nature, incidence and occasion of the act or conduct and the relationship between the parties supports a finding that there was a violation of privacy.

[Emphasis added.]

**280**  I will come back to the issue of whether or not the advertising at issue in the s. 3(2) *Privacy Act* tort has to be in relation to the sale of or other trading in property or services.

**281**  But the elements asserted by Facebook as items (d) and (e) above are Facebook's insertion of elements from ss. 1(2) and (3) of the *Privacy Act* as elements of the s. 3(2) *Privacy Act* tort.

**282**  A plain-reading as well as the history of the *Privacy Act* does not support Facebook's attempt to make elements of s. 1 part of the requirements of s. 3(2) of the *Privacy Act*.

**283**  As discussed already in dealing with the issue of jurisdiction, the origins of concerns about legal protection of privacy supports the conclusion that two different torts were intended to be addressed by the *Act*: violation of privacy, for which subjective elements of reasonableness and context were relevant under s. 1(2) and (3); and misappropriation of personality, under. s. 3(2), for which reasonableness and context is not a factor.

**284**  Furthermore, a plain reading of s. 3(2) sets out the elements of "a tort" without reference to s. 1.

**285**  A reading of s. 5 of the *Privacy Act* also supports the conclusion that the *Act* envisions two separate torts: "violation of privacy or for the unauthorized use of the name or portrait of another" (emphasis added). Section 5 of the *Privacy Act* provides:

An action or right of action for a violation of privacy or for the unauthorized use of the name or portrait of another for the purposes stated in this Act is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

**286**  It appears therefore that the misappropriation of personality tort under the *Privacy Act* envisions the wrongdoer using someone else's name or portrait for advertising or promotion, without it being necessary to show that the person had a reasonable expectation of privacy in their name or likeness.

**287**  Someone might not object to their name or image being publicized, and might not have a reasonable expectation of privacy in the same, but could quite rightly object to someone using their name or image to make money through advertising or promotion and to suggest that the person is endorsing the sponsor. Hence the statutory requirement of consent to use someone's name or portrait in this way.

**288**  The plaintiff denies that individual motivations are relevant to the misappropriation of personality tort embodied by s. 3(2) of the *Privacy Act*.

**289**  It is difficult to understand how an individual could give consent to Facebook under s. 3(2) of the *Privacy Act* based on motives unknown to Facebook at the time. It seems a more logical construct to conclude that consent would have to be communicated to Facebook in some way, otherwise consent has not been given and what Facebook would have is just a lack of objection. If consent was communicated to Facebook, then it would be through an online action that will be common to any members of the class that took that action and will be determined in answer to issue 1 above.

**290**  Nevertheless, this hearing is not the final place to determine the merits of Facebook's argument. I find that the legal construct of the argument does give rise to a common issue. One way of framing this issue is:

*Issue 2*

Is a tort under s. 3(2) of the *Privacy Act* provable as an independent tort without regard to the elements of s. 1(2) and (3) of the *Privacy Act*?

**291**  The answer to this second issue will advance the case for all class members. If the answer is that ss. 1(2) and (3) of the *Privacy Act* are irrelevant, that will either get rid of or substantially diminish any argument by Facebook that there are individual assessments of personal circumstance required in this case in order to determine liability under s. 3(2) of the *Privacy Act*.

**292**  But even if the answer is that the factors in ss. 1(2) and (3) are relevant to a claim advanced under s. 3(2) of the *Privacy Act*, I do not see this as generating individual issues of such magnitude that it would overwhelm the common issues.

***Element of Being Featured in an Advertisement or Promotion***

**293**  Returning to the first element of the statutory tort, the factual question of whether or not class members' names or portraits were used in in advertising or promoting the sale of, or other trading in, property or services will be individual to each member.

**294**  But there is a common issue that arises out of the first element of the statutory tort.

**295**  I come back to Facebook's submission that s. 3(2) of the *Privacy Act* is to be read as follows:

In summary, in order to succeed in a claim under section 3(2) of the *Privacy Act*, a plaintiff must establish that:

1. her name or portrait was used by another person;
2. for:
3. the purpose of advertising or promoting
4. the sale of, or other trading in,
5. property or services;...

**296**  By structuring the argument this way Facebook argues that advertising on its own is not sufficient to establish an element of a s. 3(2) *Privacy Act* claim; rather, the advertising must be in relation to the sale of or trading in property or services. It thus argues that Sponsored Stories that dealt with things other than the sale or other trading in property or services cannot found a claim under s. 3(2).

**297**  Facebook does not submit that Sponsored Stories were not advertisements, but argues that they were not all advertisements for the sale of or other trading in property or services because some were promoting other things such as political parties or charities.

**298**  There is another interpretation of s. 3(2) of the *Privacy Act,* and that is that the advertising use of the name or portrait stands alone, and it is not necessary to show that it was advertising the sale of, or other trading in, property or services.

**299**  Also, the plaintiff argues that the meaning of "property or services" in the *Privacy Act* should be interpreted broadly to include services of a charitable or political nature.

**300**  This dispute over the proper interpretation of the *Privacy Act* is common to all class members. The issue is as follows:

*Issue 3*

Were all or only some Sponsored Stories for the purpose of advertising or promotion within the meaning of s. 3(2) of the *Privacy Act*?

**301**  If the answer to issue 3 is that all of the Sponsored Stories were for the purposes of advertising or promotion within the meaning of s. 3(2) of the *Privacy Act*, this will materially advance all the class members' claims.

**302**  If the answer to issue 3 is that some Sponsored Stories fall outside s. 3(2) of the *Privacy Act*, then this answer will still be very helpful in determining claims on a class-wide basis, or may be a reason to divide the class into sub-groups.

***Enforceability of Choice of Law Clause***

**303**  Another issue raised by Facebook in this hearing is that the choice of law clause in Facebook's standard form Terms of Use means that the law governing the parties will be California law, not BC law, and that this defeats the application of BC's *Privacy Act*. Facebook also argues that the *Privacy Act* cannot be applied to Facebook as its activities were outside the jurisdiction, and so to apply the *Privacy Act* would be to exceed the province's territorial jurisdiction.

**304**  Clearly if this issue is decided in Facebook's favour, it will apply at least to all class members who were of the age of majority and will defeat their claims.

**305**  The plaintiff argues that the *Privacy Act* is a protection for BC residents that overrides any choice of law clause in a contract between Facebook and its members.

**306**  As mentioned above in relation to jurisdiction, the plaintiff also relies on the statement in Facebook's Terms of Use that Facebook strives to respect local laws.

**307**  Interestingly, Facebook's public Form 10-K annual report filed pursuant to the US *Securities Exchange Act*, 15 U.S.C. [s]78a (1934), for the year ending December 31, 2012, contains the following statements indicating that it is subject to foreign laws concerning privacy:

We are subject to a number of U.S. federal and state, and foreign laws and regulations that affect companies operating on the Internet, ...These may involve user privacy....In particular, we are subject to...foreign law as regarding privacy and protection of user data. Foreign data protection, privacy and other laws and regulations are often more restrictive than those in the United States.

(at p. 11)

*Our business is subject to complex and evolving U.S. and foreign laws and regulations regarding privacy...and could result in claims....*

We are subject to a variety of laws and regulations in the United States and abroad that involve matters central to our business, including user privacy....For example, the interpretation of some laws and regulations that govern the use of names and likenesses in connection with advertising and marketing activities is unsettled and developments in this area could affect the manner in which we design our products, as well as our terms of use.

(at pp. 19-20)

**308**  I find that whether or not the *Privacy Act* applies despite Facebook's choice of law clause is an issue common to all members of the proposed class and its determination will materially advance the litigation.

**309**  The issue can be stated as follows:

*Issue 4*

Does the *Privacy Act* apply to Facebook in relation to BC residents who used Facebook's services?

**310**  This brings me to the evidence that Facebook allowed users as young as 13 to sign up as Facebook members. The plaintiff argues that some members of the class will have been under the age when they could contract and could thereby consent to any of Facebook's Terms of Use.

**311**  I agree that this is an issue that may come up on a number of the common issues. If the result of the determination of common issues is different for those users who were of the age of majority versus those who were still children, then it may in the future become evident that there will need to be a sub-class of Facebook users who were BC residents and not of the age of majority at the time their name or likeness appeared in Sponsored Stories.

**312**  The above four issues deal with the applicability and interpretation of s. 3(2) of the *Privacy Act* and in my view all arise out of the plaintiff's first proposed common issue and Facebook's challenge to the same.

**313**  If class members do get past the hurdle of establishing answers to the common issues in their favour regarding the application of s. 3(2) of the *Privacy Act* and the absence of consent, they will have made significant progress to establishing liability.

**314**  However, I also am aware of the possibility that as the class proceeding evolves, it may become clear that there are individual issues that need determination before liability can be established. If necessary, a process for determining the individual issues can then be established, whether by way of a claims process or questionnaire or otherwise. However I am not persuaded at this stage of the proceeding that there will be significant individual issues requiring cross-examination of each member of the class.

***Damages***

**315**  The next question is whether or not there are any common issues in relation to the assessment of damages.

**316**  The plaintiff argues that the s. 3(2) *Privacy Act* claim is perfect for determination of damages on an aggregate basis, because the *Act* does not require proof of damage. The argument is that individual members of the class will not need to prove they suffered harm. The plaintiff argues that the damages question will centre upon whether Facebook's conduct was flagrant and callous, and the degree of commercial advantage gained by Facebook as a result of its conduct.

**317**  The plaintiff also says that it is clear from the evidence that Facebook has the tools and data to know how many Sponsored Stories advertisements it published per class member. A formula could be developed assessing damages either on a class member basis or Sponsored Story basis.

**318**  Given the estimated size of the class, which I am informed is over 1.8 million people, it strikes me that it will be very difficult to determine damages on the basis of individual loss. Furthermore, the plaintiff does not seek to do so. The plaintiff does not propose calling evidence as to the degree of embarrassment or humiliation suffered by each class member as a result of being featured in one or more Sponsored Stories, for example.

**319**  Facebook argues that the plaintiff's approach poses a problem for those class members who will want to say they suffered individual harm, whether it be by exceptional embarrassment, or because they were a celebrity whose portrait has exceptional value, or otherwise.

**320**  There is an easy solution to the issue raised by Facebook, and that is to limit the class to those people who do not seek to prove actual individual damage. The *Privacy Act* makes it optional for a plaintiff to prove loss. An individual plaintiff can choose not to do so.

**321**  Facebook argues that the plaintiff has not put forward any expert evidence to support a theory that damages could be determined in the aggregate.

**322**  Facebook relies on the affidavit of Catherine Tucker, Ph.D. (the "Tucker Affidavit"), to argue that it will be impossible to determine damages on an aggregate basis.

**323**  The plaintiff argues that Dr. Tucker's opinions are inadmissible for a number of reasons. One of these reasons is that she failed to provide a certificate that she is aware of her duty to assist the court and to not be an advocate for any party, as required by Rule 11-2 of the *Supreme Court Civil Rules*. Also, some of her opinions are outside her area of expertise as they seem to be based on interpretations of law which she is not qualified to make and which seem identical to interpretations she gave in relation to a California action. For example, Dr. Tucker's opinions seem to be based on the premise that individual proof of loss is required for claims advanced under the *Privacy Act*, which it is not.

**324**  I find these criticisms to be warranted. Furthermore, I found that much of the Tucker Affidavit appeared to be an argument that Facebook has social value and therefore needs to have a viable business model, as though obtaining consent of users to use their name and image in advertising would destroy the value of Facebook. This is not scientific opinion based on a particular expertise beyond the reach of the court.

**325**  I do not find the Tucker Affidavit helpful on the question of whether or not an aggregate damages award is possible. I add that these are not criticisms of Dr. Tucker's academic abilities as ultimately it is the responsibility of legal counsel to ensure that expert opinions are appropriate in form and substance.

**326**  Facebook also points to other class action authorities, such as price-fixing cases, where expert evidence was required to establish a methodology to calculate damages.

**327**  I do not find the price-fixing cases to be a useful analogy. In cases such as *Pro-Sys* the issue was much more complicated, and that was to prove the actual over-charge by Microsoft to direct purchasers and indirect purchasers.

**328**  Here the *Privacy Act* expressly contemplates that claims can be made without proof of damage. Surely the plaintiff does not need expert evidence on how damage is going to be proved when the plaintiff's position is that damage is not going to be proved.

**329**  Nevertheless it strikes me that if the plaintiff's proposal is that there will not be individual claims for damages, the class members will need to know this up-front. I am concerned that unless this is made clear in the class definition, the class could end up including people who might otherwise want to prove they suffered unique individual losses.

**330**  This can be accomplished by re-defining the class along the following lines:

All British Columbia Resident natural persons who are or have been Members of Facebook at any time in the period from January 2011 to May 30, 2014 and:

1. who at any time during this period registered with Facebook using either their real name or a portrait that contained an identifiable self-image or both;
2. whose name, portrait, or both have been used by Facebook in a Sponsored Story;
3. and who do not seek to prove individual loss as a result..

[Emphasis added identifying changes to class definition made earlier in this judgment; double-emphasis identifying latest change.]

**331**  As well, notice to class members will have to explain that class members will be forsaking proving individual damage and instead will be seeking class-wide damages.

**332**  After hearing evidence on the trial of the common issues, the Court would be in a better position to determine Facebook's arguments that aggregate damages are inappropriate. Section 29(1) and (2) of the *CPA* provides:

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

1. monetary relief is claimed on behalf of some or all class members,
2. no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
3. the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
4. Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
5. submissions that contest the merits or amount of an award under that subsection, and
6. submissions that individual proof of monetary relief is required due to the individual nature of the relief.

**333**  I thus accept that the following two damages issues will be common issues:

*Issue 5*

Are Class Members entitled to damages without individual proof of damage pursuant to s. 3(2) of the *Privacy Act*?

*Issue 6*

Can the amount of damages be determined on an aggregate basis; if so, in what amount?

**334**  The next proposed common issue has to do with whether or not punitive damages will be justified.

**335**  The proposed common issue is:

*Issue 7*

Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount?

**336**  Facebook argues that this is not a common issue mainly because the underlying issues of liability and damages will involve numerous individual inquiries. It also submits that there is no basis in fact on the evidence to support a conclusion that Facebook's conduct was so egregious as to justify an award of punitive damages.

**337**  I have already found that there are common issues regarding liability and damages. As to the characterization of Facebook's conduct, I conclude that will have to await a hearing on the merits of the action.

**338**  The question of punitive damages was certified as a common issue in *Pro-Sys*.

**339**  I conclude that on the facts alleged here, the question of the appropriateness of punitive damages is also a common issue as described by the plaintiff. The issues as framed are clearly based on an assessment of the conduct of the plaintiff which is common to the class: *Watson v. Bank of America Corp.*, [*2014 BCSC 532*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61XK-00000-00&context=) at para. 282.

***Interest***

**340**  The plaintiff's next proposed common issue has to do with whether or not Facebook will be liable for court order interest.

**341**  The proposed common issue is:

*Issue 8*

Is the Defendant liable to pay interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1998, c. 79; if so, in what amount?

**342**  Facebook's argument is that this is not common because the issues of liability and damages are not common. I disagree.

**343**  This was certified as a common issue in *Pro-Sys* and I find it equally appropriate to certify as a common issue here.

***Injunctive Relief***

**344**  The next and last proposed common issue has to do with whether or not the class members are entitled to injunctive relief.

**345**  Facebook argues that the injunctive relief sought by the plaintiff would not only be prohibited as extra-territorial, it is equitable in nature and would therefore give rise to a number of equitable defences: estoppel, waiver and acquiescence. Facebook argues that it will assert that these equitable defences apply to bar the claims of many if not all class members. It argues that these defences will involve a consideration of each member's knowledge and conduct.

**346**  I am not entirely persuaded by Facebook's arguments. It seems more likely that if it is going to argue that estoppel, waiver or acquiescence apply, that it will be making this argument based on the same online actions which it argues indicate a user provided express or implied consent.

**347**  In any event, these are issues that can be addressed as the proceeding unfolds, to assess whether or not they are common or individual.

**348**  I do note that the injunction issue as framed by the plaintiff seems to seek an order that would be rather difficult to enforce: that Facebook be enjoined from similar conduct in the future without express consent of class members. Will that type of order not simply beg another lawsuit as to whether or not Facebook obtained express consent? Furthermore, if, as the plaintiff argues, one of the goals of this class proceeding, as with other class proceedings, is behaviour modification, will not the plaintiff's success on the other common issues suffice?

**349**  I am not satisfied that the plaintiff has provided a basis for certification of the injunction issue as a class-wide issue.

***Common Issues Conclusion***

**350**  I have concluded there are eight issues capable of being determined as common issues.

**351**  The issues I have identified as 1 through 4 arise out of the first proposed common issue proposed by the plaintiff, and Facebook's submissions in response. Since the language does not match the common issue proposed by the plaintiff in the plaintiff's notice of application, I will give the parties' liberty to apply within 30 days to address any improvements they might propose in the wording.

1. **Preferable Procedure**

**352**  The next issue to determine is whether or not a class proceeding would be the preferable procedure. Section 4(2) of the *CPA* requires the court to consider all relevant matters including those enumerated in the section, as follows:

4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

1. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
2. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
3. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
4. whether other means of resolving the claims are less practical or less efficient;
5. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**353**  On all of the factors enumerated in s. 4(2), a class proceeding here is clearly preferable. There is no other realistic procedure available to class members to provide them with relief. They cannot bring Small Claims proceedings in Provincial Court, as the *Privacy Act* gives jurisdiction to this Court. There is no tribunal offering them relief. Their claims are most likely to be uneconomical to prosecute on their own.

**354**  I find that the three goals of the class action regime, judicial economy, access to justice, and behaviour modification, as held in *Hollick* and affirmed in *Pro-Sys* at para. 137, all will be better served by certifying this proceeding as a class proceeding.

**355**  I reject Facebook's argument that the case will be unmanageable and will inevitably break down into many individual issues, overwhelming any progress that might be made on common issues.

**356**  I find that underlying the s. 3(2) *Privacy Act* tort is the same public policy goal of behaviour modification as underlies the *CPA*.

**357**  Here, the tort under s. 3(2) of the *Privacy Act* seems tailor-made for class proceedings, where the alleged wrongful conduct was systemic and on a mass scale, and where proof of individual loss is not necessary or sought. Without the assistance of the *CPA* class action procedure, the plaintiff and proposed class members' claims based on s. 3(2) of the *Privacy Act* would be unlikely to have access to justice. Furthermore, the sheer number of individual claims, given the reach of Facebook, would overwhelm the courts unless a class proceeding was available.

1. **Representative Plaintiff**

**358**  Facebook advances no argument that the plaintiff is not a suitable representative plaintiff, other than to repeat arguments that the case itself is not suitable for certification.

**359**  I find that the plaintiff will fairly and adequately represent the class, and she has put forward a reasonable litigation plan as a starting position although I will ask the parties to return to court to refine the same. She has filed evidence establishing some basis in fact for her claim. She took the time to attend the court hearing of these motions as well. I find that she has no conflict with other class members.

**Conclusion**

**360**  Given the almost infinite life and scope of internet images and corresponding scale of harm caused by privacy breaches, BC residents have a significant interest in maintaining some means of policing privacy violations by multi-national internet or social media service providers.

**361**  Working together the *CPA* and the *Privacy Act* provide practically the only tools for BC residents to obtain some access to justice on these issues.

**362**  There is evidence showing some basis in fact for the plaintiff's assertion that Facebook used the names or portraits of BC residents who were Facebook users without their consent in advertisements called Sponsored Stories.

**363**  There is also some basis in fact to support the plaintiff's claim that this conduct creates an actionable tort pursuant to s. 3(2) of the *Privacy Act*, without the necessity of proving actual damage.

**364**  I have dismissed Facebook's application that this Court decline jurisdiction in this matter.

**365**  I have granted the plaintiff's application that the within proceeding be certified as a class proceeding.

**366**  The class description will be as follows:

All British Columbia Resident natural persons who are or have been Members of Facebook at any time in the period from January 1, 2011, to May 30, 2014 and:

1. who at any time during this period registered with Facebook using either their real name or a portrait that contained an identifiable self-image or both;
2. whose name, portrait, or both have been used by Facebook in a Sponsored Story; and,
3. who do not seek to prove individual loss as a result.

**367**  I conclude on the evidence and submissions before me that one of the central issues in the lawsuit will be whether or not Facebook's standard Terms of Use, alone or together with other Facebook online tools, provided users' consent to Facebook to use the person's name or portrait in advertising through Sponsored Stories. This is an issue common to all class members. The determination of this issue will significantly advance the lawsuit on behalf of all class members or could defeat the lawsuit altogether.

**368**  There are other common issues in addition to the consent issue.

**369**  Attached as Appendix A is a list of the approved common issues. The parties have liberty to apply within 30 days to amend common issues 1 through 4 to address any concerns with the wording. Likewise, the parties have liberty to apply within 30 days to address any concerns with the revisions to the class definition made as a result of this judgment.

**370**  l also suggest that the parties arrange for a further hearing before me to address the form of notice to class members and any revisions to the litigation plan to take into account these reasons.

S.A. GRIFFIN J.

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Appendix "A"

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| *Issue 1* |  | What if any Online Actions taken by a Class Member on the Facebook service would constitute express or implied consent to the Class Member's name or portrait being used in a Sponsored Story, such that it constitutes consent within the meaning of s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373? |  |
| *Issue 2* |  | Is a tort under s. 3(2) of the *Privacy Act* provable as an independent tort without regard to the elements of s. 1(2) and (3) of the *Privacy Act*? |  |
| *Issue 3* |  | Were all or only some Sponsored Stories for the purpose of advertising or promotion within the meaning of s. 3(2) of the *Privacy Act?* |  |
| *Issue 4* |  | Does the *Privacy Act* apply to Facebook in relation to BC residents who used Facebook's services? |  |
| *Issue 5* |  | Are Class Members entitled to damages without individual proof of damage pursuant to s. 3(2) of the *Privacy Act*? |  |
| *Issue 6* |  | Can the amount of damages be determined on an aggregate basis; if so, in what amount? |  |
| *Issue 7* |  | Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount? |  |
| *Issue 8* |  | Is the Defendant liable to pay interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1998, c. 79; if so, in what amount? |  |

**End of Document**

[***Gates v. MacDougall, [2006] B.C.J. No. 3301***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61JW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack, British Columbia

Fisher J.

Heard: November 20 - 24, 2006 (New Westminster).

Judgment: December 22, 2006.

Chilliwack Registry No. S16579

**[2006] B.C.J. No. 3301** | 2006 BCSC 1919 | 153 A.C.W.S. (3d) 1112

Between Kenneth Adam Gates, Plaintiff, and Roderick David MacDougall and Her Majesty The Queen In Right of The Province of British Columbia, Defendants

(128 paras.)

**Case Summary**

**Damages — Exemplary or punitive damages — When available — Action by the plaintiff former inmate, Gates, for damages for sexual assault against the defendant guard MacDougall allowed — The inmate was sexually assaulted several times by the guard in 1991 and 1992 — The inmate was awarded general and aggravated damages of $45,000 and punitive damages of $10,000, and costs of future counseling for one year in the amount of $5,500 — The general damage award of $55,000 was reduced by $10,000 to reflect the inmate's pre-existing psychological condition as a result of childhood sexual abuse.**

**Damages — Aggravated damages — When available — Action by the plaintiff former inmate, Gates, for damages for sexual assault against the defendant guard MacDougall allowed — The inmate was sexually assaulted several times by the guard in 1991 and 1992 — The inmate was awarded general and aggravated damages of $45,000 and punitive damages of $10,000, and costs of future counseling for one year in the amount of $5,500 — The general damage award of $55,000 was reduced by $10,000 to reflect the inmate's pre-existing psychological condition as a result of childhood sexual abuse.**

**Damages — For torts — Affecting the person — Sexual assault — Action by the plaintiff former inmate, Gates, for damages for sexual assault against the defendant guard MacDougall allowed — The inmate was sexually assaulted several times by the guard in 1991 and 1992 — The inmate was awarded general and aggravated damages of $45,000 and punitive damages of $10,000, and costs of future counseling for one year in the amount of $5,500 — The general damage award of $55,000 was reduced by $10,000 to reflect the inmate's pre-existing psychological condition as a result of childhood sexual abuse.**

**Damages — Psychological injuries — Depression — Post-traumatic stress disorder — Age of claimant — 26 to 35 — Non-Pecuniary award — $40,001 to $60,000 — Considerations impacting on award — Pre-existing injury — Action by the plaintiff former inmate, Gates, for damages for sexual assault against the defendant guard MacDougall allowed — The inmate was sexually assaulted several times by the guard in 1991 and 1992 — The inmate was awarded general and aggravated damages of $45,000 and punitive damages of $10,000, and costs of future counseling for one year in the amount of $5,500 — The general damage award of $55,000 was reduced by $10,000 to reflect the inmate's pre-existing psychological condition as a result of childhood sexual abuse.**

**Tort law — Trespass — To person — Sexual assault — Action by the plaintiff former inmate, Gates, for damages for sexual assault against the defendant guard MacDougall allowed — The evidence established that the guard had sexually assaulted the inmate while he was incarcerated in 1991 and 1992 — The guard had been found guilty of nine counts of sexual assault and had served a four-year prison sentence — The guard did not present a defence to the action.**

|  |
| --- |
| Action by the plaintiff former inmate, Gates, for damages for sexual assault against the defendant guard MacDougall -- The defendant Crown admitted vicarious liability if the guard was found liable -- The guard had been found guilty of nine counts of sexual assault against other inmates and served four years in prison -- The inmate claimed the guard assaulted him on six occasions in 1991 and 1992, mostly involving attempts to perform fellatio on him -- The inmate sought general, aggravated and punitive damages and special damages for costs of future counseling -- He suffered from depression, anxiety and post-traumatic stress disorder -- HELD: The inmate had established beyond a reasonable doubt, on a clear and cogent standard, that the guard had sexually assaulted him -- The inmate's testimony was generally credible and accepted -- The assaults were on the lesser end of the seriousness spectrum -- However, the inmate had sustained serious psychological damage as a result -- The inmate's prior history of serious sexual abuse made him vulnerable, and the guard had been aware of that -- The inmate was awarded $55,000 in general and aggravated damages, which was reduced by $10,000 to recognize his serious pre-existing psychological damage from childhood sexual abuse -- The inmate was awarded general and aggravated damages of $45,000; costs of future counseling for one year in the amount of $5,500 and punitive damages of $10,000. |

**Counsel**

Counsel for the plaintiff: D.B. Adair, Q.C.

Counsel for the defendant HMTQ: K. Johnston

No one appearing for the defendant R.D. MacDougall

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| **FISHER J.** |

**Introduction**

**1**  In 1991 and 1992, Kenneth Gates was an inmate at Fraser Regional Correctional Centre. He alleges that he was sexually assaulted by the defendant, Roderick MacDougall, who was then a corrections officer at Fraser.

**2**  This is another of many civil actions brought against Mr. MacDougall and his former employer, the provincial Crown, arising from allegations of sexual assault. There were previous criminal proceedings as well. In November 2000, Mr. MacDougall was found guilty on nine counts involving indecent and sexual assaults of five individuals between 1980 and 1991. He was ultimately sentenced to four years imprisonment and has served this sentence. None of the convictions related to offences against Mr. Gates.

**3**  Mr. MacDougall took no part in these proceedings, and the plaintiff has obtained a default judgment against him, with damages to be assessed. The Crown has admitted that it if the plaintiff was sexually assaulted, it is vicariously liable.

**Issues**

**4**  The first issue is whether the assault took place as alleged by Mr. Gates. Credibility is the key factor. The second issue relates to damages. Mr. Gates seeks general and aggravated damages, an amount for future counselling, and punitive damages against Mr. MacDougall only.

**Evidence and the standard of proof**

**5**  The events in this action took place over 15 years ago. As I have outlined in previous decisions (***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=), [*2006 BCSC 933*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1R2-00000-00&context=)***, Otter v. MacDougall***, [*[2006] B.C.J. No. 2732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1VY-00000-00&context=), [*2006 BCSC 1536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1VY-00000-00&context=)), this passage of time in itself presents challenges for both the plaintiff and the defendants. It hampers the plaintiff's ability to prove his claim, and also affects a defendant's ability to locate and present evidence.

**6**  In this case, there is little, if any, objectively verifiable evidence of the assault. Mr. Gates advances serious allegations against Mr. MacDougall, who has chosen not to defend himself in these proceedings. The primary evidence about the sexual assault comes from Mr. Gates. There is one witness to one incident. This witness, Kelly Bedard, is also a plaintiff in another action against Mr. MacDougall and the Crown. I may accept the evidence of Mr. Gates on its own, but I must be very careful when considering uncorroborated or unconfirmed allegations in these circumstances: see ***Blackwater v. Plint***, [*2001 BCSC 997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=), [*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=) at para. 16, varied on other grounds, [*2003 BCCA 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60W1-00000-00&context=), [*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=), aff'd, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=). I must also be careful when considering the evidence of Mr. Bedard. This was considered by Baynton J. in ***P.P. v. Saskatchewan***, [*[2001] S.J. No. 451*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-JWR6-S2J1-00000-00&context=), [*2001 SKQB 349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-JWR6-S2J1-00000-00&context=) at para. 31:

The court must look carefully at the evidence of the primary witnesses for discrepancies in their respective testimony that impacts negatively on their credibility. Even honest witnesses make mistakes so not every discrepancy is significant. As well, the court must look carefully for admissions against interest that bolster the credibility of the respective primary witnesses. Finally, the court must look for reliable independent evidence which tends to support or refute the details of the primary witnesses.

**7**  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 test is not whether the plaintiff has an honest belief that the assault took place, rather, it is whether he has proven to the requisite standard that the event in fact occurred.

**8**  Mr. Gates 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. There must be a high probability commensurate with the seriousness of the allegations: see ***Curran*** at para. 13 and ***Otter*** at para. 14, citing ***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=); ***R.A.R.B. v. British Columbia,*** [*[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 ***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=), [*87 B.C.L.R. (3d) 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2R5-00000-00&context=) at para. 25, rev'd on other grounds, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=), [*[2003] 2 S.C.R. 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=).

**Credibility and reliability**

**9**  The Crown challenges the credibility of the plaintiff and of Mr. Bedard.

**10**  With respect to the plaintiff, Mr. Johnston pointed out that Mr. Gates gave different versions of the events in August 2006 (for his psychological assessment), October 2006 (at his examination for discovery) and at trial. The differences relate to the number of assaults, the dates and circumstances when Mr. Gates disclosed the abuse to others, the timing of the abuse, and whether he had continuing contact with Mr. MacDougall after the abuse.

**11**  Mr. Johnston conceded that Mr. Bedard appeared to be a convincing witness, but he submitted that his emergence "at the eleventh hour" must be viewed with considerable caution. He says that Mr. Bedard has a personal interest in this litigation and his evidence fits with Mr. Gates' evidence at trial, which "re-worked" the time frame of the abuse and the disclosure.

**12**  Mr. Adair submitted that Mr. Gates' evidence was forceful and credible, and was corroborated by other evidence.

**13**  I have considered the evidence carefully, and have noted the inconsistencies and discrepancies below. While I share some of Mr. Johnston's concerns, I find the overall evidence of both Mr. Gates and Mr. Bedard to be reliable. My reasons are outlined below.

**The plaintiff's background**

**14**  Mr. Gates is a 34 year-old aboriginal. His mother was half Haida. He did not know the identity of his biological father for many years. He believes his father is Cree, but he has no ongoing contact with him.

**15**  Mr. Gates has experienced significant trauma in his life. When he was six years old, his mother was killed by his stepfather. He lived with his grandparents for a period of time. Two of his uncles physically and sexually abused him. The abuse by one of the uncles, Dennis Gates, was particularly serious[**1**](#Forward_fnref_fnr-1). His family members had serious alcohol and drug problems and he was exposed to alcohol and drugs from a very early age. He said he drank beer at age three or four and smoked marijuana at four and a half. By age 11 or 12 he took various pills, mushrooms and LSD; by age 12 he was doing crack cocaine and by 14 he was injecting cocaine. His use of drugs was periodic, and became more consistent by age 15. He quit school in about grade seven.

**16**  Mr. Gates has an extensive criminal history, beginning in 1986, when he was 14. He committed numerous offences and spent time in youth correctional facilities. By the time he entered the adult system in 1991, Mr. Gates had a lengthy record consisting mainly of thefts, break and enters, possession of stolen property, mischief and escape.

**A. Liability**

**The assaults**

**17**  On July 22 1991, Mr. Gates was admitted to Fraser Regional Correctional Centre. He was there until May 14, 1992, when he was released on parole. He says it was during this period of time that Mr. MacDougall sexually assaulted him. He says there were six incidents, which took place over a period of months.

1. **The plaintiff's evidence**

**18**  Mr. Gates testified that he was interviewed by Mr. MacDougall for classification purposes on the second day he was at Fraser. Mr. Gates recalled being scared, and Mr. MacDougall seemed like "the only friendly type of person there." He told MacDougall about being sexually abused by his uncle, Dennis Gates. Nothing happened on that occasion. However, the next time Mr. Gates was in Mr. MacDougall's office, MacDougall attempted to perform fellatio on him. Mr. MacDougall pulled Mr. Gates' pants open just before his knees so his penis was exposed. Mr. Gates did not have an erection. He was shocked, and pushed MacDougall away. When MacDougall attempted to block his way to the door, Mr. Gates made "a nuisance" and MacDougall backed off. That incident took less than a minute. Mr. Gates said that this incident made him feel sick because of the prior abuse by his uncle. His usual reaction was to go into a rage, but this was a different environment; he was afraid to do anything, although he managed to "scream and holler a bit."

**19**  The second incident took place a month or two later. Mr. Gates had been given a job issuing and storing inmates' clothing. He said that he and Mr. MacDougall went into the Effects Storage room, which is a large room full of lockers. Mr. MacDougall pulled Mr. Gates' pants down to his knees and attempted to fellate him. Mr. Gates got very upset, "stomped" out the door, and returned to his unit. This incident took about a minute and a half, and again, Mr. Gates did not have an erection.

**20**  Mr. Gates referred to a third incident in Mr. MacDougall's office, where MacDougall was trying to make him feel comfortable by bringing coffee, and was advising him about filing for Criminal Injury compensation. He did not, however, describe the details of this assault.

**21**  Mr. Gates described another incident in the Effects Storage room. Mr. Gates had been called down to clean up a holding cell. He was getting cleaning supplies and Mr. MacDougall came in to the room. Mr. MacDougall pushed Mr. Gates against a locker, pulled his pants down to his ankles and put Mr. Gates' penis in his mouth. Mr. Gates pushed him away, hitting the lockers. He panicked and went to the door. He went back to his unit, very upset. It was shortly after this incident that Mr. Gates says he disclosed the abuse to two inmates. I will return to this disclosure later in these reasons.

**22**  On November 19, 1991, Mr. Gates escaped from Fraser with another inmate. They did not get very far and were captured later the same day. Mr. Gates was placed in the Special Handling Unit (SHU) for about a week, where he was locked up for 23 hours a day. He described one time when he was masturbating in his cell and he noticed someone or something flash by. The following day, Mr. MacDougall was on that range and he told Mr. Gates he liked what he saw. Mr. Gates wondered why MacDougall was on that unit. Mr. MacDougall told Mr. Gates that he could get him out of the SHU, get him his job back and even get him to a camp. While Mr. Gates was not released from the SHU right away, he was given the job of cleaner in the SHU, which was a privilege. When he got back to the regular population, he was given his cleaning job back. This was also a privilege. Because of this job, he was one of about ten inmates with a pass to get around the institution.

**23**  After this, there were two further incidents. One was in Mr. MacDougall's office. It was more of the same. Mr. MacDougall pushed his hand on Mr. Gates' shoulder, opened his pants about the knees and tried to fellate him. This time, Mr. Gates told Mr. MacDougall that he really did not want anything to do with this and was getting tired of it all together. Mr. MacDougall did not say anything, he just went to the computer and started typing. Mr. Gates got up and left. As he was doing his chores, he saw an officer remove a paper that was covering the window in the door to Mr. MacDougall's office.

**24**  The last incident took place in the clothing issue area. Mr. Gates was leaning against the counter and Mr. MacDougall came up behind him, grinding his penis against Mr. Gates' buttocks. This took only four to five seconds, but was enough to make Mr. Gates "really uncomfortable and angry." Mr. Gates started yelling. He was restrained by other guards and taken to segregation. He lost his job.

**25**  Mr. Gates did not tell any of the other officers what was going on. There were no further assaults. On May 14, 1992, Mr. Gates was released on parole. He was back in Fraser again on May 26, 1992, a few weeks later, having breached his parole. Mr. Gates was released again on July 21, 1992.

**26**  On two previous occasions, Mr. Gates alleged that there were only two incidents where Mr. MacDougall attempted to fellate him. On August 21 and 28, 2006, he was interviewed by Dr. Ronald LaTorre for a psychological assessment. According to Dr. LaTorre, Mr. Gates described the two incidents, which followed the masturbation incident and the grinding incident, as follows:

Mr. Gates reported that Mr. MacDougall subsequently attempted to fellate him. Mr. Gates said that, when Mr. MacDougall attempted to fellate him, he pushed Mr. MacDougall away. Three days later Mr. MacDougall attempted the same thing a second time and, again, Mr. Gates pushed Mr. MacDougall away.

I asked Mr. Gates to provide details of the attempts to fellate him. He recalled that Mr. MacDougall had an office similar to the one I was interviewing Mr. Gates in at Mountain Institution. ... Mr. Gates said he was sitting on a chair and Mr. MacDougall approached him, touched his thigh, pulled his pants and underwear down his waist and put his head down on Mr. Gates' lap and his mouth on Mr. Gates' flaccid penis. Mr. Gates said he freaked both times. He denied he experienced an erection either time. He said that Mr. MacDougall tried to ignore him after that.

**27**  He confirmed that there were two instances at his examination for discovery on October 5, 2006.

**28**  Mr. Gates explained the reason for the difference. He said he was afraid and ashamed. He learned that a witness was coming forward and it then made sense "to tell the whole truth, because now it's not just my word, there's other people who know, and it's not just me saying it now." He said he did not feel so insecure now; he still has issues, but he is getting better. He said also that his counsellor, Judy Wright, advised him to disclose everything. He also said this:

I didn't even want to tell you everything, I left stuff out when the Examination for Discovery came because my pride got in the way, I wanted to be a man, I don't want you to know that I let this happen six or eight times and I want you to know that I hated every time ...

1. **Kelly Bedard's evidence**

**29**  Kelly Bedard testified that he saw Mr. Gates and Mr. MacDougall "having sex" in the Effects Storage room at Fraser in December 1991 or January 1992. He recalled that it was around Christmas time. He had been at court and was one of the last to come back into Fraser. Mr. MacDougall and Mr. Gates were working at the clothing issue area. Mr. Bedard was talking to a friend who was in one of the holding cells. He then went to clothing issue to put his clothes on. He did not see Mr. Gates. The door to Effects Storage was open. He knew where his locker was, so he went in himself to put his bag in his locker. That is when he saw Mr. Gates at the back of the room, holding on to the wall with his eyes shut and his pants down around his ankles, and Mr. MacDougall on his knees giving Mr. Gates "a blow job".

**30**  Mr. Bedard said that he was there "just enough to know it was not my business" and left. He did not know if either Mr. Gates or Mr. MacDougall saw him and he never asked about it. He thought Mr. Gates would have seen him if his eyes were open.

1. **Conclusion**

**31**  In most cases involving allegations of sexual assault, there are no independent witnesses. In this case, we have the evidence of Kelly Bedard. Mr. Bedard, however, does have an interest in this litigation. He has commenced an action of his own against Mr. MacDougall and the Crown. Because of this, I have considered his evidence with some caution.

**32**  Mr. Bedard's evidence about what he saw was not undermined in cross-examination. His description is consistent with Mr. Gates' evidence. There is no evidence that Mr. Bedard and Mr. Gates discussed their evidence. Mr. Bedard did not recall specifically when he saw the incident, but he recalled that there was a Christmas tree on the range. I accept his evidence regarding the incident he witnessed in the Effects Storage room.

**33**  The recent change in Mr. Gates' evidence regarding the number of incidents is troubling. It appears that a primary reason is that Mr. Gates was reluctant to admit how many times it happened. In addition, he learned that his case would not rely only on his word, because a witness was coming forward. While I understand that a plaintiff such as Mr. Gates has an uphill struggle, this does not excuse such changes, particularly when the statements are made under oath and within a short period of time.

**34**  I observed Mr. Gates throughout this trial, and listened carefully to his evidence. He is an emotional man, with obvious endearing qualities. He has not told the truth at various times, about a number of things. When confronted with these lies, he candidly admitted them. Most of the time, his lies were calculated to assist him to get released from custody or to obtain some benefit associated with the prison system. Regarding his experiences of abuse, he did not feel the need to disclose everything, because he ends up feeling angry and upset. Dr. LaTorre said that victims do not always report all abuse, particularly in an assessment situation. However, they do tend to disclose more as they progress in treatment. Mr. Gates had been in treatment with Judy Wright since April 2005, so one would expect that he would be more disclosive by August 2006, when he was assessed by Dr. LaTorre. However, it appears that Mr. Gates was making less progress than he thought. My impression is that Mr. Gates was less than careful when describing the extent and detail of the MacDougall assaults to Dr. LaTorre and at his examination for discovery.

**35**  There are a number of inconsistencies in his evidence, both internally and externally, which I have reviewed throughout these reasons. The inconsistencies are mainly in details, which may not be unusual in historical cases. For this reason, I do not consider Mr. Gates' evidence that there were six specific incidents to be particularly reliable. Overall, however, I find Mr. Gates' evidence that he was sexually assaulted by Mr. MacDougall to be credible. It is supported in part by Mr. Bedard's evidence.

**36**  I find that Mr. MacDougall sexually assaulted Mr. Gates on a number of occasions. The assaults consisted primarily of attempts by Mr. MacDougall to fellate Mr. Gates and one incident where MacDougall grinded his penis against Mr. Gates' buttocks.

**Disclosure of the assaults**

**37**  There is evidence that Mr. Gates disclosed the MacDougall abuse in late 1991. The reliability of this evidence is in issue due to both internal and external inconsistencies.

1. **The plaintiff's evidence**

**38**  Mr. Gates testified that he disclosed the MacDougall abuse to two inmates, Blair Smith and Kelly Bedard, sometime after the second incident in the Effects Storage room. He was not sure if this disclosure was before or after his escape on November 19, 1991. Blair Smith was an older inmate, someone who Mr. Gates went to with problems, and Mr. Bedard was "Blair's right-hand man". Mr. Smith noticed that Mr. Gates was upset, and Mr. Gates told him that there were sexual abuse issues. He did not disclose any details. Mr. Gates said that his conversation was primarily with Mr. Smith, not Mr. Bedard, but that Mr. Bedard was walking "sentry" back and forth while the other two were sitting at the kitchen table. He thought he may have talked to Mr. Smith about it in the yard as well, as they did heroin together in the yard. Neither Mr. Bedard nor Mr. Smith told Mr. Gates that they had been abused by Mr. MacDougall.

**39**  This evidence was inconsistent with Mr. Gates' answers in his examination for discovery. There, he said that he first disclosed the MacDougall abuse to a correctional officer and his alcohol and drug counsellor, in about 2000 or 2001. He testified that this answer was not true:

I didn't remember the time I disclosed it to Blair when you were questioning me about this until I saw the paper work from B.J. Brown. Like I said, we were doing heroin most of the time as well, so it's not like I was intentionally trying to lie that I disclosed it to Blair. And his word, I don't really think would really mean anything. Just like MacDougall says throughout here in his own statements, the statements of others, an inmate's word against a guard isn't going to be any good.

1. **Kelly Bedard's evidence**

**40**  Mr. Bedard's evidence is consistent to some extent with Mr. Gates' testimony. Mr. Bedard testified that Mr. Gates was pacing around the range, "stressing out". He asked Mr. Gates what was going on. Mr. Gates told him he was having a problem with another inmate. Mr. Bedard was going to see that inmate, but Mr. Gates started crying. He began telling them about an incident with Mr. MacDougall, and that MacDougall was giving him a hard time when he was working, and was "trying to get sex out of him".

**41**  Mr. Bedard did not know if Mr. Gates knew he had witnessed an incident in the Effects Storage room. Mr. Bedard "knew what MacDougall was about", as he had gone through his "own situation" with Mr. MacDougall some years earlier at another institution.

**42**  Mr. Bedard could not recall specifically where he was when Mr. Gates began talking about the abuse. He remembered sitting in the pool room, and then at a table at the end of the range, where it was quieter. He was not sure if Mr. Smith was there at that point, but he said that Mr. Smith was definitely part of the conversation. He thought he took Mr. Gates off to the side at one point and tried to talk to him. Mr. Gates said that he was abused as a child, Mr. MacDougall was "doing this stuff to him", he was "really screwed up" and did not know what to do.

**43**  Mr. Bedard confirmed that he did not tell Mr. Gates that he had been abused by Mr. MacDougall:

Well because Gates could be in PC the next day and he would be running his mouth and telling people, you know, anything he wants. Or he could back me, I've had enough people in my life experience at that point in my life not to tell people things.

**44**  He said that he has not had any conversations with Mr. Gates since then.

1. **Statement of Blair Smith**

**45**  Mr. Adair advised the Court that the plaintiff was not able to locate Blair Smith. Mr. Gates said he had not seen him since 1991 or 1992. In 1998 and 1999, Sgt. B.J. Brown was investigating sexual assault allegations against Mr. MacDougall. Blair Smith made a statement to Sgt. Brown on January 6, 1999. The statement is hearsay. Mr. Johnston did not object to this statement being admitted into evidence under the principled approach to hearsay.

**46**  The primary danger associated with this hearsay statement is the lack of opportunity for a contemporaneous cross-examination. The facts surrounding the making of the statement - it was made in response to a non-leading question from Sgt. Brown in the context of his criminal investigation of Mr. MacDougall - offer sufficient circumstantial guarantees of trustworthiness to compensate for that danger. I was satisfied that the criteria of necessity and reliability were sufficiently met to justify the admission of the statement for the purpose only of proving that Mr. Gates had disclosed the MacDougall abuse to Mr. Smith. At issue is the ultimate reliability of the statement, and what weight, if any, I should attach to this evidence.

**47**  In the interview, Sgt. Brown asked Mr. Smith if he was aware of any other inmates who were victimized by Mr. MacDougall. Mr. Smith said he was. The exchange continued:

1. Who?
2. ... young native kid that I was in Fraser with ... by the name of Kenny Gates.
3. How do you know?
4. Because Ken told me.
5. What did he say?
6. He said that he was uh, he was uh. He was crying one day and um I don't know if he had been doing drugs that day or we didn't have drugs or. You know what I mean but he was in a, in a mood of he wanted to talk and um, he was telling me that his life you know about his life and it sucked and that uh MacDougall was giving him a hard time and it uh, he had uh you know proposed sexual encounters with him and had had sexual encounters with him. Um, Kenny was uh, um at the time he was our unit cleaner. Just a young kid that everybody really really liked and uh you know he uh, you know to the best of my recollection he was pretty fucked up over it. And uh we had conversations in my cell, we also had conversations out in the ... yard because at Fraser there's, there's basically there was three yards and you could go uh to the centre yard or you can go to another yard. But uh hardly any anybody used if you want to talk right.

**48**  Mr. Smith confirmed that he spoke to Mr. Gates about this during his second trip at Fraser, which was between September 12, 1991 and December 5, 1991.

**49**  Mr. Adair conceded that only modest weight should be given to Mr. Smith's statement. However, he pointed out that during the interview, Mr. Gates' name came up spontaneously, and the timing is consistent with Mr. Gates' evidence. He submitted that the statement provides modest corroborating support for both Mr. Gates' evidence and Mr. Bedard's evidence.

**50**  Mr. Johnston submitted that the statement should be given little weight, because its credibility is compromised. First, because Mr. Bedard's evidence about where and with whom the conversation took place is not entirely consistent with Mr. Gates' evidence. Second, it appears that the criminal charge which was laid in relation to Mr. Smith did not result in a conviction, suggesting there may have been problems with Mr. Smith's credibility. Third, neither Bedard nor Smith disclosed their alleged abuse to Mr. Gates, or even to each other.

**51**  I have some concerns about the ultimate reliability of this evidence, primarily because the Crown had no opportunity to cross-examine Mr. Smith. His credibility has not been tested. However, the circumstances in which the statement was made provide some comfort in the truth of the statements about Mr. Gates' disclosure. The statement was not coerced; it was given in response to a direct question from Sgt. Brown. It is reasonably consistent with the evidence of Mr. Gates and Mr. Bedard. It differs in respect of where and when the disclosure took place. Considering the length of time since the disclosure was made, such inconsistencies are not unusual. Here, there is also evidence that Mr. Gates and Mr. Smith were using drugs during that period of time. In these circumstances, I would not expect a person to recall precisely where they were and on what date such a conversation took place.

**52**  I do not consider the fact that neither Mr. Smith nor Mr. Bedard told Mr. Gates that Mr. MacDougall had abused them to be significant in the circumstances. While Mr. Smith's explanation ("too ashamed") is hearsay, Mr. Bedard's explanation, as noted above, is entirely credible, given the prison context.

**53**  Accordingly, I have given some weight to the statement of Mr. Smith. It provides some corroboration to the evidence of Mr. Gates regarding his disclosure of the abuse in 1991.

1. **Conclusion**

**54**  Mr. Johnston submitted that Mr. Gates' evidence at trial about when he first disclosed the abuse was inconsistent with prior statements given under oath at his examination for discovery. Mr. Gates' explanation was, essentially, that he did not recall the disclosure in 1991 until he read Mr. Smith's statement to Sgt. Brown.

**55**  I find this explanation odd. However, given Mr. Gates' evidence that he was using heroin at the time, given his emotional state, and given the evidence of Mr. Bedard, I accept his explanation.

**56**  I also accept the evidence of Mr. Bedard, and to a limited extent, the evidence in Mr. Smith's statement. There are inconsistencies in each person's version, but those inconsistencies are primarily about details, which would be difficult to recall after such a long time. The essence of the evidence of both of these individuals is that Mr. Gates was emotionally upset and told them that he was having problems of a sexual nature with Mr. MacDougall. I find that consistency compelling.

**57**  I find that Mr. Gates did disclose the problems he was experiencing with Mr. MacDougall to Kelly Bedard and Blair Smith sometime in late 1991.

**When the assaults occurred**

1. **The evidence**

**58**  At trial, Mr. Gates testified that the assaults began within a few weeks after he was admitted to Fraser in July 1991. This timing is consistent with Mr. Bedard's evidence but inconsistent with what Mr. Gates told Dr. LaTorre.

**59**  According to Dr. LaTorre, Mr. Gates reported that it was after he breached his parole and returned to Fraser on May 26, 1992 that Mr. MacDougall attempted to fellate him. However, Mr. Gates had difficulty providing a timeline to Dr. LaTorre. It appears that Mr. Gates reconstructed a timeline during his second interview with Dr. LaTorre, using some documents as an aid. This timeline indicated that the masturbation incident occurred first, around November 1991, after Mr. Gates' unsuccessful escape from Fraser. In April 1992, Mr. Gates told Mr. MacDougall that he had been sexually assaulted by his uncle, Dennis Gates. The grinding incident occurred shortly after that. The two incidents of attempted fellatio occurred sometime after May 26, 1992.

**60**  It appears that the abuse did not occur until after Mr. Gates told Mr. MacDougall about the prior sexual abuse by Dennis Gates. At trial, Mr. Gates testified that he disclosed this to Mr. MacDougall right from the start. To Dr. LaTorre, Mr. Gates said that the disclosure was in April 1992. This date accords with a statement contained in a July 1992 Report to Crown Counsel, which was prepared in respect of charges against Dennis Gates. An entry dated April 2, 1992 states:

The accused' nephew, Kenneth Adam GATES, made a disclosure of being buggered by the accused when he was 6 years old. Kenneth Adam GATES made the disclosure to ROD MCDOUGALL, a social worker of the Fraser Correction Centre in Maple Ridge, B.C. He reported it because he felt that the two children of Wanda Beverly JONES residing with the accused may presently be victims of sexual assault.

**61**  This note, written by a police officer, is ambiguous. It does not say when Mr. Gates made the disclosure to Mr. MacDougall. It implies that he did so quite recently, but it is not clear in the last sentence if the writer was referring to Mr. Gates or Mr. MacDougall. Mr. Gates said that he made the disclosure to Mr. MacDougall before this.

**62**  Mr. MacDougall assisted Mr. Gates with his parole application in March 1992. He provided a letter for that application. That letter does not indicate when Mr. Gates disclosed the abuse to him:

Prior to his escape I had spoken with him on several occasions. I found him intelligent, some what communicative, lacking in the stablishment [sic] of goals, frustrated, scared and essentially withdrawing from drugs and life. I spoke with him in the Special Handling Unit U4C. At this point he had now been confined for several weeks, acting inappropriately and being left to his own devices, limited though they were. He found that living with himself may have been more frightening than living with other offenders and Staff. For what ever reason he started communicating about feelings, emotions, goals and aspirations. ... After some discussion it was decided he would be tried back in a regular living Unit and that he would be given some responsibility by working in Records. He became the Records Cleaner achieving a level of responsibility which he had not shown previously. ... He was beginning to talk about his life experiences, about why he was offending, how he feeling and how he hoped to change his life. It is important to note that this was several months prior to any application for Parole or early release. ..

It would be presumptuous to presume that his family life was tumultuous, that any parenting was virtually non-existant [sic], or he was contuously [sic] sexually and physically abused during most of his formative life. Essentially his father figure Dennis Gates was a pedophile who now only recently is before the Courts once again. ...

**63**  While this letter may imply that Mr. Gates began to open up to Mr. MacDougall sometime after his escape attempt on November 1991, it is quite clear that Mr. MacDougall was well aware of Mr. Gates' abusive background. I do not find this letter to be inconsistent with Mr. Gates' evidence that he disclosed his prior abuse to Mr. MacDougall fairly early after he entered Fraser.

1. **Conclusion**

**64**  Mr. Johnston pointed out that the plaintiff's timeline for the abuse shifted on the eve of trial, and suggested that it was carefully constructed only after the statement of Mr. Smith came to light. He submitted that it seems unlikely that Mr. Gates would have forgotten his disclosure to Mr. Smith and Mr. Bedard and so confused the timeline, in light of the "mileposts" he committed to with Dr. LaTorre.

**65**  This shift in the evidence is indeed troubling. However, I accept that time frames are difficult when one is dealing with events that took place long ago. A plaintiff such as Mr. Gates would have difficulty reconstructing the specifics of such events, particularly in the context, where he was in prison and also using heroin. The timeline that was provided by Dr. LaTorre appears to have been worked out during the interview, with the assistance of documents. The documents that provided the April 1992 date are, in my opinion, ambiguous, and do not establish when Mr. Gates told Mr. MacDougall about his prior abuse. Mr. Gates' reconsideration of this when he learned of Mr. Smith's statement makes some sense. I do not consider that Mr. Gates was "committed" to the time frame he gave to Dr. LaTorre, given his reliance on documents that were then available to him.

**66**  I accept Mr. Gates' testimony that the abuse occurred during 1991, and in any event, before his initial release on May 14, 1992.

**Lack of disclosure in 1998**

**67**  In December 1998, Sgt. Brown sought to interview Mr. Gates in connection with his criminal investigation of Mr. MacDougall. The interview was brief. Mr. Gates was upset when Sgt. Brown arrived and did not want to talk to him. He became emotional and indicated he had nothing to say. Mr. Gates said that he went into denial, he was still ashamed, and he was trying to protect himself as he was still in prison. He felt that Mr. MacDougall could get at him if he wanted.

**68**  Mr. Johnston says that this refusal to talk to Sgt. Brown is significant, because Mr. Gates was presented with a "golden opportunity" to have Mr. MacDougall charged with sexual assault. Instead, he chose not to cooperate. Counsel submitted that Mr. Gates refused at least in part because he felt compromised, as he knew he was in a relationship from which he derived benefits. Moreover, he knew he was not the only one. Participating in the prosecution of his abuser would seem like a desirable goal, but it was not the goal of Mr. Gates.

**69**  While this may have been an opportunity for Mr. Gates, he was clearly not ready to take it. There are many likely reasons for this. Sgt. Brown said that many inmates were reluctant to talk. Mr. Gates had testified in the prosecution of Dennis Gates some years before, and this had not been a pleasant experience for him, as he had been threatened by his uncles about testifying. While Mr. MacDougall was not threatening to Mr. Gates in that way, the two did appear to have a somewhat complex relationship, which involved each "keeping his part of the deal." For these reasons, I do not consider Mr. Gates' failure to cooperate with Sgt. Brown in 1998 to detract from his evidence about the MacDougall abuse.

**Further contact with Mr. MacDougall**

**70**  Mr. Gates continued to have some contact with Mr. MacDougall after he left Fraser in 1992. It appears that most of this was periodic telephone contact. This went on until about 1997, even when Mr. Gates was in a different institution. Mr. MacDougall assisted Mr. Gates with parole applications and with an application for Criminal Injury compensation. Mr. Gates listed Mr. MacDougall as a reference on parole applications in 1992, 1995 and 1997. In 1995, Mr. MacDougall assisted Mr. Gates to get transferred to Alouette River Correctional Centre[**2**](#Forward_fnref_fnr-2). Apparently, Mr. MacDougall was working there at the time. In April 1997, Mr. Gates indicated in his application that he was in regular contact with Mr. MacDougall for guidance and emotional support. He testified that this was not true; he would only contact MacDougall by telephone when he was applying for parole or for a transfer. He said this was more of a "false support" than anything.

**71**  Mr. Gates said that he received benefits only through Mr. MacDougall. Most of the time, Mr. MacDougall got Mr. Gates what he wanted; he was "honourable" and he kept his commitments. Mr. Gates felt that Mr. MacDougall played on his emotions, making him feel that he was special.

**72**  Mr. Johnston submitted that this evidence of a continuing relationship between Mr. Gates and Mr. MacDougall demonstrates a "distinctly odd" way for a victim of sexual assault to deal with his abuser. He pointed out that Mr. MacDougall derived no possible advantage from the relationship after 1991-1992, when any sexual contact ceased, and that Mr. Gates derived "significant benefits".

**73**  Dr. LaTorre did not consider it odd that Mr. Gates would use Mr. MacDougall as a reference, when taken in the context of the situation. He said that people who are abused often have ambivalence with those who have abused them. He added that there may have been some manipulation by Mr. Gates in listing Mr. MacDougall (and others) in order to obtain a type of benefit, i.e. release from prison.

**74**  I do not consider the evidence of this continuing relationship to detract from the plaintiff's evidence about the assaults. It appears that Mr. Gates did have a somewhat complicated relationship with Mr. MacDougall, but I do not find that surprising in the circumstances, particularly given Dr. LaTorre's evidence and Mr. Gates' explanations, which I accept.

**Conclusion on liability**

**75**  For the reasons set out above, I find that Mr. Gates has proven, with clear and cogent evidence, that he was sexually assaulted by Mr. MacDougall on several occasions, and that these assaults took place sometime after late July 1991 and before May 14, 1992, during the time Mr. Gates was incarcerated at Fraser Regional Correctional Centre. The assaults consisted primarily of attempts by Mr. MacDougall to fellate Mr. Gates and one incident where MacDougall grinded his penis against Mr. Gates' buttocks.

**B. Causation and damages**

**76**  I must now consider the extent to which the sexual assaults caused injury to Mr. Gates, and whether that injury has caused a loss.

**77**  As I noted in ***Robinson v. MacDougall***, [*[2006] B.C.J. No. 3251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61H1-00000-00&context=), [*2006 BCSC 1875*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61H1-00000-00&context=) and in ***Curran***, cases of historic sexual assault present significant challenges to a court in determining issues of causation and damages. Mr. Gates is a plaintiff who comes to court with a very sad life history, both before and after the assaults. He suffers from psychological injuries. It is not easy to untangle the different sources of damage and loss he has experienced. However, I am required to do so, because a plaintiff is entitled to be compensated only for loss caused by the actionable wrong. This does not mean that a plaintiff who has already experienced abuse and other trauma is worth less than one who has not. It means that the plaintiff must be placed in the position he would have been in had the tort not been committed: ***Blackwater v. Plint***, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at para. 74, citing ***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 32.

**78**  I must distinguish between causation as the source of the loss and the rules of damage assessment in tort. As Chief Justice McLachlin stated at para. 78 of ***Blackwater***:

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*.

**79**  I find Chief Justice Brenner's summary of the law of causation set out at para. 370 of the trial decision in ***Blackwater*** to be helpful:

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.

**The plaintiff's position**

**80**  Mr. Gates seeks general and aggravated damages in the range of $45,000 to $55,000, an award for future counselling in the range of $10,000, and punitive damages against Mr. MacDougall in the amount of $10,000.

**The defendant's position**

**81**  The Crown seeks a reduced award of damages on the basis that Mr. Gates' original position was significantly damaged. Mr. Johnston submitted that the appropriate range of general damages in this case is $15,000 to $20,000 and that an award for future counselling is not supported by the evidence.

**The plaintiff's injuries**

**82**  Mr. Gates gets emotional and angry when he talks about the abuse. He has had considerable difficulty dealing with his emotions, and has physically attacked others when he is in this state. He said he has assaulted people who remind him of Mr. MacDougall. He doesn't know who to trust, especially officers, but he acknowledged that he has had both good and bad times with guards.

**83**  Mr. Gates said he has had lots of sexuality concerns. At times, oral sex has triggered feelings of repulsion. He engaged in prostitution for a time, mainly with males. He wondered if he was gay. He has since determined that he is not. He has abused women, and he feels quite despondent about that. However, he has been involved in a number of relationships with women, some for fairly lengthy periods of time.

**84**  He said he has used the same drugs he did before Mr. MacDougall, but harder and more of them. He used drugs intravenously before the abuse. He uses cocaine, heroin and crystal meth. He rarely uses drugs when he is in prison now, except when his emotions get stirred up from this litigation.

**85**  Dr. Ronald LaTorre provided a psychological evaluation of Mr. Gates. He recorded background information provided to him by Mr. Gates, much of which was consistent with the evidence at trial, although Mr. Gates acknowledged that he was not truthful all the way through. Dr. LaTorre based this evaluation on Mr. Gates' report of two incidents of attempted fellatio by Mr. MacDougall, as well as the masturbation and grinding incidents. He also assumed a timeline that differs from the timeline that I have accepted from the evidence. I do not think that Dr. LaTorre's opinion deserves less weight as a result of these somewhat different factual assumptions, as his opinions are not dependent on those details. Moreover, Dr. LaTorre was cautious about accepting everything Mr. Gates told him.

**86**  Dr. LaTorre also administered several tests. Personality testing revealed that Mr. Gates has self-defeating, depressive and anti-social traits. However, he did not present as self-defeating or depressive. Dr. LaTorre opined that this was because Mr. Gates attempts to put on a good front; he does not appear to allow expressions of weakness or vulnerability, which he may have adopted in prison in order to survive. While he reported symptoms of anxiety and depression, the test results indicated that Mr. Gates remains involved in life despite this. He noted, however, that Mr. Gates was taking anti-depressant medication, which appeared to be effectively treating (or possibly masking) an underlying mood disorder. Dr. LaTorre concluded that the test results were consistent with the clinical history and presentation, taking into account that Mr. Gates was likely to present with a stronger, better adjusted façade than what actually exists.

**87**  The Traumatic Symptom Inventory (TSI) tests post-traumatic stress and other psychological sequelae of traumatic events. It assesses a wide range of psychological impacts, including symptoms associated with Post-traumatic Stress Disorder and difficulties associated with chronic psychological trauma. This test revealed statistically significant inconsistencies, so that the results for Mr. Gates must be considered with caution. However, Dr. LaTorre said that Mr. Gates was fairly low in inconsistencies overall. The TSI results suggested a "classic" post-traumatic presentation and "a relatively chronic symptom pattern" that may have become integrated into Mr. Gates' personality.

**88**  Dr. LaTorre was aware that Mr. Gates had a history of exaggerating past events for ulterior purposes, and was cautious about his self-reports. He relied to some extent on the validity indicators in his testing. He noted that Mr. Gates did not appear to self-denigrate and instead, had a tendency to put himself in a socially desirable light. Dr. LaTorre thought that this was likely related to Mr. Gates' narcissistic tendencies. In any event, it was not indicative of a malingerer. He concluded that Mr. Gates endorsed symptoms and psychological problems in a manner that was "highly consistent" with individuals honestly reporting their difficulties.

**89**  Dr. LaTorre offered a number of "provisional diagnoses", which included chronic Post-traumatic stress disorder, a major depressive disorder in partial remission, a history of cocaine, heroin and methamphetamine abuse and an anti-social personality disorder. He was not able to attribute Mr. Gates' post-traumatic stress symptoms only to the MacDougall abuse, but he did say that it may have contributed to them:

It is difficult, if not impossible, in cases of multiple traumata to speak with great certainty that any one trauma has caused the sum total of an individual's symptom picture. In this case, Mr. Gates had earlier reported that the abuse by his uncle had caused suicide attempts, relationship problems, substance abuse, criminal behaviour and sexual dysfunction. ... The symptoms, then, could have flowed from either the assaults by his uncle, the assaults by Mr. MacDougall, a combination of the two or even from the sexual assault in the group home, the murder of his mother or any other trauma that had occurred prior to 1995.

**90**  Regarding the psychiatric diagnoses related to the MacDougall abuse, Dr. LaTorre's opinion was that

Mr. MacDougall's assaults on Mr. Gates exacerbated and prolonged posttraumatic symptoms that Mr. Gates would have experienced from the multiple traumata he earlier experienced. At present it appears the assaults by Mr. MacDougall have become pre-eminent because Mr. Gates is "reliving" the assaults as he prepared for the civil proceedings.

**91**  Regarding sexuality issues, Dr. LaTorre agreed in cross-examination that abuse by Mr. Gates' uncles at around age 12 could have shaped his patterns of sexual arousal and later development. This was a significant period in his life and such an experience could slant a person's perception of sexuality. However, early abuse is not necessarily worse than later abuse by a person in authority. With respect to Mr. Gates' later prostitution, Dr. LaTorre noted that the MacDougall abuse showed him that he could get something in return, and this may have been quite different from the earlier abuse.

**92**  Dr. LaTorre also thought that Mr. MacDougall's assaults likely contributed to Mr. Gates' substance abuse and possibly exacerbated it. The basis for this opinion is not clear. He was dubious about Mr. Gates' reports of injecting cocaine and heroin by age 12, attributing this more likely to narcissistic exaggeration. Dr. LaTorre was aware of the drug abuse in Mr. Gates' family and agreed that he would be at a higher risk where alcohol and drugs are used in a family setting.

**93**  Mr. Gates has clearly been affected by Mr. MacDougall's abuse, which can be described as a sexual pursuit to some extent. He was a particularly vulnerable young man with a lot of problems, who was not able to cope very well with MacDougall's actions. He found it difficult, and continues to find it difficult, to control his anger when he thinks about Mr. MacDougall or talks about the abuse. The evidence suggests, however, that this will subside once this litigation has concluded.

**94**  I accept Dr. LaTorre's opinion that Mr. Gates has post-traumatic stress symptoms, which stem from many causes, and which have been exacerbated by the MacDougall abuse. I also accept that Mr. Gates has symptoms of anxiety and depression, also stemming from many causes, which have to some extent been exacerbated by the abuse. I find that the assaults were a materially contributing cause of these injuries. While it is possible that the abuse may have exacerbated Mr. Gates' substance abuse problems, the evidence is not sufficient to support a finding that it was a materially contributing cause to his on-going drug abuse.

**The plaintiff's loss**

**95**  Mr. Gates is entitled to be compensated for the loss caused by the sexual assaults, which includes post-traumatic stress symptoms, depression and anxiety. He is entitled to be restored, as much as possible, to his original position.

1. **Pre-existing condition**

**96**  The main issue is the extent of the damages that should be awarded in order to put Mr. Gates back into his original position. Mr. Johnston submitted that the "crumbling skull" principle applies in this case, and he further submitted that a third category of "crumbled skull" may also apply. He relied on ***T.E.G.H. v. P.K.***, [*2001 ABQB 43*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X46F-00000-00&context=), [*282 A.R. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X46F-00000-00&context=), where Trussler J. stated at para. 48:

This case almost suggests a further category, that of a "crumbled skull". What we have is a Plaintiff who was so seriously damaged before he met P.K. that it is not possible to say that P.K.'s acts caused him damage beyond the grave insult that accompanies being sexually assaulted. At the most all that could be said is that there was a slight aggravation of already well established problems.

**97**  I do not agree that a further category is warranted. The distinction between "thin skull" and "crumbling skull" is often difficult to apply, especially when dealing with psychological injuries. In ***Pryor v. Bains*** [*(1986), 69 B.C.L.R. 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G39N-00000-00&context=), the Court of Appeal suggested that the distinction depended upon whether a pre-existing condition was present and disabling at the time of the tort. In ***Athey***, Major J. moved away from the "thin skull" and "crumbling skull" 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. ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

**98**  I agree with the comments of Paperny J. in ***Whitfield v. Calhoun*** [*1999 ABQB 244*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JP9P-G39R-00000-00&context=), [*242 A.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JP9P-G39R-00000-00&context=) (Q.B.), that Major J.'s analysis in ***Athey*** was

... simply a recognition that the more active a pre-existing condition, the higher the measurable risk that it will detrimentally affect a plaintiff in the future. The more active, manifest or enduring a condition is, the more likely it is to impact on a plaintiff's "original position".

**99**  This is consistent with the statements of the Court of Appeal in ***T.W.N.A. v. Clarke***, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=), [*22 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=) at paras. 28-35.

**100**  It appears to be common in cases of sexual abuse that the abuser seeks out vulnerable victims. The injuries suffered by these individuals as a result of the abuse may be quite severe as a result of their pre-existing, psychologically-damaged condition. It is just as logical to say that the injuries suffered are actually an exacerbation or aggravation of their pre-existing condition. In my view, the approach in ***Athey*** takes both of these possibilities into account because, in the final analysis, the object is to return the plaintiff to the position he or she would have been in had the abuse not occurred and to compensate him or her for the actual damage suffered as a result of the abuse.

**101**  This principle is difficult to apply in cases involving psychological injuries. It may not be possible to separate psychological symptoms caused by the abuse from psychological symptoms caused by other life experiences, especially when dealing with symptoms over many years. However, courts are obliged to consider a plaintiff's original position regardless of the kind of injuries he or she has suffered.

**102**  Mr. Adair submitted that where there is a series of tortious acts, each of which has been a materially contributing cause to on-going psychological damage, each tortfeasor is liable for the entire amount of the loss, unless the court is able to meaningfully sort out which damages were caused by which tortious act. He suggested that this Court should take the "indivisible damages" approach taken by Vickers J. in ***E.D.G. v. Hammer*** [*(1998), 53 B.C.L.R. (3d) 89*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-228H-00000-00&context=), aff'd [*2003 SCC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0Y9-00000-00&context=), [*[2003] 2 S.C.R. 459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0Y9-00000-00&context=). I disagree with Mr. Adair's characterization of that case. ***E.D.G.*** involved psychological injuries caused by sexual abuse, where the plaintiff had been sexually abused by others subsequent to the abuse by the defendant. Vickers J. made a finding, based on expert evidence, that 90% of the plaintiff's damages were indivisible and were caused by the defendant and by the subsequent tortfeasors. This finding was not disturbed on appeal. ***E.D.G.*** does not change the requirement set out in ***Athey*** that in assessing damages, the plaintiff must be returned, so far as possible, to his original position. In my opinion, it is only where the court makes a specific finding that a plaintiff's damages are both caused by the defendant and are indivisible from damages caused by another source that this approach is appropriate. I have not made such a finding in this case.

**103**  Mr. Gates was a traumatized young man when he entered Fraser in 1991. He had an extremely difficult childhood and adolescence. His mother was killed when he was six years old, his extended family was severely dysfunctional, with alcohol and drug abuse, and he was physically and sexually assaulted by his uncles. He had a demonstrated conduct disorder at a young age, did not go to school past grade seven and became an alcohol and drug abuser himself from a very early age. He had an extensive youth record by the time he was 19 years old. The physical and sexual abuse by his uncle Dennis Gates was especially traumatic, with threats that carried on for a long time.

**104**  Despite this terribly unfortunate background, Mr. Gates still had potential in 1991. In a June 1991 Pre-sentence Report, a probation officer noted that Mr. Gates came from a "multi-problem family background" that included criminal behaviour, alcohol and drug abuse and violent interactions, and that this background had become "an integral part of who and what he has become." Yet, the officer also described Mr. Gates as "a physically healthy and intellectually capable individual" who had "the ability and potential to become a constructive, diverse and useful member of society." He noted that Mr. Gates was then at the stage of his life where he had to make certain positive decisions or be prepared to spend the rest of his formative years in jail.

**105**  Mr. Gates certainly had potential to turn his life around. However, given his life experiences and circumstances, there was clearly a measurable risk that Mr. Gates would have been psychologically damaged in the years to come, regardless of the abuse by Mr. MacDougall. This must be taken into account in the assessment of damages.

1. **Subsequent intervening events**

**106**  The same principles apply where subsequent events would have affected a plaintiff's original position: ***T.W.N.A. v. Clarke***, at para. 36.

**107**  Unfortunately, after Mr. Gates left Fraser in 1992, he did not turn his life around. He engaged in prostitution for a time, mostly with males. Most significantly, he continued to have serious substance abuse problems and he continued to engage in criminal activity. He spent years in prison.

**108**  The prostitution could be attributed, at least in part, to the MacDougall abuse. However, as I indicated above, there is no causal connection between the abuse and Mr. Gates' on-going substance abuse and criminal behaviour.

**General and aggravated damages**

**109**  I accept the evidence of Mr. Gates regarding the effects of the MacDougall abuse, and I also accept the evidence of Dr. LaTorre regarding his psychological symptoms. At the time of the assaults, Mr. Gates experienced feelings of shame, humiliation and self-blame, and he continues to experience those same feelings from time to time. He has some symptoms of Post-traumatic Stress Disorder, depression and anxiety, which stem from many sources of trauma in his life, but which have been exacerbated by the MacDougall assaults. The evidence suggests that many of his psychological symptoms will likely subside once this litigation is concluded.

**110**  I have considered the following factors for assessing damages in sexual assault and battery cases, as outlined by Stromberg-Stein J. in ***T.O. v. J.H.O.***, [*2006 BCSC 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1RJ-00000-00&context=), [*266 D.L.R. (4th) 209*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1RJ-00000-00&context=)[**3**](#Forward_fnref_fnr-3):

1. the number or frequency of assaults;
2. the nature of the sexual assaults;
3. the age of the complainant at the time;
4. the vulnerability of the complainant;
5. the relationship between the parties;
6. the force or violence used;
7. the effect and consequences on the victim; and
8. whether aggravated damages are included.

**111**  Here, the actual assaults were on the lesser end of the spectrum of seriousness. Mr. Gates did not have erections and there was no ejaculation. However, the context renders these assaults more serious. As in the other cases, Mr. MacDougall was in a position of authority in the prison and Mr. Gates was a young inmate who was vulnerable. He came to Fraser with a very sad history that included serious sexual abuse, and Mr. MacDougall took advantage of that. There were no threats of violence, but there were implied promises of benefits. What makes this case different from others is that Mr. Gates received benefits from Mr. MacDougall over a period of time, such as jobs with privileges in the institution and assistance with parole and other applications. This does not necessarily diminish the seriousness of the abuse because of the element of manipulation: Mr. Gates learned that he could get something in return. In my view, Mr. Gates' later experimentation with prostitution more than likely stemmed from this.

**112**  Mr. Adair submitted that an appropriate award for general and aggravated damages is between $45,000 and $55,000. He relied on ***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.), ***H.L. v. Canada***, [*2002 SKCA 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K701-F528-G1NT-00000-00&context=), [*[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=), aff'd in part, [*2005 SCC 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B13W-00000-00&context=), [*[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=), ***X. v. R.D.M.***, [*[2004] B.C.J. No. 2044*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S31M-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=), rev'd in part ***Zastowny v. MacDougall***, [*2006 BCCA 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B23F-00000-00&context=), [*225 B.C.A.C. 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B23F-00000-00&context=) and ***Curran***. He also referred to ***Loveridge v. HMTQ***, [*[2006] B.C.J. No. 1455*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1V1-00000-00&context=), [*2006 BCSC 966*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1V1-00000-00&context=). I reviewed these cases in ***Robinson***, at paras. 64-65 and 69-79. Suffice it to say that general and aggravated damages in the MacDougall cases to date have ranged from $20,000 to $60,000. A higher award of $80,000 was given in ***H.L.*** for moderate abuse in a different context; this award was noted by the Saskatchewan Court of Appeal to be at the upper end of the range, and perhaps exceeding it.

**113**  In ***Robinson***, which was issued after this trial, I awarded $40,000 in general and aggravated damages for one incident of fellatio. The plaintiff had an erection but did not ejaculate. I considered the assault quite serious in the context, as Mr. MacDougall was a person in authority and the plaintiff was a young inmate who was particularly vulnerable, coming into the prison system for the first time, to serve a lengthy sentence. He had been shaken up a day or two earlier from an encounter with two guards. The assault was combined with promises and implied threats and the plaintiff's consent was coerced. The award took into account the plaintiff's pre-existing condition, which included a number of serious traumatic experiences that included sexual abuse and male prostitution.

**114**  Mr. Johnston submitted that the appropriate range in this case is $15,000 to $20,000. He relied on a number of cases involving abuse at residential schools and foster homes (***Blackwater***, ***C.M. v. Canada (Attorney General)***, [*2004 SKQB 174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F873-B4CY-00000-00&context=), [*248 Sask. R.1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-F873-B4CY-00000-00&context=), ***J.W.H.T. v. H.M.M.***, [*[2002] N.B.J. No. 139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-JPGX-S287-00000-00&context=), [*2002 NBQB 134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-JPGX-S287-00000-00&context=) and ***R.E.E. v. W.O.T.***, [*[2000] B.C.J. No. 342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X00Y-00000-00&context=), [*2000 BCSC 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X00Y-00000-00&context=)), as well as ***T.E.G.H. v. P.K.*** and ***Loveridge***.

**115**  The awards given in ***Blackwater*** ranged from $10,000 to $20,000 for one or two relatively mild or moderate acts of sexual touching or fondling, with masturbation and fellatio at the higher end. ***C.M.*** involved one incident that included anal penetration on a young female student by the senior administrator of an Indian Residential School. She was awarded $37,500 for general and aggravated damages. A provisional award of $20,000 was given in ***J.W.H.T.***, where the plaintiff was sexually assaulted between the ages of 13 and 16 in his foster home by an older son. The assaults consisted of 8 to 10 incidents of fondling and oral sex. In ***R.E.E.***, $5,000 was awarded for one incident of oral sex and some physical assaults, where the judge found that the plaintiff would have suffered as much psychological damage in any event due to past trauma. Finally, in ***T.E.G.H.***, $25,000 was awarded to the plaintiff, who was 15 years old when the defendant, a manager of a recreation centre, committed approximately six acts of fondling and masturbation. This award took into account the plaintiff's pre-existing condition. The judge found that there was "a slight aggravation of already well established problems."

**116**  These cases demonstrate a variable range of awards for sexual abuse in different contexts. Each case, of course, depends largely on its facts, as damage awards depend upon the impact on a particular plaintiff.

**117**  Mr. Johnston submitted that the ***Loveridge*** decision is indicative of the amount that should be awarded in this case, as a nominal amount to compensate Mr. Gates for the violation of his personal autonomy. He says that Mr. Gates has not established that the abuse had a significant impact on his life. He bases this in part on Mr. Gates' reports to both Dr. LaTorre and Judy Wright, that he did not believe the abuse was an issue for him anymore, and that he did not have intrusive thoughts about Mr. MacDougall. I disagree.

**118**  Dr. LaTorre did not believe that Mr. Gates was fine with this. Ms. Wright thought he was doing quite well in August, but he did a lot of "backsliding" after that. Given the expert evidence and my conclusion that the MacDougall abuse exacerbated Mr. Gates' psychological symptoms, including some sexuality issues, Mr. Gates has established that it had an impact on his life.

**119**  Given all of the circumstances, it is my opinion that an appropriate award for general and aggravated damages is $55,000. This amount should be discounted by $10,000 to take into account Mr. Gates' original position, which was significantly damaged. Accordingly, I award Mr. Gates $45,000.

**Counselling**

**120**  Mr. Adair submitted that an award of $10,000 for future counselling would be appropriate, using the "indivisible damages" approach.

**121**  Dr. LaTorre was of the opinion that Mr. Gates would benefit from an additional 6 to 12 months of weekly individual counselling, "possibly" followed by a year of group sessions, and followed by monthly individual sessions for a year and then "as needed". Ms. Wright, who has been counselling Mr. Gates since April 2005, suggested individual weekly sessions for a year, to taper off after that. Both witnesses acknowledged that Mr. Gates' problems are multi-faceted. It is clear, as in other cases, that counselling addresses the individual's overall psychological problems. In this case, the MacDougall abuse is one part of Mr. Gates' many problems.

**122**  Dr. LaTorre described Mr. Gates as a "somewhat dependent individual". He thought that treatment could be protracted if the counsellor allowed him to indulge in his dependency. He also stated that because Mr. Gates is a "multiple needs individual", longer term counselling may be required.

**123**  Mr. Johnston submitted that the type of counselling recommended by Dr. LaTorre is not warranted on the evidence. Alternatively, any award should be a relatively low amount, since most of Mr. Gates' problems stem from other sources.

**124**  I do not disagree with Dr. LaTorre's opinion on this issue. However, much of this longer term counselling relates to Mr. Gates' multi-faceted problems which are not necessarily related to the MacDougall abuse. I accept Ms. Wright's suggestion that Mr. Gates would benefit from weekly sessions for a year, tapering off for a period after that. Her hourly rate is $90. In my view, an award of $5,500 would allow Mr. Gates to receive additional weekly counselling for a year, and further sessions on a periodic basis for an additional 6 to 12 months.

**Punitive damages**

**125**  Mr. Gates also seeks punitive damages against Mr. MacDougall 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: see ***O'Neill v. MacDougall***, [*2006 BCSC 180*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1WM-00000-00&context=), [*54 B.C.L.R. (4th) 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1WM-00000-00&context=).

**126**  As in other cases, I agree that such an award is appropriate in the circumstances. Mr. Gates is entitled to $10,000 as punitive damages against the defendant Roderick MacDougall.

**Order**

**127**  Mr. Gates is entitled to an award for general and aggravated damages in the amount of $45,000, and an award for future counselling in the amount of $5,500. He is also entitled to punitive damages against Mr. MacDougall in the amount of $10,000.

**128**  Mr. Gates will also have his costs at the usual scale.

FISHER J.

[**1**](#Backward_fnref_fnr-1) Dennis Gates was later convicted of sexual abuse of others, and Mr. Gates testified as a witness at this trial in 1992.

[**2**](#Backward_fnref_fnr-2) Mr. Gates' Client History Record indicates that he was at Alouette River from February 23 to March 10, 1995.

[**3**](#Backward_fnref_fnr-3) These factors stem from ***G.T. v. Griffiths***, [*[1995] B.C.J. No. 2370*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B264-00000-00&context=) (S.C.), reversed on the issue of vicarious liability of an employer [*(1997), 31 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21WF-00000-00&context=) (C.A.), affirmed ***Jacobi v. Griffiths***, [*[1999] 2 S.C.R. 570*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42N-00000-00&context=).

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[***Hamilton v. Callaway, [2014] B.C.J. No. 174***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1N3-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J. Steeves J.

Heard: October 21-25 and November 28, 2013.

Judgment: January 31, 2014.

Dockets: S063098 and S053683

Registry: Vancouver

**[2014] B.C.J. No. 174** | 2014 BCSC 158

Between Helga Hamilton, Plaintiff, and Ian Callaway, Defendant And between Ian Callaway, Plaintiff, and Helga Maria Hamilton also known as Helga McPherson, Defendant

(180 paras.)

**Case Summary**

**Contracts — Misrepresentation — What constitutes — Negligent misrepresentation — Fraudulent misrepresentation — Application by plaintiff for damages for breach of contract allowed — Plaintiff did not fraudulently or negligently misrepresent state of townhouse sold to defendant — There was doubt as to whether plumbing problems that she knew about were systemic and she did not think that they were — Defendant knew from property disclosure statement that it was "starting point" for inquiries, declined to exercise right to have inspection, knew or should have known from minutes of strata council meetings that there were plumbing problems and did not act reasonably in relying on disclosure statement without reference to minutes.**

**Contracts — Breach of contract — Application by plaintiff for damages for breach of contract allowed — Plaintiff did not fraudulently or negligently misrepresent state of townhouse sold to defendant — There was doubt as to whether plumbing problems that she knew about were systemic and she did not think that they were — Defendant knew from property disclosure statement that it was "starting point" for inquiries, declined to exercise right to have inspection, knew or should have known from minutes of strata council meetings that there were plumbing problems and did not act reasonably in relying on disclosure statement without reference to minutes.**

**Contracts — Remedies — Damages — Application by plaintiff for damages for breach of contract allowed — Plaintiff did not fraudulently or negligently misrepresent state of townhouse sold to defendant — There was doubt as to whether plumbing problems that she knew about were systemic and she did not think that they were — Defendant knew from property disclosure statement that it was "starting point" for inquiries, declined to exercise right to have inspection, knew or should have known from minutes of strata council meetings that there were plumbing problems and did not act reasonably in relying on disclosure statement without reference to minutes.**

**Real property law — Sale of land — Agreement of purchase and sale — Breach of — Damages — Purchaser — Duties and obligations — Vendor — Duties and obligations — Rights — Misrepresentation — Fraudulent misrepresentation — Negligent misrepresentation — Remedies — Damages — Application by plaintiff for damages for breach of contract allowed — Plaintiff did not fraudulently or negligently misrepresent state of townhouse sold to defendant — There was doubt as to whether plumbing problems that she knew about were systemic and she did not think that they were — Defendant knew from property disclosure statement that it was "starting point" for inquiries, declined to exercise right to have inspection, knew or should have known from minutes of strata council meetings that there were plumbing problems and did not act reasonably in relying on disclosure statement without reference to minutes.**

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| --- |
| Application by the plaintiff for damages for breach of contract. The plaintiff sold a townhouse that was part of a strata development to the defendant. The agreement provided that the defendant would pay the plaintiff her proportionate share of any funds recovered through litigation that she and the other owners of the strata had started for damages arising from leakage to the buildings. A settlement was reached after the defendant took possession, but he refused to give the plaintiff her share of the funds, arguing that she fundamentally breached the agreement by fraudulently or negligently misrepresenting the state of the townhouse when she completed the property disclosure statement that was part of the agreement.  HELD: Application allowed.  It was clear from the agreement that the plaintiff had a right to the funds. The plaintiff did not fundamentally breach the agreement. The defendant was not deprived of substantially the whole benefit of it. The townhouse had been habitable since the agreement and there was at best minimal physical damage. The only evidence of physical damage was drywall damage in one room. The plaintiff did not fraudulently or negligently misrepresent the state of the townhouse. Although she stated in the property disclosure statement that she was not aware of any problems with the plumbing system at the strata and there were in fact some, the disclosure statement was referring to systemic problems, there was doubt as to whether the problems that she knew about were systemic and she did not think that they were. Assuming that her representation was not accurate, the defendant knew from the disclosure statement that it was a "starting point" for his own inquiries, declined to exercise his right to have an inspection, knew or should have known from the minutes of the strata council meetings that were disclosed to him that there were plumbing problems and did not act reasonably in relying on the disclosure statement without reference to the minutes. |

**Counsel**

Counsel for Helga Hamilton: C.A. Clark, T. Cullen.

Counsel for Ian Callaway: G.S. Hamilton.

**Reasons for Judgment**

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| **J. STEEVES J.** |

**Introduction**

**1**  This is a decision on two applications and a counterclaim that were heard together.

**2**  In the first application the plaintiff, Helga Hamilton, claims damages for breach of contract, among other damages. She had been the owner of a townhouse (the "Townhouse") until she sold it to the defendant, Ian Callaway, pursuant to a July 2004 contract (the sale completed in October 2004).

**3**  Prior to the sale of the Townhouse, Ms. Hamilton and other owners commenced litigation to recover damage as a result of leakage and damage to the buildings, and there was a special assessment paid by the owners, including Ms. Hamilton. The agreement for the sale of the Townhouse to Mr. Callaway included a provision that he agreed any funds recovered through litigation for the damage (in a proportionate share) would be paid to Ms. Hamilton. Mr. Callaway also agreed that Ms. Hamilton would be given his proxy for any vote on the settlement. There was a settlement in February 2005 after Mr. Callaway took possession of the Townhouse. Monies were recovered but Mr. Callaway refused to give Ms. Hamilton her share of the money, or a proxy vote. The money is currently held in trust pending the completion of this litigation.

**4**  By means of her application Ms. Hamilton seeks the release of the settlement funds to her.

**5**  By way of a counterclaim, Mr. Callaway alleges that Ms. Hamilton made false and misleading misrepresentations about latent defects in the Townhouse. The counterclaim also claims fundamental breach of contract and a set-off with respect to Mr. Callaway's losses and Ms. Hamilton's share of the settlement from the litigation over leakage and damage.

**6**  In a third, separate matter Mr. Callaway is the plaintiff and Ms. Hamilton is the defendant. Mr. Callaway claims that Ms. Hamilton made untrue and fraudulent representations about the condition of the Townhouse when she sold it to him. Specifically, there were deficiencies in the previous remedial work and there were problems with the plumbing system. A problem with the roof is also alleged as being misrepresented by Ms. Hamilton. According to Mr. Callaway, Ms. Hamilton represented that there were no problems and that the Townhouse was covered by a ten-year warranty. Further, her representations were made fraudulently either knowing they were false or with reckless disregard for their truth. Mr. Callaway now seeks damages of $79,500 to reflect the loss of value of the Townhouse as a result of the alleged misrepresentations as well as general damages.

**7**  There are a number of factual disputes. There had been plumbing problems prior to the sale of the Townhouse and there is an issue as to the extent of those problems and the extent of Ms. Hamilton's knowledge of those problems. As well, as a condition of sale of the Townhouse, Mr. Callaway was to be given minutes of meetings of the strata council from July 2002 to the date of agreement, July 29, 2004. However, he says he was not given all of them or notice of an annual general meeting. Some of the ones he did not receive refer to plumbing problems, as do some of the ones he did receive. Mr. Callaway declined his right to have his own inspection of the Townhouse before completion of the sale.

**8**  The pleadings filed by Mr. Callaway refer to problems with the remediation of the Townhouse, primarily whether the Townhouse was "completely rainscreened" as described in the listing for the Townhouse. There is also an issue about a ten-year warranty that applied to the remediation. He also alleges misrepresentations about the roof and the plumbing, separate from the remediation. The evidence canvassed all of these issues. However, in argument, his submissions focused primarily on the plumbing issue. The only evidence of physical damage to the Townhouse is water damage to an upstairs bedroom in 2005 as a result of a leak in the roof.

**Background**

**9**  Ms. Hamilton is a retired school teacher. Mr. Callaway is a disability insurance consultant and a certified forensic examiner.

**10**  The Townhouse is part of a strata development called Harbour House ("Harbour House") located on Kent Avenue in south Vancouver, facing the Fraser River. It was constructed about 1995. It consists of 82 strata lots, six of which are townhouses. The remaining 76 are apartments. There are three buildings: a smaller one containing the six townhouses in the middle of two large ones containing the apartments. Harbour House is governed by an elected strata council who retains a property manager.

**11**  The address of the Townhouse is 1980 Kent Avenue. Ms. Hamilton purchased and moved into it in August 1996. She was elected to the strata council in May 1997; she participated in committee work such as, for example, the litigation or legal committee, and she was a member of the building maintenance committee in 1998. She was vice-chair of the strata council from June 1999 until June 2000 when she stopped being a member of the council. From January 2000 to about mid-2001 Ms. Hamilton was ill and she was not active at all in the affairs of Harbour House. As with all owners, she received minutes of strata council and general meetings. She testified that she did not necessarily review all of them. Mr. Callaway is currently chair of the strata council.

**12**  For a number of years while Ms. Hamilton resided at the Townhouse she would spend her winters in Palm Springs, California. She would leave Vancouver about October and then return the following March or April. During these winters she would usually return to Vancouver for short trips because she could not get travel insurance for more than 60 days.

**13**  In or about 1999 it was discovered that Harbour House was a "leaky condo." This was a problem with a number of condominiums in the Vancouver area at this time. Remediation to fix the problem usually involved creating an envelope on the exterior wall that permitted egress of any leaking water. The repairs were notoriously expensive and disruptive.

**14**  In 1999 Harbour House retained a consultant, RDH Building Engineering Limited ("RDH"), to investigate and make recommendations for the remediation of exterior walls, windows, walls, the roof and balcony assemblies.

**15**  RDH prepared a report dated January 24, 2000. A summary of damage and rehabilitation included reference to high moisture content in the exterior sheeting throughout the building and there was initial evidence of wood decay. The high moisture content and associated wood decay were more prevalent on the east and south elevations, as well as some of the courtyard walls. As well:

...

1. The exterior wall assemblies on the east and south elevations as well as the courtyard wall require a full wall rehabilitation to address the moisture related problems. The program should primarily focus on improving details, providing less sensitive wall assemblies and reducing exposure conditions.
2. The west and north walls are not significantly damaged and are less exposed and therefore with some improvements may provide acceptable performance for many years. The focus of these improvements should be on reducing exposure conditions and improvement of details. The condition of these wells should be monitored on a regular basis.

...

1. At this time there are no significant water penetration problems being experienced with the roofs.
2. Some damage has occurred to the asphalt shingle areas of roof and the initial installation quality is suspect.
3. The roofs should be reconfigured to provide overhangs at as many areas as possible and thus reduce exposure of the walls to rain. In addition, it is prudent to reroof the asphalt shingle areas at the same time as the overhangs are added.

...

**16**  The strata council and owners ultimately voted to approve the repairs recommended by RDH to correct these problems and a special assessment of approximately $3.6 million was also approved to pay for them. I will call these the "Envelope Repairs." Ms. Hamilton paid about $60,000 as her share of the special assessment.

**17**  There is a dispute about how much Ms. Hamilton knew about the Envelope Repairs and when she knew it.

**18**  She testified that she saw the RDH report for the first time as part of the subject applications. She did not recall receiving it or seeing it earlier. There is a reference in minutes from a progress meeting on March 2, 2001 that Ms. Hamilton attended to her being a liaison person to deal with owners' questions, to be available for the contractor's "timesheet sign-off", to collect all keys and to review the site with RDH staff "on a regular basis." In her evidence Ms. Hamilton agreed she did some liaison work for the owners; as she put it in her evidence, people would come to her with questions rather than to RDH. However, Ms. Hamilton denied signing off time-sheets or that she was asked to do it. And she did not explain the details of the remediation to owners because she did not have the expertise to do so.

**19**  Grant Phillips was another owner and former chair of the strata council. He has a background in project management and he was active in the Envelope Repairs and subsequent litigation (the "Envelope Litigation"). In his testimony he demonstrated that he was very informed about the remediation and plumbing issues at Harbour House (as well as the Envelope Litigation). He was a witness for Ms. Hamilton, but his evidence was presented in a fair and balanced manner and both parties rely on that evidence.

**20**  Mr. Phillips agreed with Ms. Hamilton that she did not perform the duties attributed to her in the RDH report. Specifically, the Harbour House owners involved, including Ms. Hamilton, refused to sign time sheets, there were no regular reviews or weekly meetings by owners and two other owners controlled the keys. Mr. Phillips agreed that Ms. Hamilton dealt with owners on questions and complaints and she was a "good communicator."

**21**  There is also a reference in strata council minutes dated February 22, 2001 to Ms. Hamilton "volunteering to assist the Strata Council with issues involving the building envelope restorations." According to the minutes, Mr. Phillips talked to Ms. Hamilton about this and she agreed. In his evidence, Mr. Phillips said he had no memory of this; he and another owner who primarily instructed RDH and Ms. Hamilton was not involved. Dan Tucson, chairperson at the time, was the other person who Mr. Phillips said helped him coordinate the work of RDH. Ms. Hamilton was not on the list of attendees for this meeting.

**22**  Ms. Hamilton could remember one meeting in a trailer with the contractors where she was given some documents. She could not recall what the documents were but she recalled putting them in a drawer and then leaving them on the counter for Mr. Callaway when she left the Townhouse in mid-October 2004. She could recall the remediation of her building but she could not recall any other details. She denied reviewing the site with RDH. There is a document from RDH to Ms. Hamilton, dated March 21, 2001, that says drawings and specifications about the envelope rehabilitation were sent to her.

**23**  At trial Ms. Hamilton denied receiving these documents. She was directed to her discovery where she said she remembered receiving the documents with the March 21, 2001 document. She also said in discovery that she was given them "just so I had them. I didn't understand them." In her evidence at trial she said she found the discovery "exceedingly stressful", she did not understand the questions and her answers reflected that. She said she "certainly did not" receive the drawings and specifications. All she had was a bundle of "dog-eared" papers given to her in the one meeting she attended in the trailer that she then put in a drawer.

**24**  Also in March 2001 (March 29, 2001) there is a memo from the property manager of Harbour House to Ms. Hamilton enclosing a telephone list for tenants and saying: "I have contact [sic] the owner unit #106-1920 and advised him a leak has occurred. The tenant is on holidays at the present time." In her evidence Ms. Hamilton could not recall this memo and she did not know what "106" was. She denied that the property manager contacted her because she had the keys to the suites.

**25**  A subsequent letter from the manager to Ms. Hamilton, dated August 27, 2002, enclosed a deficiency summary prepared by RDH. Among other things it stated that the walls at the ground floor entry at 1920 (Building Two) had not been remediated and the flashing not replaced. In her evidence Ms. Hamilton acknowledged this document but she could not recall it, and she denied that it refreshed her memory about walls not being remediated.

**26**  The Envelope Repairs took place between May and September 2002. The evidence was not clear but in argument it was agreed that all of the walls of Harbour House were remediated. For example, Ms. Hamilton testified that during the remediation she could see through spaces in the walls of the Townhouse. The remediation included rainscreening as well as replacing all windows, increasing the overhang of the roof and repairs to the caulking.

**27**  In 2000 the owners of Harbour House commenced the Envelope Litigation. Ms. Hamilton agreed the litigation and repairs were important to her and she helped find lawyers for Harbour House.

**28**  Harbour House created a legal committee, also called the litigation committee with respect to the Envelope Litigation. Mr. Phillips was active on this committee and in the Envelope Repairs. He testified that the legal committee was an *ad hoc* group that had no formal status under the strata council and it was made up for the most part of owners who wanted to be involved. Some, such as Mr. Phillips, were very involved and others attended only a few meetings. Ms. Hamilton was on the legal/litigation committee for a time. There was also an *ad hoc* water ingress committee. An attempt at a mediated settlement in September 2003 was not successful.

**29**  Ultimately, after some time and a change of legal counsel, a settlement was reached in the Envelope Litigation in February 2005. The terms of the settlement included payment to the owners of a confidential sum of money. Ms. Hamilton seeks, through her claim in the subject litigation, her proportionate share of that money. Mr. Callaway refuses to pay that money, for reasons explained below.

**30**  Following the remediation, Harbour House obtained a warranty, dated February 8, 2002 and expiring on February 8, 2012, for coverage of water penetration.

**Sale of the Townhouse**

**31**  In May 2004 Ms. Hamilton listed the Townhouse for sale. She testified that she decided to sell because she was spending a lot of time in California in the winters and she wanted something smaller. As well, when she first bought the Townhouse she understood that a shopping centre would be developed nearby. That never happened and she wanted to be within walking distance of shopping.

**32**  Ms. Hamilton retained a real estate agent, Sylvia Fierro. Ms. Fierro testified and she brought her closed file. It had been in storage and it had been purged of a number of documents as part of a filing system that eventually results in the destruction of the entire file.

**33**  Ms. Fierro prepared a multiple listing. She testified that she prepared it on the basis that a "very thorough" remediation had been completed. She testified that the listing for the Townhouse was based on information she researched from various sources and information from Ms. Hamilton. The listing is in the usual one-page format and at the bottom it includes the following, written by Ms. Fierro:

UNOBSTRUCTED WATER VIEWS from this spacious waterfront freehold townhouse. This immaculate home has been tastefully updated and offers a great floor plan including a large open kitchen with custom built breakfast bar, generous sized living and dining room and river views from each room! Follow the bright and open staircase to the upper level that features 2 large bedrooms including a master with more stunning water views and a luxurious 5 piece ensuite. The large den on the main floor easily doubles as a 3rd bedroom or guest room. The suite has an abundance of natural light with exposure to the South, North and East. Relax and enjoy the view of the working Fraser River from your spacious and private southern exposed deck. Top this off with plenty of closets and storage, 2 secured parking stalls and access to the incredible rec and fitness facilities at the Harbour Master Club. *This topnotch building has been completely rainscreened and comes with the balance of a 10 year warranty.* It's like living in a worry free vacation destination right here in the heart of the Vancouver Fraser Lands!

[Emphasis added]

**34**  The italicized sentence is at issue in these proceedings.

**35**  In her evidence Ms. Fierro said she wrote the above statement on her own and Ms. Hamilton did not give her specific comments to write. Ms. Fierro did not think that Ms. Hamilton used the term "rainscreened" and Ms. Fierro testified that she believed the term meant that the walls had been remediated so water could not get in. She did not think rainscreened had specifically been referred to in the engineering reports. She agreed that it was more desirable for buyers if a property had rainscreening and she did not recall knowing that some of the walls of Harbour House had not been rainscreened. She recalled having the engineering reports and she "typically" reviewed them. And Ms. Fierro testified that Ms. Hamilton said there was a ten-year warranty.

**36**  Ms. Hamilton testified that she did not know what a rain screen was in May 2004; she did not recall if she had any engineering reports at the time, and she did not recall if she left any for Mr. Callaway when he took possession of the Townhouse.

**37**  On May 24, 2004 Ms. Hamilton signed a "Property Disclosure Statement." Ms. Hamilton agreed in her evidence that she knew that buyers relied on this document, that it needed to be accurate, that any important changes needed to be communicated to a buyer before closing and that it applied to the Harbour House complex (not just the Townhouse). This is a form document prepared by the Real Estate Board of Greater Vancouver and it has an information page titled "Information about the Property Disclosure Statement." Among other things, it says that answers must be "complete and accurate" and that an answer must provide all relevant information known to the seller. There is also a paragraph titled "Buyer must still make the buyer's own inquiries" and it includes a statement that the seller's knowledge may be incomplete and additional information may be requested from the seller.

**38**  On the disclosure statement Ms. Hamilton answered "no" to the following questions:

A. Has a final building inspection been approved or a final occupancy permit been obtained?

B. Are you aware of any additions or alterations made without a required permit?

C. Are you aware of any structural problems with any of the buildings on the property?

...

E. Are you aware of any damage due to wind, fire or water?

...

G. Are you aware of any leakage or unrepaired damage?

H. Are you aware of any problems with the electrical system?

I. Are you aware of any problems with the plumbing system?

...

**39**  With regards to B (addition without a permit) Ms. Hamilton testified that she had made some changes to the Townhouse but they did not need a permit. These were installation of a light fixture and a plumbing fixture. With regards to G (leakage or unrepaired damage), Ms. Hamilton testified that there were no leaks in the Townhouse except for a sprinkler in a storage shed that leaked "slightly" and left a "tiny" stain in the living room. The strata repaired this. There were no roof leaks and, in any event, they would have been for the strata to look after. There was no mould or mildew in the Townhouse. She agreed that the question under G applied to the Harbour House complex and the Townhouse.

**40**  The negative answer Ms. Hamilton gave to the question under I (plumbing) is very much in dispute. In her evidence Ms. Hamilton said the plumbing system was "just fine." There had been pipe breaks in other buildings including some "misadventures" such as sinks or bathtubs that over flowed. The breaks were mostly in another building and they diminished over time. She understood the main problem to be "differential building settlement" whereby, over time, different parts of the building settled at different rates. This settling put stress on pipes and sometimes caused them to break. She denied that she knew Harbour House could not get insurance because of the pipe breaks. She agreed that she could not say with certainty that, when she signed the disclosure statement, there would not be more breaks but she also denied they were a real possibility. When asked if the pipe breaks were a problem with the plumbing system, Ms. Hamilton said that the cause of the breaks, differential settlement, was not a problem with the plumbing system.

**41**  Ms. Hamilton agreed there was a stain on the carpet in the north, upstairs bedroom when she moved out. But she said it was under the corner of a desk and she did not see it until she moved.

**42**  Ms. Hamilton signed the disclosure statement under the following statement:

The seller states that the information provided is true, based on the seller's current actual knowledge as of the date on page 1 [May 24, 2004]. Any important changes to this information made known to the seller will be disclosed by the seller to the buyer prior to closing. The seller acknowledges receipt of a copy of this disclosure statement and agrees that a copy may be given to a prospective buyer.

**43**  Ms. Fierro, Ms. Hamilton's realtor, testified that she wrote the date on the disclosure form. She did not recall a specific conversation with Ms. Hamilton about it but she (Ms. Fierro) thought she would have asked Ms. Hamilton to fill it out to the best of her knowledge. Ms. Fierro usually does not say it is part of the contract because it says that on the contract.

**44**  On May 25, 2004 Ms. Fierro requested information about the Townhouse from the property manager (by fax) about financial statements, the Form B, "warranty info" and bylaws. The following day she received by fax 37 pages including financial statements, Form B, by-laws and "warranty info," It also said "warranty certificate - none." Ms. Fierro testified that she did not get minutes for Harbour House from the property manager. She received those from Ms. Hamilton, she reviewed all of the documents and none were missing. She prepared a package of documents. In cross-examination she was asked to review the number of pages noted in the fax reply from the property manager. The total number of pages left few pages for engineering reports and she was asked if she received them. She answered that she requested them.

**45**  In cross-examination Ms. Fierro was told that Mr. Callaway would testify that he did not receive a full package of minutes from Harbour House or any past April 27, 2004. Ms. Fierro replied that she had no independent recollection of the documents she sent to Mr. Callaway's agent, but she relied on documents that she produced from a previous contract for the Townhouse dated July 11, 2004. This was before the Agreement and the purchaser was not Mr. Callaway. The agreed price was $365,000 and one of the subject clauses was that the purchaser obtained financing by August 12, 2004. Ultimately it did not complete and the Townhouse was sold to Mr. Callaway.

**46**  Ms. Fierro specifically relied on a letter she sent to the agent for the previous would-be purchaser and the list of documents in the agreement for sale in the contract with that purchaser. She testified that she sent essentially the same letter to the agent for Mr. Callaway and the same package of materials. However, that was eight years ago and her file had been purged of some documents over that time period. She kept the April 12, 2004 letter as a record of what she had done because it was the first letter. She did not have a copy of the letter she sent to the agent for Mr. Callaway but she was confident it was the same as the April 12, 2004 letter. She explained that she used the opportunity of the first letter to prepare a package of the materials and she copied that package to send to the agent for Mr. Callaway along with the same covering letter except it was addressed to Mr. Callaway's realtor.

**47**  Ms. Fierro's letter to the agent for the previous purchaser was dated July 12, 2004 and it listed the documents in her package. That list is as follows:

1. The countered Contract of Purchase & Sale
2. The Property Disclosure Statement
3. Titled Search
4. Strata Plan
5. Form B & attachments
6. Current Financials
7. Warranty policy for coverage from Willis Canada Inc.
8. Certificate of Completion
9. Bylaws
10. Minutes of the Strata Council for past 2 years including Notice of upcoming AGM
11. RDH Engineering report for Building Envelope 1999
12. RDH Engineering Rehabilitation Specifications 2001

**48**  Ms. Fierro testified that the minutes referred to in the list in the April 12, 2004 letter (and the letter to Mr. Callaway's agent) were for a two-year period. She also included notice of an AGM meeting in July 2004; she did not normally do that but it was in the materials she received from Ms. Hamilton so she included it. She did not have the RDH engineering reports referred to in the list in her current file but she testified that she did not believe either of them was the January 2000 report of RDH discussed above. She could not recall any minutes that referred to plumbing problems and she did not recall Ms. Hamilton saying anything about floods at Harbour House.

**49**  Mr. Callaway testified that he and his partner started looking for a place to live in Vancouver in July 2004. They did not know about Harbour House and the neighbourhood in which it is located until Mr. Callaway visited a work client in the area. They immediately liked the area and saw some for sale signs. They retained a realtor and began looking at some places, including some in Harbour House. Some of these listings included references to the buildings being rainscreened.

**50**  In his evidence Mr. Callaway explained that he and his partner looked at the Townhouse and were "very pleased" with it. They had the listing prepared by Ms. Fierro and reviewed it. Mr. Callaway testified that he read "completely rainscreened" and he took that to mean that there had been damage because of water ingress but it had been repaired with an exterior "skin" that allowed water to escape. He had read about this in the media. He took "completely" to mean that each building at Harbour House had been rainscreened. He also understood the reference to a ten-year warranty in the listing of the Townhouse to mean that any defects in the rainscreening would be covered with no expense to the owners. He had a general discussion with his agent who said the warranty was "simply standard" (in Mr. Callaway's words). Mr. Callaway said in his evidence that rainscreening was a "marquee feature" for he and his partner when they were considering buying the Townhouse. He testified that he learned that not all walls of Harbour House had been rainscreened well after he had moved into the Townhouse.

**51**  On July 27, 2004 Ms. Hamilton and Mr. Callaway signed an agreement of purchase and sale (the "Agreement"). The agreed price was $355,000 and it was not subject to financing. One of the conditions of the sale was that Ms. Hamilton be released from the contract with the previous would-be purchaser. This purchaser was not able to obtain financing and the condition was removed. Ms. Hamilton and Ms. Fierro testified that the lower price was acceptable because it was not subject to the purchaser obtaining financing. Mr. Callaway testified that the price of $355,000 was on the upper limit of the price he and his partner were prepared to pay. He also testified that his partner was "bubbling with enthusiasm" with the prospect of living in the Townhouse and its neighbourhood.

**52**  Mr. Callaway's subject clauses of the Agreement were an addendum to the Agreement and were as follows:

SUBJECT to the Buyer receiving and being satisfied with a site inspection report by *Aug. 6th*. The Seller will allow access to the property for this purpose on reasonable notice.

SUBJECT to a new first mortgage being made available to the Buyer by *Aug. 6th*, in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_ at an interest rate not exceed \_\_\_\_% per annum calculated half yearly, not in advance, with a \_\_\_ year amortization period, \_\_\_\_ year term and repayable in blended payments of approx. $\_\_\_\_\_\_\_ per month including principal and interest (plus 1/12 of the annual taxes, if required by the mortgagee).

SUBJECT to the Buyer being satisfied with the documents referred to below by *Aug. 6th* or WITHIN 3 DAYS AFTER RECEIVING THE DOCUMENTS, whichever date is later

1. a current Information Certificate (Form B)
2. a copy of the registered strata plan and any amendments to the strata plan and any resolutions dealing with changes to common property
3. the current bylaws and financial statements of the strata corporation and any section to which the strata lot belongs, and,
4. a copy of all Engineers Report(s) or Building Envelope Studies (if any)
5. the minutes of any meetings held between the period from *July, 2002* to *PRESENT*, by the strata council, and by the members in annual, extraordinary or special general meetings, and by the members or the executive of any section to which the strata lot belongs.
6. the Buyer, receiving, perusing and being satisfied with a current title search of the property.

Immediately upon acceptance of this offer or counter offer, the Seller will request, at the Sellers expense, complete copies of the documents listed above from the strata corporation and will immediately upon receipt, deliver the documents to the Buyer or Buyers agent. [Handwritten parts are italicized, the rest of the document is a form; blank spaces in original].

**53**  The agent for Mr. Callaway testified that he could not recall whether he received the documents listed in the addendums.

**54**  Another addendum to the Agreement was dated July 29, 2004 and appears to the subject clauses of Ms. Hamilton. It is the same as the subject clauses of Mr. Callaway except his agent hand wrote the following on the document: "Purchaser was offered an opportunity to inspect the property but declined it." Mr. Callaway testified that he declined the opportunity to inspect the Townhouse because believed it had been completely remediated.

**55**  A further addendum to the Agreement dated July 27, 2004 was as follows:

The buyer is aware that the Property is part of a Strata Complex which had extensive repairs and restoration necessitating a Special Assessment on this strata unit which the Seller *Helga Hamilton* has paid in full.

The Strata Council is in the process of attempting to recover damages for the repairs on behalf of all units in this Strata Complex. In the event they are successful in recovering any funds, the current owner of this unit agrees that the portion of the monies received, attributable to this specific strata unit, belongs to the Seller *Helga Hamilton* and can be paid directly to him by the Strata Council, less any outstanding legal levy not paid by *the time the monies are received.*

In the event that there is a further levy against this strata unit to cover additional legal fees to continue the law suit for recovery of monies paid by *Helga Hamilton* for the assessment, *Helga Hamilton* hereby agrees to pay such additional legal levy immediately on demand from the Strata Council or the current owner of this strata unit. Failure to pay the legal levy within one month of demand will nullify the rights of *Helga Hamilton* to recoveries mentioned in this agreement.

In the event there is a vote called by the strata council with regard to any aspect of the legal action for recovery pertaining to the Special Assessment referred to above, the current owner of this strata unit hereby agrees, provided all special legal levies are paid up, to appoint the Seller as the proxyholder of the Buyer to attend and act for and on behalf of the Buyer at any meeting dealing with the recovery of funds. And without limiting the generality of the foregoing, the Seller is authorized to vote on behalf of the Buyer at the discretion of the Seller. The Buyer agrees to sign any further documents appointing the Seller as proxy.

This agreement shall survive any future transfer of ownership, and all owners of this strata unit will ensure that any future purchasers are made aware of this agreement, and it is made a condition of any future sales.

**56**  With respect to the reference to repairs, Mr. Callaway said in his evidence that he understood that the entire "property" had been remediated. He agreed that Ms. Hamilton was to receive her share of any money obtained from the Envelope Litigation.

**57**  On the same date as the agreement, July 29, 2004, Mr. Callaway signed the statement at the bottom of the disclosure statement prepared by Ms. Hamilton in May 2004. The statement he signed was:

The buyer acknowledges that the buyer has received, read and understood a signed copy of this disclosure statement from the seller or the seller's agent on the *29* day of *July* ... *2004*. The prudent buyer will use this disclosure statement as the starting point for the buyer's own inquiries. The buyer is urged to carefully inspect the property and, if desired, to have the property inspected by an inspection service of the buyer's choice.

**The buyer acknowledges that all measurements are approximate. The buyer should obtain a strata plan drawing from the Land Title Office or retain a professional home measuring surface if the buyer is concerned about the size.**

[All emphasis in original]

**58**  Mr. Callaway agreed in his evidence that he knew there were legal consequences when he signed this document. He testified he signed the document because he believed it was "truthful." He was "not sure" if he knew he had to make sure he was protected. He was asked in cross-examination whether the disclosure statement encouraged him to make further inquiries and he answered that it "certainly directed me in that direction." Mr. Callaway also agreed that the wording of the contract for sale could mean that Harbour House was not fully rainscreened or rainscreened at all.

**59**  On July 29, 2004, Mr. Callaway removed the subject clauses to his benefit. He agreed that he could have investigated the property further prior to removing the subject clauses. Ms. Hamilton then removed her subject clauses. There is no dispute that the above documents, including the addenda, form part of the Agreement.

**60**  According to the evidence of Ms. Hamilton, she obtained the information such as minutes from the property manager of Harbour House. She gave the information to her agent, Ms. Fierro, to give to the agent of Mr. Callaway (and the agent of the previous purchaser who could not complete). As well she left some documents on the kitchen counter when she left the Townhouse. Jeff Pennington, the realtor for Mr. Callaway, testified (for Ms. Hamilton) and he said he prepared the subject clauses in favour of Mr. Callaway as well as the two addendums. He could not recall discussing the subject clauses with Mr. Callaway and he could not recall whether he received the documents listed in the first addendum of July 29, 2004. Ms. Fierro, Ms. Hamilton's agent, also testified that Mr. Pennington prepared the July 29, 2004 addendum.

**61**  In his evidence Mr. Callaway agreed that he did not have to remove his subject clauses unless he received the documents in this addendum. He also said he did not receive any engineering reports. He did not see if he had received all the documents before he removed his subject clauses.

**62**  After acceptance Mr. Callaway received the documents referred to in the contract in two groups. He received a smaller group of documents by fax and he recalled these as including: Form B, site plan and financial statements. A larger group of documents was received in a large envelope and this included minutes from Harbour House and the bylaws. Mr. Callaway could not recall the return address. His evidence is that the last minutes in the package he received were dated April 24, 2004. Mr. Callaway also received some documents that were left on the kitchen counter of the Townhouse by Ms. Hamilton but it is unclear what those documents were.

**63**  When he read the documents (including the minutes) Mr. Callaway read them once. He described taking time and sitting down to do so. He testified that there was no time to do anything more before completion (originally September 30, 2004, then extended to October 17, 2004). He did not "recall anything significant" in the minutes except a written impact statement that Ms. Hamilton had given to a mediation session over the Envelope Litigation in September 2003. He also noticed one person's name being mentioned all of the time (not a person directly involved in this litigation). Mr. Callaway had "no memory of anything else", as he put it in his evidence; specifically he had no memory of any plumbing problems. He put the documents in his filing cabinet with specific file names. He did not look at them again for some time.

**64**  As part of financing the purchase of the Townhouse, Mr. Callaway had discussions with his mortgage broker and evaluator. They required a "complete" set of minutes (as Mr. Callaway put it in his evidence) but only for 2004. He requested and obtained a copy of the May 25, 2004 minutes from the manager of Harbour House on August 6, 2004. He then sent them to the mortgage people. He testified that he did not read these minutes because the subject clauses had been removed by this point. He put them in the filing cabinet with the other minutes.

**65**  Mr. Callaway's evidence is that he did not receive documents from his agent, Ms. Hamilton's agent or from Ms. Hamilton that he was supposed to receive. These were minutes dated May 18, July 14, August 12 and September 28, 2004 and notice of the AGM dated June 24, 2004. He testified that the result was that he did not know that Harbour House suffered from pipe breaks or plumbing problems before completion of the sale of the Townhouse on October 14, 2004.

**66**  Completion of the sale of the Townhouse took place on October 14, 2004 and Mr. Callaway took possession of the Townhouse on October 15, 2004.

**67**  Mr. Callaway testified that he first learned about the plumbing problems when he attended a special general meeting on November 23, 2004 where counsel for Harbour House explained there was litigation being planned. At a subsequent meeting on November 23, 2004, Mr. Callaway learned that there were plumbing "failures throughout the complex", as he put in his evidence. He testified that this came "from out of left field", he and his partner were in a "state of shock" and they "did not know where to look."

**68**  As above, the Envelope Litigation concluded February 2005. This was by means of a settlement, rather than litigation, and Harbour House received a sum of money to be distributed proportionately among owners. The settlement was considered at a general meeting and approved. Ms. Hamilton requested from Mr. Callaway that he give her his proxy for this vote but he refused. He also refused to agree with Ms. Hamilton receiving her proportionate share. He explained that his reason for refusing was that Ms. Hamilton had not provided disclosure about the plumbing problems at Harbour House.

**69**  Ms. Hamilton's share of the Envelope Litigation is currently being held in trust pending the conclusion of this litigation. There is no evidence of physical damage to the Townhouse or Harbour House generally following the remediation that completed in 2002.

**Plumbing and the Roof**

**70**  With respect to the specific issue of plumbing the evidence on this issue is discussed in detail below. In summary, there were plumbing problems beginning in 1995 but some of these were misadventures such as bathtubs overflowing. Other problems related to concerns about structural problems with the original construction of Harbour House. There is a dispute about the extent of Ms. Hamilton's knowledge of these problems and whether she fraudulently or negligently misrepresented them. Mr. Callaway says that there were extensive plumbing problems and Ms. Hamilton knew about them. Ms. Hamilton says there were problems but not significant ones and they were less frequent over time. There is no evidence of plumbing problems in the Townhouse.

**71**  The Envelope Litigation was amended to include the plumbing problems and, when the Envelope Litigation settled in 2005, the litigation for the plumbing issues continued. Despite overly optimistic estimates by counsel for Harbour House in mid/late 2004 of damages in the range of $600,000 - $800,000, the plumbing litigation settled in 2011 for a total amount of $40,000, less legal fees.

**72**  Recently the plumbing system was repaired at a total cost of $1.3 million. Mr. Callaway's share of that cost was $19,860.00.

**73**  The evidence of problems with the roof is that there was an inspection in May 2002 that concluded, "[o]verall roof in very good condition, minor deficiencies noted and have been corrected." Then the January 2000 RDH report on the envelope problems noted there were no significant water penetration problems with the roofs; there was some damage to the asphalt shingle areas of the roof (most of the roof at Harbour House is wood shingles or shakes) and the quality of the initial installation quality was suspect.

**74**  In May 2005 Mr. Callaway reported to the strata council that there was mold and moisture in an upstairs bedroom. This was ultimately identified as a roofing problem and repaired.

**75**  In June 2009 Mr. Callaway filed a notice of civil claim to commence litigation against Harbour House Strata Corporation with respect to a roof leak and to recover damages for that leak. He alleged that the strata corporation had failed to repair the roof for many years resulting in mould infestation. Ultimately, this litigation was settled with a payment of $130,000 to Mr. Callaway, as approved by a special general meeting of owners held on January 12, 2004.

**Expert Evidence**

**76**  Mr. Callaway has submitted two expert reports, both dated November 25, 2011.

**77**  One report is from EBI Buildings Inspection Ltd. with regards to the roof of the Townhouse. It was prepared by Matthew Foxall, a professional engineer. The November 2011 report included an inspection and report from 2007 which found "multiple examples of water egress into the upstairs bedroom where there was water damage. Mr. Foxall opined that the roof had been leaking for "a considerable period, likely in the order of 3 to 5 years" prior to the 2007 inspection.

**78**  In cross examination, Mr. Foxall agreed that he had never worked as a roofer, he was not a journeyman roofer and he was not a member of an association of roofing contractors. He also agreed that he first saw the roof at the Townhouse in 2007 and he did not see it in 2004. And he agreed that he was not retained in 2007 to give an opinion as to how long the roof had been leaking. He had not been given, nor had he seen, the 2002 roof inspection that said the roof at Harbour House was in very good condition. Mr. Foxall agreed that it was difficult to determine how long a roof had been leaking, it can start suddenly. He could not say with certainty when the leak in the Townhouse occurred and it could have happened during the three year-period before his 2007 inspection.

**79**  The second expert report was prepared by Larry Dybvig, an expert in real estate appraisal. As above his report is dated November 25, 2011. He assumed, among other things, that there were deficiencies and problems with the plumbing in the "overall strata development" and that there was "leakage causing damage to the interior of [the Townhouse] prior to the date" of the Agreement. He also assumed that the ten-year warranty after the Envelope Repairs applied only to the "sections of the overall strata development on which the remedial work was actually performed."

**80**  Mr. Dybvig considered a number of comparables and he opined that there had been a loss of value of the Townhouse as a result of the deficiencies he assumed of $84,000. Mr. Callaway now claims that amount in damages, among other claims.

**81**  Ms. Hamilton objects to Mr. Callaway's claim for damages for lost value on the basis that an amendment of his claim to include this claim was neither agreed by her, nor allowed by the court.

**Analysis**

**82**  As above, the claims by Ms. Hamilton and Mr. Callaway, as well as his counterclaim, raise issues of contract and misrepresentation. Specifically, Ms. Hamilton claims, as a matter of contract, that Mr. Callaway has agreed to the payment from trust of her share of the settlement funds from the Envelope Litigation (and that he would give her his proxy for the owners' vote on the settlement).

**83**  For his part, Mr. Callaway claims that Ms. Hamilton fraudulently or negligently misrepresented the state of the Townhouse when she sold it. He alleges that there were misrepresentations over, primarily, the state of the plumbing. He also plead and presented evidence over the rainscreening of Harbour House, the warranty from the remediation and the condition of the roof. He claims damages for loss of value of the Townhouse, for ***negligence*** and as a set off between his damages and the amount held in trust that is payable to Ms. Hamilton from the Envelope Litigation.

**84**  I will consider these issues in turn; with regards to the allegations of misrepresentation, I will consider them as they apply to the plumbing and consider the other allegations separately (rainscreening, warranty, roof).

**Breach of contract**

**85**  I will begin with the issue of whether Ms. Hamilton is entitled to her share of the funds from the Envelope Litigation, now held in trust. This is a contractual issue and it relates to the Agreement dated July 29, 2004 between Ms. Hamilton and Mr. Callaway with respect to the sale of the Townhouse.

**86**  The addendum to the Agreement dated July 29, 2004 is applicable and I reproduce excerpts of that document again:

...

The Strata Council is in the process of attempting to recover damages for the repairs on behalf of all units in this Strata Complex. In the event they are successful in recovering any funds, the current owner of this unit agrees that the portion of the monies received, attributable to this specific strata unit, belongs to the Seller Helga Hamilton and can be paid directly to him by the Strata Council, less any outstanding legal levy not paid by the time the monies are received.

...

In the event there is a vote called by the strata council with regard to any aspect of the legal action for recovery pertaining to the Special Assessment referred to above, the current owner of this strata unit hereby agrees, provided all special legal levies are paid up, to appoint the Seller as the proxyholder of the Buyer to attend and act for and on behalf of the Buyer at any meeting dealing with the recovery of funds. And without limiting the generality of the foregoing, the Seller is authorized to vote on behalf of the Buyer at the discretion of the Seller. The Buyer agrees to sign any further documents appointing the Seller as proxy.

...

**87**  The problem is that Mr. Callaway did not agree to Ms. Hamilton voting on his behalf at the ratification meeting for the settlement of the Envelope Litigation, despite more than one request by Ms. Hamilton to do so. Nor has Mr. Callaway agreed to the release of the funds from the settlement to Ms. Hamilton.

**88**  Turning to the wording of the addendum, it is clear that Ms. Hamilton has a contractual right to the funds she is claiming and it is clear that she was entitled to cast a proxy vote at the ratification meeting. This is not seriously in dispute and nor can it be on the terms of the Agreement.

**89**  Mr. Callaway says he does not have to pay the funds from the Envelope Litigation to Ms. Hamilton because she fundamentally breached the Agreement. This breach occurred, according to Mr. Callaway's counterclaim, when Ms. Hamilton falsely and negligently misrepresented a number of latent defects in the Townhouse. The defects presented in evidence were roof leaks and defective plumbing that was the subject of litigation. Other pleaded allegations not presented in evidence or argued were: damage to carpet in the living room, failure of the strata council of Harbour House to report outstanding debts or liabilities, plumbing and electrical work without a permit and an allegation that there were irregularities in how the strata corporation conducted its financial affairs. I consider Mr. Callaway's allegations on their merits below.

**90**  The principles of fundamental breach of a contract have been discussed in previous cases.

**91**  In *Gundersen v. Savoy*, [*2012 BCSC 1047*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24T9-00000-00&context=), the purchasers of a home discovered several months after taking possession that it was infected with mould and mildew. The purchasers claimed that they could not occupy the home and had not done so for the six years prior to trial. They claimed that the contract for sale was fundamentally breached but this claim was dismissed. Mr. Justice Melnick found, at para. 60, that the remedy of fundamental breach was not engaged on these facts because there was no objective evidence that the home could not be remediated and made habitable. In these circumstances the plaintiff had not been deprived of substantially the whole benefit of the contract and thus there was no fundamental breach.

**92**  In a second case, *Shenasi Carpet Ltd. v. Future World Holdings Ltd.*, [*2009 BCSC 737*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S038-00000-00&context=), the plaintiff leased premises from the defendant to sell and clean carpets. Over about seven years, there were numerous roof leaks that damaged the plaintiff's carpets. A new roof was ultimately installed. The plaintiff claimed, among other things, that the repeated leaks constituted a fundamental breach of the lease. Mr. Justice Curtis found there was no fundamental breach because the plaintiff did not abandon the premises but chose to stay and also renewed its lease twice.

**93**  In the subject case, Mr. Callaway completed the Agreement for the sale of the Townhouse in October 2004. He has lived there continuously since that date. The only evidence of physical damage is drywall damage in one upstairs bedroom in May 2005 as a result of a roof leak. There is no evidence of physical damage to the Townhouse as a result of the remediation or from plumbing problems.

**94**  Clearly, the Townhouse has been habitable since completion of the Agreement and there is, at best, minimal physical damage. It follows that Mr. Callaway has not been deprived of substantially the whole benefit of the Agreement.

**95**  I find that there has been no fundamental breach by Ms. Hamilton of the Agreement with Mr. Callaway. Instead it was Mr. Callaway who has breached the Agreement by not paying to Ms. Hamilton her share of the settlement proceeds and by refusing to give her a proxy vote at the meeting to approve the settlement. She is entitled to payment forthwith of her share of the funds from the Envelope Litigation now held in trust. It also follows that there is no basis for any set off. Ms. Hamilton does not seek damages for Mr. Callaway's refusal to give her the proxy vote.

**Fraudulent misrepresentation**

**96**  It is submitted on behalf of Mr. Callaway that Ms. Hamilton was closely involved with the investigation and management of the plumbing issues at Harbour House. By means of that involvement she knew that there were serious and longstanding problems with the plumbing, but she answered "no" to the question on the property disclosure statement, "Are you aware of any problems with the plumbing system?" In her evidence, Ms. Hamilton agreed that this statement applied to Harbour House generally and not just the Townhouse. According to Mr. Callaway, it follows that Ms. Hamilton's representation about the plumbing system on the disclosure statement was fraudulent and reckless.

**97**  The Court of Appeal has set out the elements of fraudulent misrepresentation in a previous decision (*Islip v. Coldmatic Refrigeration of Canada Ltd.,* [*2002 BCCA 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0SS-00000-00&context=) at para. 11; citing G.H.L Fridman, *The Law of Contract*, 3rd ed. (Toronto, Carswell), at p. 295). Applying those elements here, to establish fraudulent misrepresentation Mr. Callaway must prove on a balance of probabilities the following:

1. Ms. Hamilton made a representation of fact about her awareness of plumbing problems at Harbour House to Mr. Callaway;
2. The representation was, in fact, false;
3. Ms. Hamilton must have known the representation was false at the time it was made;
4. Mr. Callaway must have been induced to enter into the contract in reliance upon the representation; and
5. Ms. Hamilton, in making the representation, must have intended that Mr. Callaway act on the representation.

**98**  Fraudulent misrepresentation has also been called the tort of deceit involving "serious moral guilt" that is difficult to prove because of its "central theme of dishonesty" (Philip Osborne, *The Law of Torts*, Third Edition, (Irwin Law Inc. 2007), page 300).

**99**  With regards to the first element of fraudulent misrepresentation, there is no serious dispute that Ms. Hamilton made a representation of fact to Mr. Callaway with respect to the plumbing at Harbour House: she completed the property disclosure statement and she represented that she was not aware of any problems with the plumbing system.

**100**  The next element of fraudulent misrepresentation is whether the representation made by Ms. Hamilton about the plumbing was, in fact, false. That is, was there a problem with the plumbing system at Harbour House when she completed the disclosure statement on May 24, 2004? I take this to be something of an objective approach to the issue of misrepresentation, compared to the more subjective inquiry under the third element discussed below. The issue at this stage is whether there was a systemic problem and, in light of the wording of the disclosure statement, whether Ms. Hamilton was aware of the problem? Mr. Callaway obviously answers these questions in the affirmative; Ms. Hamilton accepts that there were some pipe breaks at and before mid-2004 but she denies at the time of the disclosure statement in late May 2004, there any systemic problems with the plumbing.

**101**  It is useful to start with the language of the disclosure statement. It seeks information about whether Ms. Hamilton was aware of any systemic problems with the plumbing systems at Harbour House. This is broad language that is capable of being interpreted to the benefit of both the seller and buyer. For example, the scope of the language is broad but there can also be problems that are not necessarily systemic.

**102**  It is also necessary to provide some clarification of what are "plumbing problems" or "issues" and what is a "plumbing system." There is evidence of flooding from what were described as misadventures such as the overflowing of bathtubs and toilets. I do not consider those events of significance with respect to the issues in these claims since they can occur regardless of what systems are in place or the quality of those systems. Nor did the parties consider them significant in their evidence or argument. Similarly, a list of all repairs or all insurance claims (as developed early on by the strata council in August 2003) is not an accurate reflection of the structural plumbing problems at issue in the subject applications since it was incomplete and it included misadventures. As well, there is some overlap between plumbing problems and water ingress as a result of the problems with the building envelope. For example, the report by RDH of January 24, 2000 discussed above in the context of Envelope Repairs refers to water problems. As above, the Envelope Litigation was settled in February 2005.

**103**  With these qualifications in mind, and considering the wording of the disclosure statement, I conclude that the "plumbing problems" referred to in the statement must mean plumbing problems that may be systemic or structural (and I apply the same approach in the discussion of negligent misrepresentation below). Further, the objective of the disclosure statement appears to be to elicit information from the seller about systemic plumbing problems that would be of concern to a buyer.

**104**  There were some incidents of plumbing leaks at Harbour House before Ms. Hamilton signed the disclosure statement in May 2004 (and she included some of the incidents in her evidence). For example, there was a newsletter dated September 2, 2003 for the owners in Harbour House. The main purpose of the newsletter was to educate owners about mediation efforts to resolve the Envelope Litigation. An information meeting for owners was held on August 18, 2003 and a mediation session was to be held on September 9, 2003. The newsletter was five pages (plus a covering letter) dealing with the mediation. With respect to plumbing issues, it said only "[t]he Strata Council will be giving additional details about ongoing plumbing problems due to shoddy original construction to our legal team." Information on the plumbing problems was not presented at the scheduled mediation on September 9, 2003 because the information was incomplete.

**105**  Mr. Phillips, the owner who was active in the Envelope Repairs, drafted the newsletter and he testified that this sentence referred to piping in the walls that had kinked because of the settling of the building. He explained that the owners believed that at some point the building would settle and the shrinkage would stop. The reference to "legal team" in the newsletter was to the lawyers working on the Envelope Litigation. In May and June 2004 counsel was retained to investigate the plumbing problems and an expert was retained, as discussed in more detail below.

**106**  In July 2004 (after the May 2004 disclosure statement but before the closing of the sale of the Townhouse) a reliable spreadsheet of plumbing breaks was prepared by counsel for the strata. It was available to Mr. Phillips about this time and he described it in his evidence. Ms. Hamilton did not see it at the material times in 2004.

**107**  The list includes about 75 plumbing incidents over the period November 1995 to May 2004. Each item is one or two lines and there are columns for the following: an unexplained number code; the date of the incident; a description of, usually, who did the repair; the cost (most were less than $1,000); and a short description of the "Nature of the Leak."

**108**  The spreadsheet also included a description of the unit or units in Harbour House where the problem occurred. None of the incidents were in the six townhouses (including the Townhouse), 32 were in the apartment block at 1990 Kent Avenue, 30 were in the apartment block at 1920 Kent Avenue and the balance did not have an address. It is possible but unlikely that the incidents without addresses included the townhouses since they are described by apartment numbers and the townhouses all have separate street addresses.

**109**  This list describes the number of incidents decreasing over time and thus it confirms the evidence of Ms. Hamilton and Mr. Phillips that they understood that the breaks would diminish over time as the building settled. There is no evidence that the Townhouse or any of the townhouses had any plumbing problems. And the corrosion of the plumbing was an issue on the eventual settlement of litigation in 2011 for the plumbing issues but corrosion was not a problem in 2004.

**110**  Overall, in May 2004, there was concern among owners at Harbour House of problems with the plumbing system. Counsel was retained although it is not clear if that would have occurred independent of the Envelope Litigation. Mr. Phillips testified that the strata council was looking for additional issues to add to the Envelope Litigation, but there was still a question whether any litigation over the plumbing would result in more money than the legal fees to proceed with it.

**111**  I also note that counsel for Harbour House in 2004 was suggesting potential damages in the range of $600,000 - $800,000 in May and June 2004, but ultimately the plumbing issues were settled in 2011 for a total of $40,000, less legal fees. Counsel's initial estimate would obviously lead to a conclusion of very significant problems with the plumbing system at Harbour House. However, with the benefit of hindsight it is clear that the problems were far less significant. Mr. Callaway emphasizes counsel's initial estimate of damages to support his submission that there were serious problems known by everyone at the time, but that is not the evidence.

**112**  In summary I find that there were, in fact, problems with the plumbing system at Harbour House in May 2004 and there was concern among owners at Harbour House about the problems. However, the problems were not significant at that time or later, and I find that Mr. Callaway has exaggerated the extent of the plumbing problems by a significant degree.

**113**  With respect to whether the problems were systemic or structural there is some doubt. The fact that the problems were diminishing over time suggests that any structural issues were settling out. As well, the fact that nothing was done to repair the problems until 2012 (including corrosion that was not evident in 2004) suggests that there were limited problems in 2004. Mr. Phillips testified that he did not believe the plumbing issues were a problem even when he moved out of Harbour House in 2006. Finally, the nominal settlement of the litigation over the plumbing problems in 2011 suggests that, at a minimum, no structural or systemic cause could be identified that could support a large settlement.

**114**  It was not the case, as submitted by Mr. Callaway, that there were widespread and obvious plumbing problems. I find that the evidence as a whole is more in accord with Ms. Hamilton's account than that of Mr. Callaway. As she testified there were some pipe breaks, they were diminishing over time and she did not belief there was a systemic problem. Taken all together I conclude that there were, at best, some indications of a systemic problem with the plumbing at Harbour House in mid-2004. With the benefit of hindsight we also know they did not develop into a significant problem (when, for example, the subsequent litigation was settled some time later). I accept that the primary time was mid-2004 but, in light of the stark difference between the estimate of potential damages then and the ultimate settlement, I consider it appropriate to put give some weight to the later events.

**115**  Since there was a minimal basis for concluding there was a systemic problem with the plumbing in 2004 it would have been prudent for Ms. Hamilton to have answered "yes" to the question about this on the disclosure statement. Whether she acted dishonestly when she did not do so is the next issue.

**116**  I turn next to the third element of fraudulent misrepresentation: did Ms. Hamilton make the representation that she was not aware of any problems with the plumbing system at Harbour House knowing that it was false at the time it was made? Was she deceitful and dishonest and did she make a wilful distortion of the truth when she made this representation?

**117**  There is no serious dispute that Ms. Hamilton had some knowledge of the plumbing problems at Harbour House in mid-2004. The dispute is the extent of her knowledge and whether she fraudulently misrepresented the situation. According to Mr. Callaway, her knowledge was extensive and she was very involved in the decisions to retain counsel on the plumbing issue, to obtain legal opinions with respect to that issue, to investigate the piping problems and to effect short and long-term remedies to those problems. He submits that this is strong evidence that she knew her statement on the May 2004 disclosure statement was false and fraudulently made.

**118**  It is therefore necessary to review Ms. Hamilton's knowledge of the plumbing issues at Harbour House in the context of the material events in these applications: Ms. Hamilton completed the property disclosure statement on May 24, 2004 and the Agreement was dated July 29, 2004 (completion was October 14, 2004).

**119**  A critical event for Mr. Callaway is a meeting of the strata council on May 18, 2004. Ms. Hamilton attended this meeting as a guest and as a member of the litigation committee. The minutes of that meeting include a report on the Envelope Litigation; there is no specific reference to plumbing problems in the minutes. There is a reference to a decision to transfer "the file" to new counsel (because previous counsel had a conflict). This was in the context of a pre-mediation session for the Envelope Litigation. The minutes do not expressly say so, but clearly the "file" being transferred was the Envelope Litigation, especially since there was no "file" at the time on the plumbing issues.

**120**  Ms. Hamilton testified that she remembered the May 18, 2004 meeting as a "meet and greet" with the new lawyer and she could not recall if the plumbing issues at Harbour House were discussed. She denied that she knew at the end of the meeting that a decision had been made to investigate the plumbing problems. She could not recall if a decision was made to obtain a legal opinion with regards to those problems. The minutes indicate the meeting was short, from 7:00 PM to 8:10 PM.

**121**  It appears that, at about this time, counsel was retained to investigate the plumbing problems. This was the same lawyer who represented Harbour House on the Envelope Litigation; the "file" was transferred to him from previous counsel (neither counsel are counsel in the subject applications). On May 21, 2004 the new counsel wrote to a plumbing expert and described "an alarming number of pipe breaks in the building", and this was described in the letter as a "systemic problem." The expert was advised that the lawyer had authority from the strata council to hire him to "determine the cause and propose a fix" for the pipe breaks.

**122**  Assuming that counsel's letter is correct with respect to his instructions, he had been retained on both the issue of the pipe breaks and the Envelope Litigation. The decision to do this was likely made at the time of the strata council meeting on May 18, 2004; the minutes do not say it was made at this meeting, but Mr. Phillips testified that it was made then. At about the same time, according to his letter, counsel was authorized to retain an expert; again the evidence is not clear specifically when that occurred. It is of passing interest that it was not until the July 2004 AGM that the owners specifically authorized retaining counsel on the plumbing issues.

**123**  There was another meeting of the strata council on May 25, 2004 and this was described in the minutes as a "continuation" of the meeting on May 18, 2004. Under new business there was reference to a break in a plumbing line in unit 1990 on May 7, 2004. The break was described as causing damage in a number of suites (as described below, the extent of the damage was not entirely the result of the break itself).

**124**  Ms. Hamilton did not attend the meeting on May 25, 2004; she could not recall in her evidence attending, the minutes do not list her as in attendance and there is no other evidence she did attend. This is consistent with the evidence of Mr. Phillips who testified that Ms. Hamilton had been involved in the litigation committee but she "sort of drifted away" at this time because she was selling her unit. On reflection, during his evidence, he went further and said Ms. Hamilton was not involved and he could not recall her being involved in any of the "debates". It was also well known that she also continued to spend her winters in California, except for short trips back to renew her travel insurance.

**125**  On June 24, 2004 notice of an annual general meeting on July 14, 2004 was sent to the owners of Harbour House. The notice referred to the plumbing problem on May 7, 2004, in the May 18, 2004 minutes, and described the problem as being that "[t]he contacts on file were not accurate and this resulted in more damage being done to the affected units than necessary." Updates for contact information were sought in order to prevent a similar problem in the future. Apart from saying that the description in the May 18, 2004 minutes was incorrect, the extent of the break on May 7, 2004 and the direct damage it caused is not known.

**126**  Among other proposed resolutions in the notice for the AGM was one titled "Litigation." It referred to the Envelope Litigation and sought authorization to change counsel, to negotiate a settlement with the previous counsel, to develop a revised litigation plan and budget for the Envelope Litigation and the resolution sought authorization to attempt a negotiated settlement of the Envelope Litigation. The same resolution sought authorization on issues relating to the plumbing (the two issues, plumbing and envelope, were discussed together in the resolution): to "change counsel" for "potential separate litigation for pipe breaks"; to investigate "the piping problem" to determine cause and appropriate remedy; to effect short-term remedies for the piping problem and develop recommendations for a long-term remedy; and to obtain legal opinions "in respect of the viability of an action in respect of the piping problems."

**127**  Mr. Phillips drafted these resolutions and he testified that the information on the plumbing problems was "anecdotal" at the time of the AGM. They did have the July 2004 spreadsheet from counsel setting out a reliable list of the actionable problems but they did not have a full review of the problems. Ms. Hamilton did not have the list. According to Mr. Phillips, it was "early on" in any litigation about the plumbing, they were looking to add issues to the Envelope Litigation and it was not clear that the strata would make any money after legal fees were paid.

**128**  The AGM took place on July 14, 2004 and the resolution seeking authorization on litigation was passed by the required vote (including an amendment unrelated to the subject claims). In her evidence Ms. Hamilton could not recall attending this meeting. She was shown notes she took on a copy of the notice for the meeting and she acknowledged she could have attended. I find she did attend.

**129**  Litigation for the plumbing issues was commenced by amending the pleadings for the Envelope Litigation on May 9, 2005 to include the plumbing problems. As above, Ms. Hamilton had left Harbour House in October 2004. Mr. Phillips testified that she was on the ad hoc litigation committee for a time before she left but she was also away for the winters. He said she was "not around a lot." Ultimately, as above, the litigation over the plumbing problems settled in 2011 for $40,000, less legal fees. This was a substantially lower amount than the original estimate of $600,000 - $800,000 in damages given by counsel in mid-2004.

**130**  Finally, in August 2012 a decision was made to re-pipe Harbour House because of original design and workmanship problems, building shrinkage and the corrosive effect of the Vancouver water supply. This was after a plumbing consultant's report in March 2011 and well after Ms. Hamilton left Harbour House.

**131**  From all of this I conclude that Ms. Hamilton had some knowledge of the plumbing problems at Harbour House. She knew from various sources that there had been pipe breaks in the apartment buildings (not the townhouses) and she, along with Mr. Phillips (and apparently others), believed they were caused by faulty workmanship in the original construction. She had been a member of the strata council (including being vice-chair). But that was well before her May 2004 disclosure statement and the Agreement and there is no evidence that she had any information about the plumbing issues from her time on council that was or is of significance.

**132**  Similarly, Ms. Hamilton was on the litigation committee with respect to the Envelope Litigation, not the plumbing issues. Mr. Phillips described the litigation committee as an *ad hoc* group, attracting people who wanted to be involved rather than having any formal status within Harbour House. The idea was to reduce the workload of the strata council, some members did more than others and some members did not show up for meetings. Ms. Hamilton was away during the winters and she was "not around a lot", according to Mr. Phillips.

**133**  Again, Ms. Hamilton completed the property disclosure statement on May 24, 2004 in which she stated she was unaware of any problems with the plumbing system at Harbour House. I have found above that there were some problems with the plumbing system at this time, although not significant ones. There were only indications of systemic problems with the plumbing in mid-2004 that did not develop into significant systemic problems. Ms. Hamilton's evidence was broadly consistent with this description.

**134**  I accept that Ms. Hamilton likely knew of the change of counsel for the Envelope Litigation, as did many owners at Harbour House. She did attend the short strata council meeting on May 18, 2004 where, according to Mr. Phillips, counsel was given instructions to retain an expert. She did not attend the continuation on May 25, 2004 but she attended the AGM on July 14, 2004. Mr. Callaway makes essentially a circumstantial case that these facts must mean that Ms. Hamilton was in the thick of the decisions made by the strata council with respect to retaining counsel and a plumbing expert. However, in my view, the evidence does not support this conclusion (and nor were the problems significant from a systemic point of view). Of significance is the evidence of Mr. Phillips that Ms. Hamilton was not active in the litigation committee and he could not recall her being involved in any of the "debates".

**135**  As Mr. Phillips explained in his evidence, it was not until counsel prepared the July 2004 list of incidents that there was any reliable idea of the possible extent of the problem (that, ultimately, resulted in nominal damages). Ms. Hamilton did not see this list at any of the material times. Again, Mr. Phillips also testified that he did not believe the plumbing issues were a problem even when he moved out of Harbour House in 2006. From this I take it that in May 2004 the information available about the plumbing problems was not extensive and the problems were not well understood by anyone.

**136**  With regards to Ms. Hamilton, it is fair to say she had some direct information from attending the May 18, 2004 strata council meeting. However, according to Mr. Philips, the strata council was looking for ways to increase the scope of damages in the Envelope Litigation. That is, there were tactical issues at play within the strata as well as substantive issues. Further, Mr. Philips testified that he and others (not Ms. Hamilton) were skeptical about the value of pursuing litigation over the plumbing. There was apparently responsible assessment of the situation within the strata council that was independent of the significant damages estimated by counsel.

**137**  In general, it is not correct to say, as does Mr. Callaway, that Ms. Hamilton was fully informed and deeply immersed in the discussions about extensive plumbing problems. As explained in Mr. Phillips' evidence, there was not much to be known about the plumbing problems in mid-2004. Further, looking at the evidence about the information available in mid-2004 as well as with the benefit of hindsight (and despite counsel's original assessment), we know that there has never been much to the plumbing problems as evidenced by the settlement of litigation over them in 2011 (including problems such as corrosion that were not evident in 2004) for a nominal amount.

**138**  For the above reasons I accept Ms. Hamilton's evidence that she understood the representation on the disclosure statement to be true. She knew about some plumbing problems but she did not think they were systemic and that is why she answered no to the question on the disclosure statement. I have found above that there were, in fact, some minimal systemic problems but that does not mean Ms. Hamilton fraudulently misrepresented the situation. Her evidence generally accords with the other evidence that at the material times (and later) there were minimal systemic problems with the plumbing. On this basis I conclude that there is no fraud in this case because Ms. Hamilton had an honest belief in the truth of what she said (G.H.L Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto, Carswell), at p. 711).

**139**  On the evidence, there is another way to assess whether Ms. Hamilton's representation about the plumbing was fraudulent and dishonest. This is to consider the evidence of disclosure by Ms. Hamilton of the documents required to be disclosed under the Agreement. There is a dispute about what was disclosed and I will consider that below. For the purposes of this part of the analysis, I will consider only the documents that Mr. Callaway agrees were disclosed to him prior to completion of the Agreement on October 14, 2004.

**140**  The documents that were disclosed to Mr. Callaway included eight copies of minutes of the strata council of Harbour House over the period August 22, 2002 to February 24, 2004. They included reference to the following:

1. "There was a minor flood from one unit to the one below" (minutes dated August 22, 2002);
2. Reference to summarizing of "plumbing and related invoices ... to determine if any of the problems are construction related as this may form part of the legal action" (September 24, 2002);
3. "There was a flood in 1920 that resulted in damage to one unit" with a total repair of "just over" $5000. "The cause was a compression break in a supply line. The pipe had been bent, instead of using a coupling" (July 22, 2003);
4. A plumbing leak that affected three units (July 22, 2003);
5. Under the heading "Report on Litigation" there was a reference to "[a] history of claims pertain to plumbing pipe breaks is to be provided as well" (August 25, 2003);
6. Reference to "some plumbing leaks" (December 4, 2003);
7. Reference to a "plumbing leak caused by a split pipe" (January 21, 2004); and
8. "Copies of invoices for plumbing line breaks, report and invoices for damage restoration are to be forward to [counsel for Harbour House], as there are issues about the mechanical installation to be included in the suit" (February 24, 2004).

**141**  Mr. Callaway testified that he read the minutes he received, but he could not recall reading about any plumbing problems. From this I conclude that there is something to the submission made on behalf of Ms. Hamilton that this explanation is hard to credit to a certified forensic examiner such as Mr. Callaway. In any event, the plumbing problems were there to be read and it is not relevant that Mr. Callaway now does not remember reading about them.

**142**  Ms. Hamilton disclosed in the above documents a number of references to plumbing problems and this does not support Mr. Callaway's assertion of a dishonest intent on her part to falsely misrepresent the plumbing problems. In fact, she did disclose the problems (I will consider Mr. Callaway's obligation to exercise due diligence below, under negligent misrepresentation). A dishonest and fraudulent act would have been not to disclose any information about plumbing problems or to alter the documents so as to deceive Mr. Callaway. Ms. Hamilton did neither.

**143**  It is true there is a contradiction between Ms. Hamilton's answer on the disclosure statement (that she was not aware of any problems with the plumbing system) and her disclosure of the minutes that revealed information contrary to that answer (that there were problems). In this regard, I note the following statement about the substance of fraudulent misrepresentation:

[fraudulent misrepresentation is] a deliberate, wilful, conscious distortion of the truth, the making of a false statement with the knowledge that it is untrue, or with reckless disregard for its truth or falsity, and with the intent that the plaintiff should act upon it. For liability to ensue the plaintiff must act upon it in a manner contemplated or manifestly probable and, in consequence of such act, the plaintiff must incur damage. The deliberate or reckless deception of the plaintiff by the defendant must have been intended by the latter and must produce the consequence that was itself intended or, at the very least, foreseen as being likely. The tort of deceit involves more than fraud or falsehood. There must be a direct causal link between the untruth and the behaviour of the plaintiff that leads to the detrimental occurrence.

G.H.L Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto, Carswell), at p. 709.

**144**  Applying this to the above evidence, it is clear that Ms. Hamilton did not conceal the issue of plumbing problems at Harbour House from Mr. Callaway. Nor can it be said that she concealed that the strata council was considering the plumbing problems as a legal issue. It is consistent with the above finding that Ms. Hamilton had an honest belief in the truth of what she said for her to disclose the information received by Mr. Calloway. I find that she did not make a conscious and wilful distortion of the truth and nor can her actions be characterized as a deliberate or reckless deception of Mr. Callaway.

**145**  It is not necessary but with respect to the other two elements of fraudulent misrepresentation, I find that the evidence that Ms. Hamilton disclosed a number of references to plumbing problems at Harbour House is contrary to Mr. Callaway's assertion that she intended him to rely on the representation in the disclosure sheet to induce him to agree to the Agreement. If she intended to make a false statement that would induce him to enter into the contract, then it is unlikely that she would have volunteered information that undermined that intention. Finally, I find that Ms. Hamilton intended for Mr. Callaway to act on her representation.

**146**  In summary, I find that Mr. Callaway has not proven all of the elements required that Ms. Hamilton fraudulently misrepresented the plumbing system at Harbour House.

**Negligent misrepresentation**

**147**  The issue here is whether Ms. Hamilton made a negligent misrepresentation when she stated on the May 2004 property disclosure statement that she was unaware of any problems in the plumbing system at Harbour House.

**148**  The elements of negligent misrepresentation are different in substance from the elements of fraudulent misrepresentation and I set out the former in the context of the subject applications as follows:

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

*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.

**149**  As with the issue of fraudulent misrepresentation, I will begin by reviewing the eight sets of minutes that Mr. Callaway agrees he received. I reproduce the relevant parts of those minutes again:

1. "There was a minor flood from one unit to the one below" (minutes dated August 22, 2002);
2. Reference to summarizing of "plumbing and related invoices ... to determine if any of the problems are construction related as this may form part of the legal action" (September 24, 2002);
3. "There was a flood in 1920 that resulted in damage to one unit" with a total repair of "just over" $5000. "The cause was a compression break in a supply line. The pipe had been bent, instead of using a coupling" (July 22, 2003);
4. A plumbing leak that affected three units (July 22, 2003);
5. Under the heading "Report on Litigation" there was a reference to "[a] history of claims pertain to plumbing pipe breaks is to be provided as well" (August 25, 2003);
6. Reference to "some plumbing leaks" (December 4, 2003);
7. Reference to a "plumbing leak caused by a split pipe" (January 21st 2004); and
8. "Copies of invoices for plumbing line breaks, report and invoices for damage restoration are to be forward to [counsel for Harbour House], as there are issues about the mechanical installation to be included in the suit" (February 24 2004).

**150**  In addition, according to Mr. Callaway, he obtained the minutes of May 25, 2004 by his own inquiries. These minutes also refer to a problem with the plumbing.

**151**  This information must be considered in the context of the language in the Agreement of July 29, 2004. I also reproduce the relevant language of that document that Mr. Callaway, the 'buyer", signed again:

The buyer acknowledges that the buyer has received, read and understood a signed copy of this disclosure statement from the seller or the seller's agent on the 29 day of July ... 2004. The prudent buyer will use this disclosure statement as the starting point for the buyer's own inquiries. The buyer is urged to carefully inspect the property and, if desired, to have the property inspected by an inspection service of the buyer's choice.

**The buyer acknowledges that all measurements are approximate. Buyer should obtain a strata plan drawing from the Land Title Office or retain a professional home measuring surface if the buyer is concerned about the size.**

[All emphasis in original]

**152**  There is no serious dispute that Ms. Hamilton owed Mr. Callaway a duty of care based on their relationship under the Agreement. Also, it follows from the discussion above that Ms. Hamilton had knowledge of plumbing breaks in mid-2004 but there is some question whether they were a systemic problem. Nonetheless, for the purposes of the analysis here, I accept that Ms. Hamilton's representation was inaccurate.

**153**  With regards to the next two elements of negligent misrepresentation, a previous judgement is of assistance. In *Sask v. Brooke*, [*2000 BCSC 1745*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2P7-00000-00&context=), there was a sale of a "leaky condo". In the property disclosure statement, the vendors answered "no" to questions about whether they were aware of any structural problems, any damage due to water and any roof leakage or unrepaired damage. However, minutes disclosed by the vendors described problems with water leaks. As in the subject applications, the vendors signed a statement with regards to their obligation to provide accurate information. As well, the purchaser signed a statement that, among other things, said a prudent buyer will use the information disclosed by the vendors as a "starting point for their own inquiries." The purchasers commenced an action in negligent misrepresentation; this was dismissed.

**154**  In *Sask*, Mr. Justice Collver noted authority to the effect that a disclosure statement is not a warranty (citing *Zaenker v. Kirk*, (20 December 1999), Kamloops No. 24348, (BCSC). He found that the first two elements of negligent misrepresentation had been met. He found, at para. 23, that the third element, whether the vendors had been negligent, was not determinative. Under the fourth element he concluded that the disclosure by the vendors of minutes in which leakage problems were discussed fulfilled their disclosure obligations "... in a manner that should have alerted a prudent purchaser to the need to make further inquiries". Further, the court found, at para. 24, that the purchaser did not act "... in a reasonable manner by relying upon the property condition disclosure statement without reference to the information provided in the strata council minutes".

**155**  In my view a similar result to *Sask* is required in the subject applications. Mr. Callaway knew from the disclosure statement he signed that it was a "starting point" for his own inquiries and he was "... urged to carefully inspect the property and, if desired, have the property inspected" by an inspector of his choice. Mr. Callaway declined to exercise his right to have an inspection. Further, he knew or should have known from the minutes that were disclosed to him that there were plumbing problems at Harbour House. As above, his evidence that he read the minutes but he does not remember reference to any plumbing problems is not responsive or material. Mr. Callaway's obligation under the Agreement cannot be avoided by testifying that he cannot remember what he read at the material times.

**156**  I also note Mr. Callaway's evidence that, on August 6, 2004, he obtained his own copy of minutes dated May 25, 2004 because they were required in order to obtain a mortgage. He testified that these minutes were not disclosed to him before. In my view, a reasonable person in these circumstances would have been alerted to the fact that there were deficiencies in the disclosure of documents. At that point Mr. Callaway, as a prudent buyer, was obliged to do something to inquire into the extent of disclosure by Ms. Hamilton before completion on October 14, 2004. Instead, he did nothing and he cannot now seek a remedy to correct a situation that was in his control before the completion of the Agreement.

**157**  Returning to the fourth element of negligent misrepresentation, I conclude that Mr. Callaway did not act reasonably when he relied only on the disclosure statement without reference to the information provided to him in the minutes. Further, it was unreasonable to discover missing documents and then not make inquiries to determine if there were other documents missing.

**158**  In summary, Mr. Calloway has not proven all of the elements of negligent misrepresentation.

**Disclosure**

**159**  There remains the factual issue of whether Ms. Hamilton disclosed all of the documents she was supposed to disclose under the Agreement. She testified that she did disclose all of the documents under the Agreement; Mr. Callaway says she did not disclose all of the documents she was required to disclose under the Agreement.

**160**  With respect to one document, Mr. Callaway complains that he was not sent a copy of the notice of the AGM on July 14, 2004. However, the Agreement does not identify that document as one to be disclosed. According to Ms. Fierro, the realtor for Ms. Hamilton, it is unusual to disclose notices of AGMs in contracts for purchase and sale for strata title properties.

**161**  With regards to the other documents at issue, there are certainly difficulties with the evidence and it is not at all clear what documents were received by whom and at what time. Mr. Callaway says that he received documents by fax and then in a package, but he cannot say who they were from. He then filed them and they remained in his filing system for some time. For her part, Ms. Hamilton says she gave all of the required documents to her realtor but she also says she left some documents on the kitchen counter when she gave up possession of the Townhouse. These may have been consultant's reports with regards to the Envelope Repairs and they may have been documents not listed in the Agreement. Mr. Callaway gave no evidence about receiving documents from the kitchen counter when he took possession of the Townhouse and nor did he deny it.

**162**  Ms. Fierro, Ms. Hamilton's realtor, testified that she sent the documents listed in the Agreement to Mr. Callaway's realtor. She does not have the covering letter for this and she relies on a covering letter to a previous purchaser. She says she did essentially a "save-as" using the previous letter with a change of addressee. Mr. Callaway's realtor testified but he could not recall receiving or sending any documents.

**163**  Both parties are required to prove their assertions on the documents on a balance of probabilities; Mr. Callaway that he did not receive the documents he has identified and Ms. Hamilton that she or her agent sent all of the documents required under the Agreement. There is some evidence supporting each party.

**164**  Considering all of the evidence I conclude that Ms. Fierro's evidence is significant. It is true that she was the realtor for Ms. Hamilton but that was almost 10 years ago and it cannot be reasonably said that she is now somehow beholden to Ms. Hamilton. Unfortunately, Ms. Fierro does not have a copy of the letter she says she sent to Mr. Callaway's realtor but her account of using a previous letter as a template is logical and consistent with the gradual purging of a file with the file ultimately being destroyed entirely. She also had some memory of the documents in question as demonstrated when she distinguished between different consultant's reports for the Envelope Repairs.

**165**  In contrast to Ms. Fierro's evidence, Mr. Callaway's agent testified that he could not remember receiving or passing on any documents. Again, Mr. Callaway said in his evidence that he could not recall who sent him the documents he did receive. With respect to the evidence of Ms. Hamilton and Mr. Callaway on this point, I interpret that evidence to be essentially the same: the former says she sent all the documents and the latter says he did not receive all the documents.

**166**  The resolution of this issue is not at all straightforward. However, primarily on the basis of the evidence of Ms. Fierro, I conclude that Ms. Hamilton complied with her obligation to provide the information required under the Agreement to Mr. Callaway. That is, she provided the documents she was required to provide to Ms. Fierro who sent them to Mr. Callaway's realtor. And, as above, there is no question that Mr. Callaway received the documents he says he received and my conclusions on that evidence are above.

**Other Issues**

**167**  Early in the trial on the subject applications, Mr. Callaway alleged that Ms. Hamilton had misrepresented the state of the Townhouse when she answered "no" to a question on the May 24, 2004 disclosure statement that asked whether she was aware of any "additions or alterations made without the required permit." The specific allegation was that Ms. Hamilton has installed a bathroom fixture and a lighting fixture without permits.

**168**  In her evidence, Ms. Hamilton was asked about these installations and she answered that a permit was not required. No further issue was raised on behalf of Mr. Callaway and nor could there have been an issue.

**169**  Another issue is that a significant amount of time during the trial of the subject applications was taken up by evidence about the Envelope Repairs. The result of that evidence is that it can be said that Ms. Hamilton had some minimal involvement in those repairs through her involvement in the litigation committee. In any event, there is no evidence there were ongoing problems after their completion and there is no evidence of any misrepresentation on this issue.

**170**  A related matter is the statement in the listing for the sale of the Townhouse that it was "completely rainscreened." Mr. Callaway testified that this was a "marquee" issue for him and his partner. He was cross-examined on this and he agreed that the Agreement referred only to "extensive repairs and restoration" rather than complete rainscreening. He also agreed that, considering the wording of the Agreement, the walls might not have been rainscreened at all. A further difficulty for him is that Ms. Hamilton's realtor, Ms. Fierro, testified that she drafted the listing including the phrase "completely rainscreened" without input from Ms. Hamilton. I can find no misrepresentation by Ms. Hamilton on this evidence.

**171**  A further issue with respect to the remediation is the warranty. The listing prepared by Ms. Fierro stated that the Townhouse had been completely rainscreened "and comes with a 10 year warranty." Mr. Callaway attempted to prove that the warranty was limited in coverage. Assuming that was the case, there is no evidence of representations by Ms. Hamilton to the contrary. Further Mr. Callaway had an obligation under the Agreement to make his own inquiries about the warranty if that was an issue for him before closing the sale of the Townhouse.

**172**  There is also the roof. In May 2005 Mr. Callaway reported water damage to an upstairs bedroom. The cause was a leak in the roof and this was repaired. He relies on the evidence of his expert, Mr. Foxall, who opined that the roof had been leaking for three to five years prior to November 2007. This opinion was obviously made with considerable hindsight because he was not retained in 2007 to determine how long the roof had leaked. As well, and unfortunately, he was not shown a May 2002 report that described the roof as being in very good condition overall. So he did not and could not explain how a leak could develop from a roof in very good condition in a short time period. And Mr. Foxall agreed that the leak could have occurred during the three year period before his November 2007 inspection.

**173**  I conclude that it is improbable that there was a roof leak in 2004 but, assuming there was one, an inspection by Mr. Callaway would have been the best means of discovering this defect. As reflected in Mr. Foxall's evidence, a visual inspection of the roof by a qualified person would have revealed any problems. However, again, Mr. Callaway declined to exercise his right to have an inspection. Finally, I have some difficulty accepting that Mr. Callaway can now claim substantial damages for the roof when he received $130,000 from Harbour House Strata Corporation in 2012 for the roof.

**174**  Finally, Ms. Hamilton relies on the "entire agreement" clause in the Agreement. She says this operates to exclude any claims for representations outside the Agreement. For the reasons given above, it is not necessary to decide this issue. However, I note that the case relied by Ms. Hamilton is one where the parties were "both sophisticated commercial entities" and the Court of Appeal concluded that it "would not accord with commercial reality to give no effect" to the entire agreement clause there (*No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.*, [*2007 BCCA 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2475-00000-00&context=), para. 59). I do not believe that the parties in the subject applications or the Agreement can be so characterized.

**Summary and Conclusion**

**175**  There was no fundamental breach of the Agreement by Ms. Hamilton. Instead, Mr. Callaway breached the Agreement by not agreeing to the release of Ms. Hamilton's share of settlement funds from the Envelope Litigation (and by not giving her a proxy vote for approval of the settlement).

**176**  I direct that the settlement funds held in trust for the benefit of Ms. Hamilton be released to her forthwith.

**177**  Mr. Callaway alleges that Ms. Hamilton fraudulently and negligently misrepresented the condition of the Townhouse when she completed the property disclosure statement that was part of the Agreement. Neither of these allegations has been proven.

**178**  There is a factual dispute between the parties about whether Ms. Hamilton disclosed all of the documents required to be disclosed under the Agreement. The evidence on this point is quite unclear about whom received what documents and when. However, in light of the evidence of Ms. Hamilton's realtor in particular, I conclude that Ms. Hamilton complied with her obligations under the Agreement for disclosure.

**179**  Finally, any allegations of misrepresentation with regards to the Envelope Repairs, the reference to the Townhouse or Harbour House being "completely rainscreened", and problems with the warranty that followed the remediation are not supported by the evidence.

**180**  Ms. Hamilton is entitled to costs on her application as well as costs on Mr. Callaway's counterclaim and his application.

J. STEEVES J.

**End of Document**

[***Jellis v. Lukinuk, [2019] B.C.J. No. 1765***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5X47-57X1-F57G-S36J-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A. Ross J.

Heard: July 15-19 and 22-24, August 15, 2019.

Judgment: September 18, 2019.

Dockets: M160871, M160873

Registry: Vancouver

**[2019] B.C.J. No. 1765** | 2019 BCSC 1577

Between Vanessa Jellis, Plaintiff, and Amanda Lukinuk, Defendant And between Vanessa Jellis, Plaintiff, and Alexandra Hodgson, Defendant

(149 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Head injuries — Headaches — Action by Jellis for damages for personal injuries sustained in two motor vehicle accidents allowed in part — The accidents occurred in March 2014 and May 2015 — In both cases, Jellis was in a vehicle that was struck from behind — She experienced pain throughout her neck and back — Jellis provided training to estheticians — She was capable of performing her occupation but there was a prospect that she could suffer a loss in the future — The Court made no award for future housekeeping or past loss of earning capacity — Jellis was awarded $118,161 in damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Cost of future care — Loss of earning capacity — Retroactive loss of income — Special damages — Non-pecuniary loss — Action by Jellis for damages for personal injuries sustained in two motor vehicle accidents allowed in part — The accidents occurred in March 2014 and May 2015 — In both cases, Jellis was in a vehicle that was struck from behind — She experienced pain throughout her neck and back — Jellis provided training to estheticians — She was capable of performing her occupation but there was a prospect that she could suffer a loss in the future — The Court made no award for future housekeeping or past loss of earning capacity — Jellis was awarded $118,161 in damages.**

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| --- |
| Action by Jellis for damages for personal injuries sustained in two motor vehicle accidents. Jellis was 43 years old. She and her husband had two children, born in 2006 and 2008. Jellis worked as an independent contractor, providing training to estheticians. The first accident occurred in March 2014. Jellis was a passenger in a vehicle driven by her husband when it was struck from behind. The second accident occurred in May 2015. Jellis was alone in her vehicle when it was rear-ended. Liability was admitted for both accidents. In the months after the first accident, Jellis felt pain throughout her neck and back. She considered herself to be 75 per cent recovered at the time of the second accident. She had not missed any work after the first accident. She testified that her existing injuries immediately regressed after the second accident. At the time of the accidents, Jellis worked on a part-time basis. She increased her hours to full-time in 2016. In mid-2017, she modified her work activities, cutting back in some areas. Jellis claimed that her injuries had resulted in damages including loss of enjoyment of life, loss of capacity to earn income, future care costs, and out-of-pocket expenses. It was common ground that most of the damages suffered in the two accidents were indivisible. Jellis was seeking non-pecuniary damages in the range of $85,000 to $90,000. The defendants submitted that the range should be $25,000 to $30,000.  HELD: Action allowed in part.  Prior to the accidents, Jellis suffered from intermittent but long-standing issues with her neck and mid-low back. There was no evidence that her neck and back problems limited her in her occupation, but she did have flare-ups of pain that required treatment. It was not reasonable for Jellis to take steps that decreased her earnings and then seek the decrease in her earnings as damages from the defendants. All of the expert evidence indicated that she was capable of performing her occupation. However, there was a prospect that Jellis could suffer a loss in the future. She could lose her contract due to circumstances unrelated to her condition and out of her control. If she could not find work as a trainer, then she would likely have to full back on her training and experience as an esthetician. That eventuality was not probable, but the chances exceeded mere speculation. If that occurred, the evidence indicated that Jellis would not be able to work on a full-time basis. The Court made no award for future housekeeping or past loss of earning capacity. Jellis was awarded $118,161 in damages, including $85,000 in non-pecuniary damages, $20,000 for loss of future earning capacity, $8,650 for the cost of future care, and $4,511 in special damages. |

**Counsel**

Counsel for the Plaintiff: R. McCardell, I. Campbell.

Counsel for the Defendant A. Lukinuk: R.J. Merlo.

Counsel for the Defendant A. Hodgson: P. Pandher.

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**1**   The plaintiff claims damages for injuries suffered in two motor vehicle accidents: March 15, 2014, and May 27, 2015. She claims that these injuries have resulted in damages including loss of enjoyment of life, loss of capacity to earn income, future care costs, and out of pocket expenses.

**2**  It is common ground that, with the exception of certain special damages incurred after the first accident and some new symptoms that are attributed to the second accident, the damages suffered in the two accidents are indivisible. I note that there is no claim for any income loss until approximately two years after the second accident. The plaintiff attributes the past and future loss of capacity to earn income to a combination of the two accidents.

**The Accidents**

**3**  The first accident occurred on March 15, 2014, near the intersection of West 17th Ave. and Heather St. in Vancouver (the "First Accident"). The plaintiff was a passenger in a vehicle driven by her husband. The couple's two children were in the back seat. The accident occurred around dusk. It was raining. Mr. Jellis noted a pedestrian who was between two parked cars. He slowed because he was not sure whether the pedestrian would attempt to cross the street. As he slowed, his vehicle was struck from behind by the defendant's vehicle.

**4**  Liability is admitted by the defendant, Ms. Lukinuk. Evidence from the defendant's examination for discovery was read in, indicating that she was travelling at about 30 km/h when she noticed the plaintiff's brake lights go on. There is no evidence of how fast Mr. Jellis' vehicle was travelling at the moment of impact.

**5**  The second accident occurred on May 27, 2015, at the intersection of East 1st Avenue and Slocan Street in Vancouver (the "Second Accident"). The plaintiff was alone in her vehicle. It was rear-ended by the vehicle driven by the defendant, Ms. Hodgson. Liability is admitted. There was no evidence regarding the severity of the impact of the Second Accident.

**The Plaintiff**

**6**  Ms. Jellis is 43 years old. She was born and raised in Australia. After high school she attended Helene Abicair College of Advanced Beauty and received a diploma that qualified her to work as an esthetician. She met Mr. Jellis while travelling and working in Europe in 1998. The couple married in 2004 and settled in the Port Coquitlam area. They have two children, born 2006 and 2008. Mr. Jellis worked full time in Vancouver until late 2015.

**7**  From 1998 to 2006, the plaintiff worked on a full-time basis in a day spa as an esthetician. After the birth of her second child, the plaintiff took a maternity leave. When she returned to work she found that her working conditions and remuneration were unsatisfactory. In 2010 she joined an entity called "Evelyn Charles" as a teacher of estheticians. She worked 3 days per week, 10 hours per day. She found that teaching was less physically demanding than her prior work as an esthetician.

**8**  In September 2012, the plaintiff was retained as an independent contractor by a company called "Phytoderm" as a Skincare Technique Trainer. Phytoderm is a supplier of skincare products to spas and clinics. She provides training to estheticians who work in spas and clinics that purchase Phytoderm's products.

**9**  At the time of the First and Second Accidents, the plaintiff worked on a part-time basis. She increased her hours to full-time in 2016. In mid-2017 she modified her work activities, cutting back in some areas. She says that she took this step because of the pain she experiences from the two accidents. This area is discussed below under the heading "Loss of Capacity (Past and Future)".

**10**  She testified that, during the time she worked as an esthetician, she attended regular massage therapy treatments. Those treatments, she said, were to release work stress, as opposed to treating her for neck or back pain. However, she admitted on cross-examination that, in part, she attended those treatments due to muscle tension.

**11**  Both plaintiff and defendants argue that the plaintiff's pre-accident health was relevant to the assessment of damages. Both sides led evidence relating to that issue.

**12**  The plaintiff and her husband testified that, when she was in her 20s, she was very fit. She was at the gym several times per week. Her commitment to her level of fitness declined somewhat after her first child was born in 2006. After having her second child in 2008, her attendance at the gym for exercise became "sporadic".

**13**  The plaintiff testified that she was very active with her children's activities before the First Accident. She would regularly take them to a local outdoor pool in the summer, and she played with her children and their friends in the pool. She said she was able to travel on trips to Australia and return without being exhausted. When asked about the housekeeping duties, the plaintiff testified that, pre-accident, those duties were divided 95% to her and 5% to her husband. She testified that her husband did help with the vacuuming, but the work was mostly done by her. In contrast, her husband testified that he did the vacuuming before the accidents. This testimony is discussed under the heading "Cost of Care".

**14**  She testified that, during the time she worked as an esthetician, she attended regular, at times weekly, massage therapy treatments. Those treatments, she said, were to release work stress, as opposed to treating her for neck or back pain. However, she conceded on cross-examination that, in part, she attended those treatments due to muscle tension.

**15**  The plaintiff concedes that she had some pre-existing health concerns with pains in her neck, back, and hips. She says that those pains did not limit her in her work or social activities. As noted above, she did see a massage therapist regularly when working as an esthetician before her children were born.

**16**  The plaintiff also sought treatments from her chiropractor, Dr. Slater, on a fairly regular basis in the three years before the First Accident. The plaintiff's position is that, pre-accidents, she only went to see Dr. Slater for "maintenance" and when she had a flare-up of neck or low-back pain. She testified that any flare-ups would resolve within a few treatments by the chiropractor.

**17**  The defendants called Dr. Slater, and he confirmed the dates that he treated the plaintiff both before and after the accident. He also interpreted his clinical notes which delineated the areas of her body to which he applied treatments. He noted that the fact that he treated an area did not mean that the plaintiff was suffering pain in that area. He acknowledged that this statement also held true for treatments provided after the accidents. It was clear from his records that he treated many of the same areas both before and after the subject accidents. Overall, Dr. Slater's testimony did not assist in the assessment of the plaintiff's claims relating to these two accidents.

**18**  However, from Dr. Slater's records it is evident that in the two years prior to the First Accident, she sought three main bouts of treatment: the first in the Spring into the Summer of 2012, the second in the Autumn of 2012, and the third in the Spring of 2013. She also had two treatments in late February 2014, less than 2 weeks before the First Accident.

**19**  As discussed above, the plaintiff acknowledged in her direct evidence that, prior to the subject accidents, she would sporadically experience tightness in her neck and pain in her low back. She related the cause of those pains to carrying her children or other specific tasks involving lifting. If the pains flared up, she would see her chiropractor, and the pains would resolve over a series of treatments. She said that the pains did not limit her (then) part-time work for Phytoderm. She did the work that was required, with pain. There is no evidence to contradict her statement.

**20**  The defendants also point to evidence of a remote motor vehicle accident, in the late 1990s in Australia. The defendants suggest that there is evidence that the plaintiff suffered from intermittent neck and back pain arising from that accident. The plaintiff denied that she suffered any such recurring pain due to that accident. There was no evidence contradicting her testimony.

**21**  Based on the testimony of the plaintiff and Dr. Slater, I find that Ms. Jellis suffered from intermittent, but long-standing, issues with her neck and her mid-low back. The problems were worse when she worked full time as an esthetician and decreased when she started working as a trainer on a part-time basis. There is no evidence that her neck and back problems limited her in her occupation. However, it is evident that she did have flare-ups of neck and back pain that required treatment. She argues that those flare-ups were primarily due to lifting her children when they were young. However, as noted above, when she worked as an esthetician, she attended weekly massage treatments. Those visits pre-dated the birth of her children.

**After the First Accident**

**22**  In the weeks after the First Accident, the plaintiff said she had difficulty getting out of bed due to her neck pain. She took over-the-counter medications to deal with her pain. It was her understanding that her chiropractor was the equivalent of a medical doctor. She did not see any distinction between the two disciplines. As a result, she had limited interactions with her family physician, and there were no referrals for other types of treatment.

**23**  She also developed severe occipital headaches that would last for three to four days. Within a few months, she found that she could control the headaches by taking a combination of ibuprofen and acetaminophen. By the time of the Second Accident, the headaches were not a significant problem.

**24**  In the months after the First Accident, the plaintiff felt pain throughout her neck and back. She considered the pains all to be related as one big injury. The pain fluctuated and moved from place to place in her neck and back.

**25**  In the 14 months between the two accidents, the plaintiff saw her chiropractor 58 time for treatment.

**26**  With treatment and time, the plaintiff's neck pain improved significantly before the Second Accident. She considered herself to be 75% recovered at the time of the Second Accident. She had not missed any work after the First Accident.

**After the Second Accident**

**27**  As noted, the Second Accident occurred on May 27, 2015. The plaintiff testified that her existing injuries immediately regressed. She felt that the intensity and frequency of the pain and headaches was greater after the Second Accident. She does not feel that she has returned to a "baseline" improvement that she had achieved before the Second Accident.

**28**  The plaintiff also had increased headaches for 18 - 24 months after the Second Accident. They improved by the end of 2016 or the middle of 2017. She told Dr. Finlayson, whom she saw for an Independent Medical Examination in March 2018, that as of that date she experienced a headache every 3 - 4 weeks. At trial she testified that she now gets about 2 - 3 headaches per month but they are well controlled by taking the combination of ibuprofen and acetaminophen.

**29**  In addition, the plaintiff noticed that a pre-existing condition, tinnitus, was worse after the Second Accident. She testified that she had experienced tinnitus for approximately 15 years before the Second Accident. She described the pre-accident condition as a "hum" that was not bothersome. After the Second Accident, the volume of the tinnitus increased. She said that it was more noticeable at night and it interrupted her sleep and her attempts to fall asleep. The increase in severity was a significant issue for her. When asked about the changes he observed after the Second Accident, Mr. Jellis pointed to the increase in the tinnitus as one of the more notable changes.

**30**  Within a few months after the Second Accident, the plaintiff determined that she could mask the tinnitus by using a vaporiser in her bedroom when she was going to sleep. The sound of the vaporiser hit the same frequency of the tinnitus. She still uses the vaporizer today, and her sleep is rarely affected.

**31**  The issue of causation of the tinnitus is discussed below under "Expert Reports".

**32**  The plaintiff has continued to experience neck and upper back pain on a regular basis to the date of trial. The plaintiff was assessed for the expert reports discussed below. All of those reports pre-dated the trial by at least a year. The plaintiff's husband testified that the plaintiff's overall condition had improved over the last few months before the trial.

**33**  The plaintiff did not lose any time from work in the months after the First or the Second Accident. She continued to perform her occupational duties with only minor accommodations until 2017. At the time of the First and Second Accidents, she was working on a part-time basis. Starting in January 2016, she became the sole income earner for the family. She increased her schedule and her territory.

**34**  The plaintiff testified that as she increased her work, she experienced increased pain, but she "sucked it up" and worked through the pain. She said that she did not allow herself to be affected by the pain and that, based on comments from her family doctor, she believed that her pains were normal for a woman of her age.

**35**  After attending a Functional Capacity Evaluation for the purpose of this litigation in March 2017, the plaintiff says that she realized the her pains were far in excess of what was considered "normal." She felt that she had been working too hard and her work was having a negative effect on her health. At trial, she testified that since 2017, she has modified the way she works by conducting more webinars and fewer seminars. The seminars are associated with more travel and heavy lifting, but they are more profitable for the plaintiff. She says that because she cut back on the seminars, her income has decreased.

**Credibility and Reliability**

**36**  With the exception of one significant inconsistency, I found the plaintiff's evidence to be credible. She gave her evidence in a straightforward fashion, although she had difficulty remembering the sequence of events. The majority of her testimony harmonized with the independent evidence. However, as discussed below, the plaintiff's evidence at trial regarding alterations that she made to her work activities did not accord with the history that she provided to Dr. Finlayson. The nature of that modification was key to the plaintiff's allegation that she suffered a business loss flowing from her alleged loss of capacity to earn income. No explanation was provided regarding that inconsistency. I do not accept her evidence on that issue.

**37**  The impact of this testimony is discussed below in relation to the plaintiff's Expert Evidence and the claim for Loss of Capacity (Past and Future).

**38**  I found the other witnesses called by the plaintiff to be credible and reliable.

**Treatment Received**

**39**  The defendants make arguments about the sufficiency of the treatments pursued by the plaintiff after July 2015. The defendants point, in part, to the fact that the plaintiff's family physician has not recommended any prescription strength pain-killers nor referred her to a specialist for her ongoing problems. I consider this evidence to be relevant in assessing the severity of the plaintiff's ongoing condition. The defendants' other arguments are discussed below.

**40**  The plaintiff saw her chiropractor regularly until early July 2015 when she noticed that she felt worse after each chiropractic appointment. She stopped attending chiropractic sessions, visited her family doctor, and received a referral to a Physiotherapist. She had 18 physiotherapy appointments between July 2015 and May 2016 at which point she stopped all forms of therapy.

**41**  In the Spring of 2017, she re-started physiotherapy for three months but then stopped. She did not receive any other regular treatment of any kind until she returned to seeing her former chiropractor in March 2019.

**42**  The defendants called Ms. Karen Chow, the treating physiotherapist. She testified about her treatments of the plaintiff from July 22, 2015, to May 18, 2016, and one further appointment in March 2017 before the plaintiff moved to a different therapist within the same office. Ms. Chow's observations indicated that the plaintiff had a full range of motion as of the first visit and there was never any limitation of her range of motion. Some of the treatments related to low back pain. Ms. Chow noted that the plaintiff's movements indicated that there was imperfect "glide" in her cervical spine. She considered this to be an objective sign of injury, although she could not, of course, comment on the causation of that problem.

**Expert Evidence**

**43**  The plaintiff called two experts: Dr. Heather Finlayson, a Physiatrist, and Ms. Louise Craig, a physiotherapist who has taken additional training in costing future care.

**Dr. Finlayson**

**44**  Dr. Finlayson was qualified as an expert who is a specialist in Physical Medicine and Rehabilitation capable of providing opinion evidence on the assessment, diagnosis, treatment and rehabilitation of persons with physical injuries, chronic pain and functional impairment. She saw the plaintiff for an independent medical examination on May 24, 2018, and produced a report of the same date.

**45**  Dr. Finlayson's opinion was that Ms. Jellis had "at least occasional neck and back pain prior to the MVAs based on the history that she attended massage therapy and chiropractic treatments in the past." Those problems were not severe, constant, or functionally limiting.

**46**  Dr. Finlayson gave her evidence in a straightforward manner. She made appropriate admissions in cross-examination. She was not defensive on cross. Defence counsel did not attack the core of her opinion. The defendants argue that she had been misled regarding the level of the plaintiff's pre-accident problems.

**47**  Dr. Finlayson's report states:

IMPACT ON FUNCTION

Ms. Jellis has continued to work her requisite schedule as a skin care trainer despite her symptoms. I expect that she will experience aggravations of her neck pain, upper back pain, upper shoulder pain, and headaches with work-related activities that require heavy and repetitive use of her upper body or prolonged static positions such as bending forward to perform or demonstrate skin care techniques.

Ms. Jellis is best suited to work that allows her the option of frequent position changes to stretch and move around. She would be poorly suited to work as a full-time esthetician that requires prolonged static postures in a position in which she is bent forward without the opportunity to frequently get up and move around.

PROGNOSIS

There is potential for improvement in Ms. Jellis' symptoms with active rehabilitation supplemented by physiotherapy and massage therapy for management of flares of her pain. However, it is likely that she will experience at least intermittent flare-ups of her pain into the foreseeable future. These symptoms are likely to be worse (more frequent, intense, and longer lasting) than the occasional symptoms she had prior to the MVAs/ She is likely to be able to continue to work despite these flare-ups of pain."

...

Ms. Jellis will likely be able to continue working as a skin care trainer. It is unlikely that she would be able to return to work as a full time esthetician at any time in the foreseeable future as this would likely aggravate her symptoms to an intolerable degree. This is the case even if there is modest improvement in her symptoms with the interventions outlined in the section above on 'Recommendations'.

**48**  Dr. Finlayson opined that the injuries suffered in the two accidents were limited to soft tissue injuries developing into myofascial pain in her neck and upper back plus cervicogenic headaches. The plaintiff had complaints of low back pain, but Dr. Finlayson did not attribute them to the two accidents.

**49**  In her medical opinion regarding the plaintiff's work capacity, Dr. Finlayson stated that she "will likely be able to continue working as a skin care trainer." However, she would have difficulty working as a full-time esthetician.

**50**  In her direct evidence, Dr. Finlayson testified that the "context" of her opinion regarding Ms. Jellis being able to continue her occupation was based upon the plaintiff obtaining accommodations from Phytoderm. She testified that she understood those accommodations included limiting her travel, shifting positions, and conducting more webinars than seminars. The plaintiff argues that Dr. Finlayson's opinion is that the plaintiff can perform her occupation at the reduced capacity that she has undertaken since mid-2017.

**51**  However, I give little weight to Dr. Finlayson's testimony regarding the aforementioned "context" of her opinion because:

1. at page 4 of her report, she recorded the history provided by the plaintiff indicated that she has "continued to work her requisite schedule ... despite her problems"; and
2. at page 14, Dr. Finlayson recorded the history that Ms. Jellis provided as follows: "There has been no major change in her work hours since the MVAs. ... She finds the seminars in hotel rooms to be more aggravating for her symptoms because she does not have an adjustable height [therapy] bed and proper setup as she would in a clinic/spa. She travels two or three times per month for work. She tends to choose more work in private clinics rather than seminar training due to less aggravation of her symptoms."

**52**  There is no mention in this history, taken four years after the Second Accident and 14 months after the Functional Capacity Evaluation, that the plaintiff had consciously reduced the number of seminars and replaced them with webinars due to health concerns. The plaintiff did discuss aggravation of symptoms and altered scheduling with Dr. Finlayson. However, the description provided by Ms. Jellis to Dr. Finlayson related to Ms. Jellis choosing more training in private clinics to replace the seminars as opposed to doing more webinars.

**53**  On this basis, there is no basis for Dr. Finlayson to state, at trial, that the opinion in her report was based upon the plaintiff working in an accommodated fashion by conducting more webinars. That was not part of her understanding when she wrote her report. It could not form the basis of her opinion.

**54**  As discussed below under the heading "Loss of Capacity (Past and Future)", at trial the plaintiff's testimony referenced financial losses (past and future) arising from cutting back on seminars and performing more webinars after May 2017. There was no explanation from the plaintiff as to why the information in Dr. Finlayson's report did not accord with her testimony at trial.

**55**  I find that Dr. Finlayson's written opinion means what it says at page 6: she will be able to continue working as a skin care trainer but is unlikely to be able to return to work as a full-time esthetician.

**56**  Dr. Finlayson provided the only expert opinion on the plaintiff's tinnitus. She noted that tinnitus is often associated with cervicogenic headaches. There is no specific opinion from Dr. Finlayson relating to the plaintiff's condition. However, the fact that the tinnitus increased immediately after the Second Accident along with the increase in cervicogenic headaches is sufficient to make a finding of causation. There was, however, no expert opinion evidence indicating the severity of this problem. Ms. Jellis mentioned the problem on one occasion to her family doctor following the Second Accident.

**57**  Dr. Finlayson provided other recommendations regarding the plaintiff's needs for future care which are discussed below under that heading.

**Ms. Louise Craig**

**58**  As noted, Ms. Craig provided two reports.

**59**  Ms. Craig's Functional Capacity Evaluation (FCE) report is dated March 10, 2017, and is based on an assessment conducted March 2, 2017. The Cost of Future Care Report is dated May 22, 2018. Ms. Craig did not conduct a second assessment in order to prepare the cost of care report.

**60**  During the preparation for the FCE, Ms. Craig had the plaintiff complete a number of self-assessment forms. The plaintiff described that the two areas of her body that were painful were her "mid/upper back" and "neck". She rated the pain in her mid/upper back as "1-2" on a scale from 0-10. She rated her neck pain as "1". When asked about her work activities, the plaintiff indicated that they were "[n]ot limited" by her injury. Further, she noted on Ms. Craig's forms that none of her work or personal activities were affected except, "lift heavy things", "carry heavy things", "exercise", "scrub floors", "sit on floor", and "turning to look behind when driving". All of those activities were noted as having a "slight limitation." These subjective self-assessment reports were incorporated into Ms. Craig's FCE report.

**61**  In the history provided to Ms. Craig, the plaintiff stated that she made a number of accommodations in the manner that she carried out her work in order to manage her symptoms. Those include making postural changes and taking breaks during long paperwork sessions, restricting the duration of webinars, reducing the time she works in a stooped or neck flexion posture and avoiding heaving lifting especially of her luggage.

**62**  Ms. Craig's opinion was that:

1. (At page 4)

... Ms. Jellis demonstrates the capacity to partially meet the physical demands of her job as a Technical Trainer ...with accommodations required for positional and postural changes during travel ..., postural changes/ breaks after longer durations of sitting for paperwork or webinars and minimizing exposure to stopped and neck flexion posture during the set-up of products and during treatment demonstrations. Caution is require when handling heavier pieces of luggage and training materials.

1. (At page 4)

It is likely she will be able to continue to manage this type of work provided she is able to employee such accommodations, albeit she will likely continue to experience pain aggravation due to work. Without these accommodations, Ms. Jellis would likely struggle to maintain her workload ... which could affect her employment in this role. Should she be required to seek alternate employment with a different employer, Ms. Jellis may not be able to maintain these accommodations which may affect the positions for which she is suitable or the hours that she can work.

**63**  Ms. Craig's finding that the plaintiff was able to "partially meet the physical demands of her job as a Technical Trainer" mirrors the plaintiff's description of the accommodations that she had made prior to the FCE. Hence, Ms. Craig's opinion, as contained in the FCE report, is essentially a repetition of the history provided by the plaintiff.

**64**  As noted, Ms. Craig's opinion was that, with these accommodations, the plaintiff would be able to continue to carry out her occupation. The accommodations that Ms. Craig listed were minimal in the context of the plaintiff's overall work requirements. As of March 2017, the plaintiff had not instituted any of the changes in her work that, she says, have limited her income.

**65**  The plaintiff says that she came to a realization, after the FCE, that her work was having a negative effect on her health. She testified that her perception of her pain changed and she decided that she would reduce the amount of work that she carries out. She testified that she decided to cut back on the number of seminars that she conducted. The FCE report did not recommend that Ms. Jellis reduce her seminars or state that she was not capable of doing them.

**66**  Although the plaintiff's perception of her own health may have changed during this period of time, it is clear that Ms. Craig's opinion was that the plaintiff should be able to continue to carry out her occupation by employing the accommodations that she had already instituted by that point in time.

**67**  Turning again to the self-assessment forms, the plaintiff argues that the notations in the self-assessment forms indicate that the plaintiff under-declared the impact of her injuries on her functional abilities. Not surprisingly, the defendants argue that these notations constitute an accurate statement of the plaintiff's limitations as of 2017. I find that they were accurate statements that formed the basis of Ms. Craig's opinion.

**Defence Expert**

**68**  The defence called Dr. Locht, the Orthopedic Surgeon who saw the plaintiff for an Independent Medical Examination on July 9, 2018. His report is dated August 20, 2018.

**69**  Of note, Dr. Locht actually found a causal relationship between the Second Accident and the plaintiff's complaints of low back pain. I do not find that much turns on that issue because the plaintiff's functioning is not limited by her mild low back pain. However, this opinion, which is more generous than Dr. Finlayson's, lends credence to his overall opinion.

**70**  Dr. Locht opined that the plaintiff's complaints were "non-specific pain complaints" and were not likely to cause any future functional limitations apart from requiring her to pace herself, control her posture, and use pain reduction strategies. He opined that there is no support for any work related, household, or recreational medical restrictions. Dr. Locht conceded on cross-examination that one pain reduction strategy would be to reduce the amount of work the plaintiff performs. He noted, however, that any reduction of income has to be balanced against the benefit of the pain reduction.

**71**  Dr. Locht did not indicate that the plaintiff had declined to undertake any treatments that would have improved her condition. He stated that future passive therapies are not indicated. He recommended that the plaintiff engage in a self-managed exercise program and self-massage while using over-the-counter medications to control her symptoms.

**Assessment of Expert Evidence**

**72**  There is substantial agreement between the experts in respect of the plaintiff's current condition and causation. With respect to functional limitations, as noted, all three experts who testified agreed that the plaintiff is capable of carrying out the requirements of her occupation.

**73**  There are, however, differences of opinion regarding limitations that go beyond her current occupation. Dr. Locht says that there are no occupational limitations. Dr. Finlayson and Ms. Craig say that the plaintiff would not be able to work as an esthetician on a full-time basis. In this respect, I prefer the opinions of Dr. Finlayson and Ms. Craig regarding the plaintiff's functional limitations for other occupations. Dr. Locht tended to minimize the plaintiff's complaints. That may have been, in part, due to the plaintiff's own tendency to minimize her own condition. However, I find that Dr. Finlayson's opinion was based on a more nuanced assessment of the plaintiff's overall condition. Further, I find Dr. Finlayson's opinion to be more informed because of her area of specialty as a Physiatrist. She treats more with cases like Ms. Jellis', whereas Dr. Locht would not see a person for chronic pain except in the medical/legal context.

**74**  The experts do not agree on the necessity for future care or treatments or accommodations around the home. Those issues are discussed below under that heading.

**75**  I now address the heads of damage claimed by the plaintiff.

**Non-Pecuniary Damages**

**76**  The plaintiff notes that non-pecuniary damages are awarded to compensate for the pain, suffering, loss of enjoyment of life, and loss of amenities. This compensation must be fair to all parties as measured against comparable cases.

**77**  Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 46:

[46] The inexhaustive list of common factors cited in ***Boyd*** that influence an award of non-pecuniary damages includes:

1. age of the plaintiff;
2. nature of the injury;
3. severity and duration of pain;
4. disability;
5. emotional suffering; and
6. loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

1. impairment of family, marital and social relationships;
2. impairment of physical and mental abilities;
3. loss of lifestyle; and
4. the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: ***Giang v. Clayton***, [*[2005] B.C.J. No. 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=) (QL), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**78**  In applying the factors set out in *Stapley*, I consider the primary question for assessment to be: How is the plaintiff's life different after the accidents?

**79**  To the plaintiff's credit, she has minimized the extent of the impact of her complaints on her life. She continues in her prior employment. She continues to be engaged in her capacity as a wife and mother. In all of these respects, she says that she is somewhat limited and capable of performing to a lesser degree than she did before the accidents.

**80**  According to her husband, the plaintiff did not suffer many aches or pains before the accidents. As of the date of trial, he testified that she does her job, but she is more tired at the end of the day. She does not have the same energy that she did before the accidents.

**81**  The plaintiff relies on the following cases wherein the non-pecuniary damages were assessed in the range of $85,000 - $90,000:

1. *Khademolhosseini v Ji*, [*2019 BCSC 854*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5W8R-N721-FCK4-G3B9-00000-00&context=);
2. *Harry v. Powar*, [*2018 BCSC 845*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SF0-P1T1-JS5Y-B1S5-00000-00&context=);
3. *Woelders v Gaudette*, [*2016 BCSC 1066*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K27-9R71-JWBS-63Y8-00000-00&context=).

**82**  The defendants rely on the following cases wherein non-pecuniary damages were assessed at $25,000 - $30,000:

1. *Reyes v. Pascual*, [*2008 BCSC 1324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3KX-00000-00&context=);
2. *Manson v. Kalar*, [*2011 BCSC 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KS-00000-00&context=);
3. *Willis v Lalancette*, [*2015 BCSC 1817*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H54-K961-F8D9-M18D-00000-00&context=).

**83**  With the greatest respect to the defendants' counsel's submissions, I did not find the cases they submitted to be helpful or analogous to the plaintiff's injuries or circumstances. For example, in *Willis* the plaintiff had been disabled by a work injury for two years before the subject accident. He claimed that the subject accident aggravated his pre-existing, and totally disabling, condition. That case is not helpful in assessing Ms. Jellis' damages. The other two cases are significantly dated.

**84**  I have reviewed the cases relied upon by the plaintiff, and I find them to be analogous to the injuries suffered by the plaintiff. Each of the three cases involves a plaintiff who suffered soft-tissue injuries that evolved into myofascial or chronic pain. The prognosis for further improvement in each plaintiff was guarded. They were able to carry on their occupation, but with certain limitations. Similar to Ms. Jellis' case, the plaintiffs in those cases did not suffer significant emotional disruption.

**85**  I award the amount of $85,000 for non-pecuniary damages.

**Loss of Capacity (Past and Future)**

**86**  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=), the Court of Appeal dealt with the question of loss of earning capacity:

[30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), and *Andrews v. Grand & Toy Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=). These principles are:

1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].

[31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.[Emphasis in original.]

**87**  The plaintiff works as an independent contractor training the staff at the spas and clinic that use of the products supplied by Phytoderm. Her territory includes British Columbia, Alberta, Saskatchewan, Manitoba, Washington, and northern Oregon. The types of training provided by the plaintiff fall into three categories: seminars, in-person training, and webinars.

**88**  Seminars are presented in hotel ball-rooms to groups of 20 - 40 people. The attendees are comprised of staff members from various spas in the area of the seminar. In-person training takes place at one spa for the benefit of the staff of that spa. Webinars are also directed at the staff of an individual spa. The plaintiff conducts the webinars from her office in her home, using video technology provided by Phytoderm.

**89**  Of these three methods of teaching, the most profitable for the plaintiff is the seminar. Seminars are more profitable because she is paid a fixed fee for flight time and an amount for set-up and tear-down of the exhibits at the hosting hotel.

**90**  The plaintiff is an independent contractor. She is paid on a fee for service basis plus certain flat fees negotiated with Phytoderm. She earned the following amounts from Phytoderm:

|  |  |  |
| --- | --- | --- |
| 2012 | $12,706 |  |
| 2013 | $26,071 |  |
| 2014 | $30,788 |  |
| 2015 | $36,859 |  |
| 2016 | $61,896 |  |
| 2017 | $43,256 |  |
| 2018 | $47,262 |  |

**91**  As an independent contractor, the plaintiff has expenses that are associated with running her own business. The amounts set out above represent her gross income before expenses. Evidence of her expenses was only provided for 2016 and 2017. Her business expenses were $16,000 in 2016 and $12,000 in 2017. There was no evidence regarding the nature of the business expenses and whether some of them may have provided a personal benefit to the plaintiff.

**92**  It is evident from the earnings set out above that the plaintiff had her best earning year in 2016, after the two accidents.

**93**  The plaintiff's testimony to explain her increased earnings in 2016 was that her husband left his job in late 2015 and she was the sole income earner. She felt a responsibility to earn the income for the family. She did not allow herself to be in, or complain of, pain. She took on as much work as she could get. She was in the process of building her client base and her territory. According to her testimony, that level of activity continued until at least March 2017.

**94**  In March 2017, the plaintiff attended the FCE with Ms. Craig. During and after the testing, the plaintiff realized that she had been making accommodations for her pain. Further, until the FCE, she thought that the pains she was experiencing were normal for a woman in her forties. After the FCE, she went home and told her husband that her health was more important than money and that she would cease working so hard in the future. In terms of the work she would do, she testified at trial that she started to do more webinars and fewer seminars. In one respect her testimony is borne out. Her invoices to Phytoderm show that her seminars (total) decreased from 13 in 2016 to seven in 2017 and eight in 2018.

**95**  There is no dispute between the parties that the plaintiff's decrease in income occurred because of the plaintiff's own decision to reduce the number of seminars that she conducts. The plaintiff argues that this decision was a reasonable pain reduction strategy that was necessitated by the ***negligence*** of the defendants. The defendants argue that the plaintiff's own self-perception is not sufficient to be a basis for a loss of capacity claim.

**96**  The plaintiff concedes that she did not suffer any income loss until the middle of 2017. In 2014 and 2015, she was working on a part-time basis and did not miss any work assignments. She worked to her full capacity in 2016. In mid-2017 she decided to make changes in her work that resulted in a decline in her gross and net income. Her gross income decreased from $61,896 in 2016 to $43,256 in 2017. Her net income as declared on her income tax returns, decreased from $45,119 to $31,653.

**97**  The plaintiff argues that I should take judicial notice that some of the business expenses claimed by a self-employed person working from her home would be of personal benefit to her. I decline to take such notice. There is no evidence of the amount of any of her business expenses.

**98**  There was no evidence regarding the plaintiff's future plans regarding her occupation.

**99**  The plaintiff assesses her damages for past loss of capacity at $35,696 based on a reduction of her income for the years 2017 to the date of trial.

**100**  Based on her current age (44 years old), the plaintiff seeks damages of $307,926 representing a fixed loss per year calculated through her 70th birthday.

**101**  As an alternative argument, the plaintiff says that the expert evidence is clear that she is not capable of working as a full-time esthetician. Further, she argues that her ongoing pains and limitations make her less attractive to a possible future employer because she will need accommodations in her work environment.

**102**  The defendants argue that the totality of the evidence does not meet the test required for a loss of capacity claim. They point to the expert evidence, Ms. Craig's self-assessment forms and the evidence from the plaintiff's examination for discovery. They argue that the plaintiff's self-perception is not a sufficient basis for a loss of capacity claim. The defendants argue that cutting back or altering her work schedule was not a reasonable step. Counsel's submissions noted that this argument included elements of a mitigation defence, but was, in reality, an issue of reasonableness. Can it be said that it was reasonable for the plaintiff to take steps that reduced her income in the context of all of the facts surrounding her case?

**103**  In support of the argument that "self-perception" is not sufficient grounds, the defendants rely on *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=) which cites *Perren v. Lalari* and continues:

[7] More recently, in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=), [*3 B.C.L.R. (5th) 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=), this court emphasized at paras. 21, 32, and 33 the requirement for the plaintiff to meet the onus of showing at least a "real possibility" of future loss, as opposed to a theoretical loss. Similarly, in *Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), [*64 B.C.L.R. (4th) 152*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), the Court discussed the comment of Madam Justice Southin 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=), to the effect that it was "impossible to say" the plaintiff in that instance would not suffer reduced earning capacity in the future. Mr. Justice Donald wrote in *Steward* at para. 17

But the language in question there was used in the context of appellate review and, with respect, it cannot be transposed to an original analysis at the trial level. The claimant bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur: *Parypa 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=) para 65.

This is not a heavy onus, but it must be met for a pecuniary award to be justified.

[8] In my view, the trial judge here did err in equating the loss of capital asset here with the plaintiff's own perception. As the cases demonstrate, that is not enough. The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace - with economic consequences, not merely psychological ones. In my view as well, the trial judge's statement made after the award was pronounced, that Ms. Kim "may" be less capable of maintaining her disciplined approach to work also fell short. As we suggested to counsel this morning, the word "may" is essentially speculative and does not equate to a finding of a real possibility. [Emphasis added.]

**104**  As discussed above, the three expert reports concur that, at the time each assessment was conducted, the plaintiff was capable of performing her occupation if she employed the accommodations that she had instituted by that point in time. Ms. Craig, in March 2017, opined that the plaintiff had instituted certain minor accommodations and that she should be capable of continuing in that manner in the future.

**105**  Dr. Finlayson saw the plaintiff 14 months after the FCE. The plaintiff told Dr. Finlayson that she had replaced seminar training with in-person training in the spas. That history, provided by the plaintiff, was different from the plaintiff's testimony at trial. The defendants argue that, regardless of any inference to be drawn from the inconsistency in the plaintiff's story regarding the accommodations that she employed, it is clear that Dr. Finlayson's opinion was based on the understanding that the plaintiff was working full time and conducting seminars and in-person training. She opined that the plaintiff could continue working in her occupation with the accommodations that Dr. Finlayson understood to be in place.

**106**  The defendants also point to the self-assessment forms completed by the plaintiff for Ms. Craig's FCE. Those forms indicated very low levels of pain and stated that the pain had not limited her work activities.

**107**  The defendants also note that in cross-examination, the plaintiff admitted that she provided the following correct answers at her examination for discovery on May 12, 2017 (two months after the FCE):

382 Q. So do you say that as a result of either of these accidents that you've lost income?

1. No.

...

|  |  |  |  |
| --- | --- | --- | --- |
| 429 |  | Q. Tell me about now, Ms. Jellis, in terms of your approach to your job in the next few years. Is it going to be different? |  |

1. No. I think I've adapted myself with my injuries to my - - my work.

**108**  Hence, by May 2017, the plaintiff did not perceive that she had suffered any loss of income, and she did not perceive that she would suffer any loss into the future.

**109**  The defendants' argument against the loss of capacity claim is bolstered by the plaintiff's actions in the period after the FCE. At trial she claimed that she returned from the FCE appointment and indicated that her health was more important than money. She said she changed her work habits by reducing seminars and increasing webinars.

**110**  During the period from March to May, 2017, the plaintiff attended physiotherapy treatments. However, from June 2017 until March 2019, she did not receive any medical or other treatment. During this period, she received less treatment that she usually received in the period before the two accidents. As noted above, in the two years before the First Accident, the plaintiff had fairly regular appointments with Dr. Slater for maintenance and to deal with flare-ups of her pain. The inference is that the plaintiff had less pain after May 2017 than she had in the years prior to the subject accidents.

**111**  Hence, an assessment of the reasonableness of the plaintiff's decision to modify her work duties must be viewed in the context that she was not taking any steps to control her symptoms through any form of medical treatment.

**112**  Taking all of these circumstances into account, I agree with the defendants' submission that it was not reasonable for the plaintiff to take steps that decreased her earnings and then seek the decrease in her earnings as damages from the defendants. There was no expert opinion or advice recommending that she take that step. To the contrary, all of the expert evidence indicates that she is capable of performing her occupation. She did not pursue any medical treatment after May 2017 during a period when she says that she felt compelled to cut back or alter her work due to pain.

**113**  The defendants also note that the change in the plaintiff's income after 2016 is not determinative. They say that her income in 2017 is a poor comparator to 2016. The plaintiff suffered two deaths in her family during that year. She returned to Australia for 2 visits of 3 - 3.5 weeks each. Those visits skew her earnings for 2017 downward for reasons not related to her injuries.

**114**  In the result, I decline to award damages for past or future loss of capacity on the basis of the plaintiff's alteration to her work in 2017 and following. The evidence does not support such an award.

**115**  I now turn to the plaintiff's alternative argument for loss of capacity relating to her ability to work full time as an esthetician. There are two elements to this claim: the prospect that she could lose her current position, and the employment options available to her should that occur.

**116**  First, the plaintiff says that she is now incapable of working as a full-time esthetician. That argument is based on the opinions of Dr. Finlayson and Ms. Craig. I have accepted those opinions over Dr. Locht's opinion to the contrary.

**117**  The plaintiff testified that during periods when spas are very busy, they do not want to take time to have their estheticians attend training. As a result, her business is slow during those periods. These periods are in July - August and December - January. Ms. Jellis is usually free during those periods. According to Ms. Jellis' testimony, the spas can always use a qualified person to step in to work as an esthetician.

**118**  I do not accept that the plaintiff has lost any income in this context in the past. Although the plaintiff testified that she turned down opportunities to work during the slow periods, I do not understand that she turned those jobs down because of her symptoms. She simply did not want to pursue them. Further, although the expert evidence indicates that the plaintiff could not work as an esthetician on a full-time basis, there is nothing suggesting that she could not do temporary or part-time work, which is the type of work that has been offered to her.

**119**  Looking to the future, however, there is a prospect that the plaintiff could suffer a loss. Ms. Jellis could lose her contract with Phytoderm due to circumstances unrelated to her condition and out of her control. There is no evidence that this will occur, but it is a possibility. If she loses her current position, the plaintiff would be required to seek alternate employment. That employment would probably be in the same field. She would seek work as a trainer. If that work was not available, she would have to fall back on her experience as an esthetician.

**120**  Although the plaintiff's perception is that she is less capable of performing her occupation as a trainer, the expert evidence indicates that she is capable. As noted above in *Kim*, the plaintiff's perception is not a sufficient basis to award damages. I do not find that any of the restrictions noted in Dr. Finlayson's or Ms. Craig's reports would make the plaintiff generally less attractive to a prospective employer.

**121**  However, if the plaintiff was unable to find work as a trainer, then she would probably have to fall back on her training and experience as an esthetician. That eventuality is not probable, but the chances exceed mere speculation. If that should occur, the evidence indicates that she would not be able to work on a full-time basis.

**122**  The plaintiff's evidence is that she switched from working as an esthetician to her current work as a trainer because she did not believe she was being paid enough as an esthetician. I find that estheticians earn less than the plaintiff's current level of income.

**123**  Taking all of this evidence into account, I award the amount of $20,000 for loss of capacity on the basis that the plaintiff has lost the ability to do the more physically demanding, but less remunerative, work of an esthetician. In order for this loss to be realized, the plaintiff would have to lose her current position and be unable to replace that work as a trainer with another organization. As noted above, the prospect of those two occurrences is low, but it is above speculation. In many cases, an award under this head of damage is assessed in reference to a year of income. An award to the plaintiff in this case does not warrant the equivalent of one year of the plaintiff's earnings. I have assessed this award on the basis of half a year's earnings.

**Cost of Care**

**124**  Awards for cost of care are meant to compensate the plaintiff for future expenses that may be incurred in order to put the plaintiff back in the position she was in before the subject accident. As noted in *Krangle (Guardian ad litem of) v. Brisco*, [*[2002] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=):

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

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

**125**  In this case, as noted above, in the period before the accident, the plaintiff suffered from long-standing intermittent flare-ups of neck pain and upper back that required chiropractic treatment. That was her condition before the First Accident. Dr. Finlayson's prognosis for the plaintiff included the following statement at page 6:

There is potential for improvement in Ms. Jellis' symptoms with active rehabilitation supplemented by physiotherapy and massage therapy for management of flares of her pain. However, it is likely that she will experience at least intermittent flare-ups of her pain into the foreseeable future. Those symptoms are likely to be worse (more frequent, intense, and longer lasting) than the occasional symptoms she had prior to the MVAs.

**126**  On this basis, I find that there would have been a certain baseline of treatments that Ms. Jellis would have required if the accidents had not occurred.

**127**  The plaintiff relies on the cost of care report of Ms. Craig dated May 22, 2018. Of note, this report pre-dates Dr. Finlayson's medical/legal report. Dr. Finlayson reviewed Ms. Craig's report and indicated that she agrees with the recommendations therein. The defendants rely on the opinion of Dr. Locht. As set out above, he does not recommend any significant treatment.

**128**  The plaintiff calculates the future care costs set out in Ms. Craig's report at $68,850. In the five years since the First Accident, the plaintiff has spent $5,825 that she attributes to the injuries suffered in the accidents.

**129**  The defendants suggest that an award of $1,500 - $2,000 would be appropriate for future care. They point to *Dzumhur v. Davoody*, [*2015 BCSC 2316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HX-00000-00&context=) for the principles to be applied in an award under this head of damage:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

1. the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
2. the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
3. the test for determining the appropriate award is an objective one based on medical evidence;
4. there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
5. the concept of "medical justification" is not the same or as narrow as "medically necessary";
6. admissible evidence from medical professionals (doctors, nurses, occupational therapists, *et cetera*) can be taken into account to determine future care needs;
7. however, specific items of future care need not be expressly approved by medical experts... It is sufficient that the whole of the evidence supports the award for specific items;
8. still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
9. no award is appropriate for expenses that the plaintiff would have incurred in any event.

**130**  The care recommendations of Ms. Craig fall into four categories:

1. treatment: ergonomic assessment, physiotherapy, kinesiology, massage, and Pilates classes;
2. equipment: ergonomic chair, keyboard drawer, wall-mount computer riser, tilt work surface, document holder, wheeled work bag;
3. medications: discussed below; and
4. household maintenance: discussed below.

**131**  Ms. Craig's recommendations under the treatment category total $23,613. They include the provision of physiotherapy and kinesiology visits to age 75. I do not find those recommendations to be reasonable. Instead, I award:

1. $750 for an ergonomic assessment;
2. the amount of $2,400 to allow the plaintiff, in the first year, to undertake an active rehabilitation program with a kinesiologist. Included in that award is provision for the plaintiff to seek physiotherapy or massage treatments as her activity level increases; and
3. an allowance of $5,000 for future physiotherapy or massage treatments following the short term period noted above.

**132**  The items recommended in under the equipment category total $4,098. I find that all of the items included in those recommendations constitute normal business expenditures, such as an ergonomic chair. I do not find that they are reasonable or necessary in the context of the plaintiff's condition. I do not award any amount for equipment.

**133**  Under medications, the plaintiff claims the amount of $892 being the present value of the cost of over-the-counter medications that the plaintiff will take until her 75th birthday. I award an allowance of $500 under this claim. I note that it is normal for families to have over-the-counter medications in the house. The plaintiff may be required to spend above the normal family.

**134**  Under housekeeping services, the plaintiff claims $40,484 for assistance with floor scrubbing, heavy seasonal cleaning, seasonal yard work, and handyman services.

**135**  Dr. Finlayson says:

Ms. Jellis is likely capable of the majority of her housekeeping tasks if she is able to break them up into small chunks off time. She probably requires assistance with heavy tasks such as vacuuming and mopping that are likely to aggravate her symptoms more severely. It has been appropriate for her to have assistance from family members for tasks such as vacuuming, mopping and heavy yard work. If she did not have this family assistance, she would require hired help. She will probably require assistance for more time-consuming and heavy tasks such as seasonal spring cleaning.

**136**  The plaintiff and her husband both testified about the division of duties around the house. Those duties were altered when Mr. Jellis ceased working downtown and started working from home. At the same time, the plaintiff increased her working hours to full-time. Also, at the beginning of 2016, the Jellis family moved from a townhouse in Coquitlam to a 10-acre property in the Fraser Valley.

**137**  When asked what extra work he does now, Mr. Jellis said that he is a better cook, he does more laundry, and he does more grocery shopping, including carrying the grocery bags. He added that he was more involved in everything around the house. Mr. Jellis' testimony was in the context of him working from home and his wife's condition. It was my impression that the plaintiff's condition was not the cause of the majority of the alteration in their household responsibilities.

**138**  As a result, Mr. Jellis' duties around the home have increased for reasons that are unrelated to the accidents. Neither the plaintiff nor her husband indicated that Mr. Jellis had been required to undertake additional duties with respect to the heavier cleaning, yard or handyman obligations because the plaintiff was incapable of performing those tasks. It was evident from their testimony that the members of the Jellis family each share in the responsibilities around the house. If there are heavier tasks that require strength above the plaintiff's lifting tolerance, I expect that those tasks can be shared or divided between the plaintiff and other family members.

**139**  I also note that the FCE report indicated that the plaintiff's safe lifting tolerance was up to 40 pounds. She is also encouraged to undertake an active rehabilitation program. I find it inconsistent that the plaintiff is being encouraged to undertake an active rehabilitation program, but be discouraged from carrying out the regular requirements of home ownership and the activities of daily life.

**140**  I make no award for future housekeeping.

**141**  The total award for future care treatment is $8,650.

**Special Damages**

**142**  The plaintiff seeks an award of $5,825 in special damages. The defendants submit that the award should be $4,511.19.

**143**  The defendants' position is based on the fact that in the period prior to the two accidents, the plaintiff attended chiropractic treatments on a fairly regular basis. Hence, the plaintiff cannot claim that every chiropractic treatment after the accidents was caused by the accidents. I agree with that proposition.

**144**  The defendants further argue that some of the plaintiff's claimed special damages were for "Thai Massage" that was not performed by a registered massage therapist. They argue that such massages are not appropriate special damages. The total cost for the three Thai Massages was $346.50. I agree with the defendants' position.

**145**  I award the amount of $4,511.19 in special damages.

**146**  I noted in para. 2 that some of the special damages were incurred before the Second Accident. Those damages are attributable only to the First Accident. The special damages incurred after the Second Accident are attributable to both accidents on the basis that the ongoing condition was found to be indivisible.

**Summary of Damages**

**147**  In summary, I award damages to the plaintiff in the following amounts:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary general damages: | $85,000.00 |  |
| Past loss of earning capacity: | Nil |  |
| Loss of future earning capacity: | $20,000.00 |  |
| Cost of care: | $8,650.00 |  |
| Special damages: | $4,511.19 |  |
| **TOTAL:** | **$118,161.19** |  |

**148**  Court ordered interest is awarded at the registrar's rates on the special damages.

**Costs**

**149**  Costs will follow the event unless there are circumstances that should be brought to my attention. If that is the case, the parties may make further submissions to me within 60 days.

A. ROSS J.

**End of Document**

[***MacMillan, Tucker & Mackay v. Cook, [2009] B.C.J. No. 991***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2D5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Registrar M.B. Blok

Heard: September 12, November 7 and 27, 2008; written

submissions, April 14, 2009.

Judgment: May 19, 2009.

Docket: S082262

Registry: Vancouver

**[2009] B.C.J. No. 991** | 2009 BCSC 665

Between MacMillan, Tucker & Mackay, Solicitors, and John J.A. Cook and Shelagh J. Cook, Clients

(107 paras.)

**Case Summary**

**Legal profession — Barristers and solicitors — Compensation — Agreement for fees — Non-professional or mixed services — Estimates — Accounting and refunding — Application by former client for review of lawyer's accounts allowed in part — Lawyer made one unnecessary application and billed client improperly for secretarial and billing services — Lawyer otherwise provided services promised to client — Accounts exceeding figure agreed upon as ceiling for fees allowed because client caused extra work and expense by directing mail to lawyer and by locating and serving wrong defendant — Lawyer not liable for estimating case would generate damage award for client when it ultimately resulted in no award — Legal Profession Act, ss. 71, 72.**

**Professional responsibility — Self-governing professions — Financial regulation and reporting — Billing — Remuneration — Fees — Billing — Overbilling — Review by governing body — Professions — Legal — Barristers and solicitors — Application by former client for review of lawyer's accounts allowed in part — Lawyer made one unnecessary application and billed client improperly for secretarial and billing services — Lawyer otherwise provided services promised to client — Accounts exceeding figure agreed upon as ceiling for fees allowed because client caused extra work and expense by directing mail to lawyer and by locating and serving wrong defendant — Lawyer not liable for estimating case would generate damage award for client when it ultimately resulted in no award.**

|  |
| --- |
| Application by Cook for review of the accounts rendered by his lawyer, Pyper, with respect to two files. Cook retained Pyper to commence an action against the Canada Revenue Agency and other parties for harassment and to obtain an injunction preventing further harassment. Pyper suggested the damages awarded in such a case could be as much as $700,000, but told Cook it was likely the Crown would settle for between $100,000 and $200,000. Cook signed a retainer letter that provided for a $25,000 ceiling on fees. Cook proceeded to have all correspondence from CRA and several other parties forwarded to Pyper's office, and also took steps to locate an additional defendant. Cook found the wrong person and $1000 had to be paid out for this party's legal fees. Pyper acted for Cook in successfully defending an application to strike the action, but did not obtain costs payable forthwith for the application. Cook's wife later signed a retainer letter with Pyper, as she wanted to commence a harassment action against CRA as well. This letter did not refer to the ceiling on fees. Pyper's firm made transfers of funds paid by the Cooks to the firm between the two files without consulting them. By the time Cook discharged Pyper and took carriage of his own case, the accounts owing to Pyper's firm totalled $39,125. Cook took the position Pyper had not performed the services he was hired to perform and wanted all the money back that he had paid. He raised the issue of an application Pyper made for default judgment against certain parties who had not been personally served in the action, as well as the costs of the motion to strike which were not ordered payable forthwith. He claimed Pyper never applied for the injunction he promised to seek. Pyper took the position Cook created extra work for him, over and above that to which the parties had agreed, and as such, the ceiling on fees did not apply.  HELD: Application allowed in part.  The accounts rendered for the two files were reduced from $39,125 to $33,613. The second file was not subject to the $25,000 ceiling on fees. The two files were separate, as shown by the existence of a second retainer letter that did not refer to any limit on fees. There was no evidence Cook objected to the fees billed to the second file. Pyper wasted time and money in attempting to secure default judgment against certain parties not personally served. He could not be faulted for failing to include a term in the costs order that costs were payable forthwith, as this was not a provision the judge had pronounced. Pyper did not act unreasonably in initially discussing the potential award of damages Cook might achieve in his action. Pyper included a request for an injunction in the payer for relief included in the statement of claim, so it Pyper was doing what he promised. Nothing Pyper did forced Cook to discharge him. Pyper was not entitled to bill for secretarial services and billing matters. Cook added work to Pyper's plate by having his mail unnecessarily directed to Pyper's office. He also created unnecessary work for Pyper in his efforts to locate Andrews. |

**Statutes, Regulations and Rules Cited:**

British Columbia Rules of Court, Rule 19(24)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B

Legal Profession Act, [*SBC 1998, CHAPTER 9, s. 71*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-F4NT-X0GX-00000-00&context=)(4), s. 72

**Counsel**

Counsel for the Solicitors: Gerhard Pyper.

Appearing on his own behalf and on behalf of Shelagh Cook: John Cook.

**Reasons for Decision**

|  |
| --- |
| **REGISTRAR M.B. BLOK** |

**A. Introduction**

**1**  This is a client-initiated review conducted under the provisions of the ***Legal Profession Act*** of a number of legal bills rendered by the solicitors to the clients.

**2**  Mr. Cook (who spoke for both clients) has a host of objections to the bills, but in broad terms he maintains: (1) all work was subject to an agreement that fees would not exceed $25,000; (2) the solicitor's accounting of billings and payments is inaccurate; and (3) in any event, the solicitor ought to be disentitled from recovering any fee whatsoever.

**3**  Gerhard Pyper, the solicitor who did the work that is the subject of this review, concedes that there was an agreed $25,000 maximum for fees on one of the two files in issue, but states that there was work that was done outside the scope of this arrangement. He joins issue with Mr. Cook on the matter of the accuracy of the firm's accounting of the amounts owing and on the matter of any fee disentitlement.

**4**  Mention should be made of what might appear to be an undue delay in issuing reasons in this matter. As noted on the first page of these reasons, this review was heard over three days in September and November of last year. By agreement, written submissions were to have been delivered to the client by Mr. Pyper by December 31, 2008, the client was to have delivered his submissions to Mr. Pyper by January 31, 2009 and Mr. Pyper was to have delivered any reply submissions by February 16, 2009. Mr. Pyper was also directed to collect the submissions and file them with the court on or shortly after that latter date. He did not do so. I understand that court staff made efforts to follow this up with Mr. Pyper, yet still the submissions were not filed by him. I also understand Mr. Cook took steps to fill in that gap. As it turned out, the submissions were not formally received until April 14, 2009, and no reply submissions were ever received.

**B. The Accounts**

**5**  The billings are detailed in Schedule A to these reasons. Accounts were rendered on two files; in the first, the total amount billed to Mr. Cook was $34,228.89, of which $26,063.45 is for fees. In the second file, bills totalling $4,895.67 (comprising $3,207.00 in fees) were rendered to Mr. and Ms. Cook jointly. Fourteen bills were rendered for the first matter and four bills for the second. In the first matter two small billing entries in the firm's accounts (for $60.67 and $62.60) were not evidenced by any actual accounts. I speculate that these were probably not bills to the client at all but may have been bills to opposing counsel for copywork, but in any event they were not proven as owing by Mr. Cook.

**6**  Mr. Pyper said at the outset of the hearing that total payments of $24,056.57 were credited to the first matter, leaving a balance owing of $10,172.32, although these figures changed later in the hearing. The sum of $4,464.76 was credited to the second matter, leaving a balance owing of $430.91.

**7**  Mr. Cook maintains that, leaving aside his other complaints, on a proper accounting he owes the firm $2,407.31 on the first matter and that he and his wife are owed $2,399.86 on the second matter, meaning just $7.45 is owed to the firm.

**C. Orders/Amendments**

**8**  Mr. Cook's Appointment named Mr. Pyper as the solicitor, but it soon became clear that the bills had been rendered by Mr. Pyper's firm, MacMillan, Tucker & Mackay. Accordingly, during the hearing I allowed an application by Mr. Pyper to have his name replaced with that of his firm (now, apparently, his former firm) in the style of cause. Later in the hearing it emerged that Mr. Cook had also intended to dispute certain bills rendered to both Mr. Cook and his wife on another file. A further order was therefore made, adding Shelagh Cook as a named client.

**D. Evidence**

1. **Mr. Pyper**

**9**  Mr. Pyper said that the matter on which he was retained had its origins in alleged criminal activity on the part of Mr. Cook. Mr. Cook was in the computer business, and it was alleged that he had a scheme whereby he would attend at a certain "big box" retailer in Washington state and, using a particular shoplifting method, purloin significant volumes of small but valuable computer components. This activity attracted the attention of law enforcement agencies in the U.S., who may have tipped off the Royal Canadian Mounted Police and Canada Border Services, because on April 1, 1998 Mr. Cook was stopped at the border on return to Canada and computer goods were seized.

**10**  These allegations of criminal activity were related by the RCMP to Revenue Canada (as it was then called, but to which I will refer by its current initials, "CRA"). CRA subsequently audited Mr. Cook and reassessed him for unpaid taxes of about $1.4 million. CRA also filed charges against Mr. Cook for failure to file tax returns.

**11**  When Mr. Cook came to see Mr. Pyper his complaint was about the tax assessment and what he saw as harassment of him by CRA. He also felt that there was improper collusion between the RCMP and CRA and that complying with the requirement to file tax returns would put him in peril because that information would be given by CRA to the RCMP.

**12**  A retainer letter was prepared by Mr. Pyper on March 24, 2004 and signed by Mr. Cook the same day. It reads, in part, as follows:

In acting for you, I confirm your instructions to provide the following services:

1. To institute action for damages as the result of harassment, etc.;
2. To make application for an injunction to have Canada Customs and Revenue Agency and/or Her Majesty the Queen in Right of Canada and/or the Attorney General of Canada to refrain from pursuing, harassing and/or prosecuting you maliciously for unfounded tax assessments;
3. To facilitate negotiations with solicitors and/or parties adverse in interest to you;
4. To appear in Court, if necessary, on your behalf; and
5. To take such other steps as are necessary to protect your interests and effect settlement of the issues.

**13**  The retainer letter then sets out fairly standard terms, including Mr. Pyper's billing rate of $195 per hour, and it includes a request for a retainer of $2,000 (which was paid on March 25, 2004). The retainer letter also states the following:

I confirm the legal fees quoted for this action will not exceed $25,000.00 excluding taxes and disbursements.

**14**  Mr. Pyper filed an action on Mr. Cook's behalf on May 21, 2004, naming Her Majesty the Queen in Right of Canada, the Attorney General of Canada and two individuals as defendants. The cause of action was essentially that of misfeasance in public office, an unusual tort. Mr. Pyper said he advised Mr. Cook to claim for harassment and since Mr. Cook was also complaining that he had suffered health and psychological consequences as a result of CRA's actions, he also told Mr. Cook that he (Mr. Cook) would have to get expert medical evidence.

**15**  A statement of defence was filed on June 30, 2004 and a reply was filed on August 12, 2004. Mr. Pyper served interrogatories on August 11, 2004 and a reply to those interrogatories was received on September 21, 2004. A list of documents was received from the defendants on October 28, 2004 and Mr. Pyper prepared a plaintiff's list of documents dated November 26, 2004 and a supplementary list dated January 11, 2005. The documents disclosed in the case took up three large binders and one smaller binder.

**16**  On January 19, 2005 the defendants brought an application under Rule 19(24) arguing that the pleadings ought to be struck and also arguing that there was no jurisdiction in the Supreme Court to hear the matter. The application was heard by Madam Justice Loo on February 14, 2005. Loo J. dismissed the Rule 19(24) application with costs, but ordered that Her Majesty the Queen be removed as a defendant and gave leave to the plaintiff to amend his pleadings accordingly.

**17**  The order of Loo J. had to be settled. Mr. Pyper could not recall whether that was done before a registrar or before Loo J. herself. Although costs had been awarded in Mr. Cook's favour, CRA took the position that these costs were not payable until the end of the case. Mr. Cook wanted costs payable forthwith. Mr. Pyper said that this was not part of "appearing in court if necessary", as set out in the retainer letter, because that application was not necessary. Mr. Pyper said that he told Mr. Cook that these services would be extra and Mr. Cook agreed. However, Madam Justice Loo did not change the costs order.

**18**  Mr. Pyper conducted examinations for discovery of the two individual defendants on March 17, 2005, September 8, 2005 and November 28, 2005, and Mr. Cook was examined for discovery on May 15, 2006.

**19**  There was a further court application on March 28, 2006, brought by the defendant, which was heard by Master Taylor. He ordered that a discovery of the plaintiff was to proceed in May 2006 and be completed by June 30, 2006 and that the plaintiff was to produce documents.

**20**  Mr. Pyper said that there were a number of attempts to settle. Although he initially said there was a settlement conference that took place on March 28, 2006 and that he had done a brief for this conference, I note this is the same date on which he said there was an application before Master Taylor, and in cross-examination he admitted that the "settlement conference" was, instead, the hearing to settle the order.

**21**  In or around March 2006 Mr. and Ms. Cook came to see Mr. Pyper and reported that CRA was harassing Ms. Cook as well because she, too, had not filed tax returns for some years. Mr. Cook had taken the position that his wife was owed money for tax refunds so there was no need for her to have filed tax returns. Because of this perceived harassment Ms. Cook also retained Mr. Pyper. A retainer letter dated March 27, 2006 was signed by Ms. Cook on that date. It is in similar terms to the earlier retainer letter, although there is no fixed ceiling on fees, the billing rate mentioned is $250 per hour and a $3,000 retainer is requested. The firm's records show that the retainer monies were received on March 29, 2006.

**22**  A second action was commenced on March 28, 2006, this one with both Mr. and Ms. Cook as plaintiffs, and Her Majesty the Queen in Right of British Columbia, the Attorney General of British Columbia, the Attorney General of Canada and two different individuals as defendants. This action was a tort action for alleged harassment by government employees. Mr. Pyper said that his intention was to join both the actions of Mr. Cook and Ms. Cook but he never got to this point.

**23**  Mr. Cook had insisted that one of the individual defendants, Alan Andrews, be named as a defendant. Evidently Mr. Andrews was a member of the RCMP, although there was a suggestion he was also a member of Canada Border Services or was employed by CRA. Mr. Andrews proved very hard to locate and serve and Mr. Cook took it upon himself to assist with this aspect.

**24**  Mr. Cook's sleuthing efforts resulted in the identification of a certain person as Alan Andrews and this person was served. However, it turned out that this person was not the correct Alan Andrews and they subsequently received a letter from a lawyer pointing out the error. According to Mr. Pyper, this error on Mr. Cook's part caused a lot of extra work.

**25**  Ultimately, this Mr. Andrews, through his counsel, demanded a release and Mr. and Ms. Cook signed one in his favour and also paid $1,000 towards legal fees.

**26**  Yet a further court application was brought by the defendants in the first action to strike the matter for want of jurisdiction. This was heard by Leask J. on August 20, 2007 but the application was adjourned. Although the jurisdiction point was argued Leask J. felt that the case should simply go to trial, which by that point had been set for February 2008 for five days.

**27**  At the hearing before Leask J. the parties agreed to an order that Mr. Cook would file tax returns but that CRA could not share the information with the RCMP except by court order. The tax returns were to be filed by November 30, 2007. The assumption was that CRA would then do an assessment based on those tax returns.

**28**  Mr. Pyper wrote to Mr. Cook on August 21, 2007, confirming the consent order made by Leask J. and confirming the need to obtain an expert report or medical reports pertaining to the damages suffered by Mr. Cook as a result of CRA's actions. Mr. Pyper also asked that Mr. Cook bring his retainer for the trial up to date, stating:

The anticipated costs while bearing in mind our quotation as well as interim applications not accounted for in our quotation amounts to approximately $15,000.00.

**29**  Mr. Pyper said that Mr. Cook had by this point adopted the practice of using Mr. Pyper's office as a "mail drop", Mr. Cook having instructed others to send his mail to Mr. Pyper's office. Mr. Pyper said that mail came in to his office in "leaps and bounds", particularly from CRA and CIBC. There were even traffic tickets sent to his office, a speeding ticket and two other traffic charges. For each of these items Mr. Pyper had to look at them to see if they pertained to the case. Mr. Pyper said that he told Mr. Cook that he was going to have to pay for this service. In cross-examination Mr. Pyper agreed that two-thirds of this mail was from CRA to Mr. or Ms. Cook but he disagreed that these letters were a necessary part of the harassment claim as there was no need for him to look at all of the mail from CRA.

**30**  On December 10, 2007 Mr. Cook filed a notice of intention to act in person and Mr. Pyper's involvement in the matters ceased at that time. So far as Mr. Pyper knew Mr. Cook never did as he had recommended and never saw a psychologist to establish the medical aspect of his claim. According to Mr. Pyper, other than this evidence the case was ready to go to trial.

1. **Diane Lescisin**

**31**  Diane Lescisin, Mr. Pyper's assistant, gave evidence concerning the billings, payments, adjustments and credits. Her evidence brought some element of organisation to a confusing array of billings, credits and transfers between files.

**32**  Ms. Lescisin's analysis shows the amounts billed, received and credited to each file (which I will refer to as the "First File" and the "Second File"). The amounts billed are as set out in Schedule A. According to Ms. Lescisin, the total of the amounts received in the First File is $30,747.03, comprised of $30,127.33 received through the firm's trust account plus the additional sum of $619.70 recorded as a cash receipt. The total amount received in the Second File is $3,375.00.

**33**  There were several transfers of funds from and to each file in order to pay accounts receivable. These transfers were difficult to follow, although I am satisfied that Ms. Lescisin has, for the most part, set them out accurately.

**34**  Ms. Lescisin said that one transfer (for $855.58) from the Second File was for payment of an account receivable on a third file. That account was dated March 29, 2006 and the transfer was made in June 2006.

**35**  In cross-examination Ms. Lescisin was asked about a payment of $2,250 referred to in a letter from Mr. Pyper to Mr. Cook of November 8, 2007. Ms. Lescisin said that the firm's accounts showed that this was not a payment received from the client but instead was a payment applied to an account receivable from monies already in trust.

1. **Mr. Cook**

**36**  Cook said that he had had an acrimonious relationship with CRA going back to 1997. He said that, aside from 2003 and 2004, he was not working in Canada and he was not generating any income here.

**37**  Mr. Cook categorically denied that he stole or smuggled anything. Some items were seized from him at the border but these were small in value. However, this prompted a contraband smuggling group from Canada Border Services to send information to CRA and CRA decided to do an audit.

**38**  Mr. Cook said he learned that CRA employees were assisting the RCMP in a criminal investigation and so he decided to rely on his Charter rights. He felt that the improper sharing of information between CRA and the RCMP infringed on his right to remain silent, and that this was a point of principle, and so he ended his former cooperation with CRA in their inquiries.

**39**  Mr. Cook said that in both 1999 and 2002 he was charged by CRA with failing to comply with CRA demands to file tax returns. In May 2000 he was acquitted of the first charge.

**40**  In summer 2001 there were further demands made by CRA and as a result Mr. Cook attended at the offices of McMillan, Tucker and Mackay and met with a lawyer there, a Mr. Hanbury. His purpose in attending at that time was to see about recovering the legal fees he had spent in defending the income tax charges that had been brought against him. The advice he received at that time was that the cost would exceed recovery.

**41**  In April 2002 there was a second charge and in December 2002 CRA entered a stay of proceedings on that charge.

**42**  There was therefore a history of dealings between CRA and Mr. Cook.

**43**  According to Mr. Cook, in mid-2003, a month after he had opened a business in Vancouver, a CRA official told him "I'm going to get you" and, as a consequence, Mr. Cook closed his business. CRA then initiated a reassessment for tax years 1977 to 2002, which resulted in claimed unpaid taxes totalling $1.46 million.

**44**  Mr. Cook said that it was this background that prompted him to again contact Macmillan, Tucker & Mackay, where he met Mr. Pyper. He told Mr. Pyper about all of the assessments and letters from CRA and said that he (Mr. Cook) could not deal with all of it. Mr. Cook said that Mr. Pyper recommended to him that he sue for harassment. Mr. Cook asked him how this would resolve his tax assessments and Mr. Pyper responded that it would stop them taking enforcement measures. Mr. Pyper quoted a billing rate of $195 per hour plus disbursements and said the proceedings would take one to three years. Mr. Cook told him that he could not afford a blank cheque; with his criminal defence counsel he had had a set amount, and that was what he preferred. They then agreed that Mr. Pyper would do the case for $25,000 plus taxes and disbursements. Mr. Pyper told him that he doubted that the disbursements would exceed $5,000.00 excluding the cost of experts.

**45**  Mr. Pyper said that an accountant would be needed to show that the tax assessments were "bogus" and there would also have to be expert medical evidence. He said that it was hard to tell how much these experts might cost, but it might be in the range of $2,000 to $10,000.

**46**  Mr. Cook then asked Mr. Pyper what he might obtain from a lawsuit and Mr. Pyper explained the different types of damages. Mr. Pyper told him that recovery would be unlikely to exceed $700,000 and that he thought the government would want to settle soon, for perhaps $100,000 to $200,000. Mr. Cook agreed to retain Mr. Pyper after this discussion.

**47**  Mr. Cook said that he was told by Mr. Pyper that he needed to forward all documents relating to the case. He told Mr. Pyper that CRA had sent hundreds of letters. He asked Mr. Pyper if he wanted future documents as well and Mr. Pyper said yes. Mr. Cook then sent a letter to CRA and asked them to send all future documents to Mr. Pyper.

**48**  The Department of Justice brought a motion on February 14, 2005 to strike his claim, which application was dismissed with costs. Mr. Cook thought that those costs would be paid to him in short order, but he was told that CRA took a different position. Mr. Cook complained that Mr. Pyper failed to put a term in the order that costs were payable to him immediately.

**49**  Mr. Cook also complained that Mr. Pyper had an opportunity to apply for an injunction before Madam Justice Loo but did not do so, and that Mr. Pyper told him he would represent him in tax court but he never did. He acknowledged, however, that Mr. Pyper clearly stated in a letter to him of August 17, 2004 that he was not representing him on the tax assessment appeals. Mr. Cook made inquiries about retaining a tax lawyer but found that this was going to cost him $50,000 to $100,000.

**50**  Mr. Cook said that, within his action, Mr. Pyper asked for an examination for discovery of Alan Andrews in order to show the connection between CRA and the RCMP, but opposing counsel refused on the basis that he was not a named defendant. By this point CRA was now harassing Mr. Cook's wife and they reported that to Mr. Pyper.

**51**  According to Mr. Cook, Mr. Pyper told them that the Department of Justice was "hiding" Mr. Andrews and that the best plan of attack to deter CRA and to get an examination for discovery of Mr. Andrews was to start a second action. Mr. Cook said he told Mr. Pyper that they could not afford it and Mr. Pyper said, "other than ancillary disbursements there would be no more fees". Mr. Pyper told him the two actions would later be joined together. It was on this basis that he and his wife agreed to commence the second action.

**52**  Mr. Pyper again emphasized the need for all relevant documents. Accordingly, they not only forwarded additional documents they also filed FOI-type requests with creditors to ascertain what CRA had communicated to them, and they had all resulting materials forwarded to Mr. Pyper.

**53**  Mr. Pyper had some difficulty locating the two individual defendants so Mr. Cook tried to assist. He acknowledged taking unusual efforts to locate Mr. Andrews, eventually identifying a person who seemed to be the right age and who worked in the area where the RCMP headquarters were located. This person was subsequently served but unfortunately it was not the correct person.

**54**  Initially the wrong Mr. Andrews' lawyer did not ask for money but Mr. Pyper then sent a letter requiring a statement of defence or else default would be taken and so "they got their backs up". Ultimately Mr. Cook instructed Mr. Pyper to cut their losses, pay the $1,000 asked for, and get out.

**55**  Mr. Pyper said he would apply for an order permitting substitutional service on the correct Mr. Andrews but he never did. The second case became dormant.

**56**  At this point Mr. Pyper called them in to discuss funding for the litigation. He wanted to engage two experts, a tax expert and a medical expert. He said he would need $15,000 for these experts. Mr. Cook said that they agreed to pay Mr. Pyper $375 a week through Visa charges until February 2008 in order to get the money together for experts. I note that the summaries of both lawyer and client show 13 Visa payments of $375, commencing in March 2007 and ending in July 2007. Evidently these Visa payments ceased at that point at Mr. Cook's request.

**57**  The defendants' application to have the case dismissed for lack of jurisdiction was heard by Leask J. on August 20, 2007. At the hearing Leask J. offered his view that the chance of any substantial damages was slim. Until that point Mr. Cook had felt he had had a case and now he learned that even if he won the case the chance for substantial damages was slim.

**58**  Mr. Cook said that it was Leask J. who suggested a solution to the impasse by way of an order that CRA not share with the RCMP any information contained in the tax returns that Mr. Cook would file. The parties agreed to this order.

**59**  The Department of Justice drafted the order, but Mr. Pyper signed the order without sending it to Mr. Cook for his approval. This has created problems because there is no mention in the order of a requirement that CRA assess the tax returns that Mr. Cook subsequently filed, and these still have not been assessed.

**60**  Relations between Mr. Cook and Mr. Pyper were becoming strained because Mr. Pyper was demanding payment of accounts and further retainer monies for the trial and he felt that they had already dealt with the financial aspects with their weekly Visa payment (which by that point had been discontinued). Ultimately, Mr. Cook sent Mr. Pyper a letter dated December 10, 2007 removing him as his counsel.

**61**  Later Mr. Cook said he had the cases "shut down" by Leask J., without costs.

**62**  Mr. Cook said that he has calculated that he and his wife have paid the firm a total of $32,402.56 on the first matter and $3,373.00 on the second matter. He said that when he made payments he would go to the firm's counter and tell the staff which file to credit. He did not authorize the transfer of credits between files.

**63**  In cross-examination Mr. Cook acknowledged that they received accounts on the Second File and that these showed fees being billed. He denied that this contradicted what he said he had been told (that no additional fees would be charged for this file). He said he objected to these bills a number of times.

**E. Submissions**

1. **Mr. Cook**

**64**  Briefly summarized, Mr. Cook's submissions were as follows:

1. there was an agreed fee maximum of $25,000, which later encompassed the Second File as well such that no fees ought to have been charged in that later matter;
2. there was no work done by the solicitor that would justify a departure from the agreed maximum fee;
3. there ought to be a reduction in both fees and disbursements to reflect improper service of documents of the two individual defendants in the second action, and a fruitless attempt to take default judgment against them;
4. Mr. Pyper failed to ensure that the costs order made by Loo J. entitled Mr. Cook to immediate payment of costs, and he should not be charged for Mr. Pyper's efforts to have this provision corrected;
5. Mr. Pyper failed to ensure that the consent order made by Leask J. included a requirement that CRA assess in a timely way the tax returns that Mr. Cook was to file;
6. Mr. Pyper never made the application for an injunction that he said he would; and
7. Mr. Pyper persuaded him to commence an action whose chances for success turned out to be "slim", improperly demanded a further retainer for trial and forced him to dismiss Mr. Pyper as his solicitor. As a result Mr. Pyper should be ordered to repay all funds paid to him or his firm, with interest, and to pay costs.

**65**  In addition, Mr. Cook had detailed objections to the debits and credits recorded on both files.

1. **Mr. Pyper**

**66**  Mr. Pyper submitted that the Second File was never subject to the $25,000 fee maximum, as the retainer letter in that matter makes clear. The work that went into both matters was "enormous and extensive", and some of the work fell outside the parameters of the fee quote in the First File (for example, asking Mr. Pyper to change Loo J.'s costs order, and using the firm as a "mail drop"). Mr. Pyper submitted that he was therefore justified in billing somewhat more than $25,000 in fees in the First File, and full fees in the Second File.

**67**  Mr. Pyper submitted that the evidence showed that Mr. Cook simply ran out of money and was unable to muster the funds needed to employ experts.

**F. Discussion**

1. **Billings and Payments**

**68**  An inordinate amount of time was spent by the parties in sorting out the basic arithmetic in this matter. On the first day of this hearing Mr. Pyper was unable to answer the basic questions "How much was billed?" and "How much was paid?" Mr. Cook contributed to the confusion through his own erroneous calculations.

**69**  The billings, at least, are now clear, and are reflected in Schedule A, though as noted earlier the two smallest bills must be omitted from the total of the bills rendered to Mr. Cook. The resulting figure for total billings on the First File is $34,105.62, of which $26,063.45 is for fees. As noted, the total amount billed on the Second File is $4,895.67, of which $3,207.00 is for fees.

**70**  As for the amounts paid, I have reviewed the numbers in some detail and I am satisfied that once all errors are accounted for, both parties have the same figures.

**71**  The most obvious error committed by both parties is their failure to take into account the $1,000 paid to the "wrong" Mr. Andrews. The firm's accounts show the sum of $1,000 being paid, from monies held in trust, to the law firm acting for Mr. Andrews, and thus this is not an amount that is properly included as a payment or credit towards the bills in question.

**72**  There are two other errors, one by each party. Ms. Lescisin's trust summary (Exhibit 9) in the First File includes the sum of $625.42, but this ought to have been shown as a transfer of funds from the Second File, which is how it is shown in the firm's accounts. It is not an additional sum that was received from the clients (and Mr. Cook did not assert that it was). Mr. Cook incorrectly shows a payment of $30.95 in his summary (Exhibit 13), when this sum was not paid by him but was received by the firm from the Department of Justice, presumably as reimbursement for copywork charges or the like.

**73**  The only matter of controversy (as opposed to error) concerned a payment of $2,250, which Mr. Cook maintained ought to be included as an additional credit to him because Mr. Pyper's letter of November 8, 2007 described it as a "lump sum payment". Mr. Cook, however, offered no other proof that he made such an additional payment. I am satisfied that Ms. Lescisin is correct that the "payment" was a payment towards an outstanding account by way of a transfer of existing funds from trust, that is to say, from monies already received and held in trust. It was not a payment of additional funds by Mr. Cook.

**74**  When the foregoing matters are taken into account, the difference disappears between the respective figures of the parties, which for the firm are reflected in Exhibit 9 (First File) and Exhibit 11, Tab 3 (Second File), and for the client in Exhibit 13. Accordingly, $29,121.61 was paid by the client on the First File ($30,121.61 paid in total, less $1,000 paid out to the "wrong" Mr. Andrews) and $3,375.00 was paid on the Second File.

1. **The Transfers Between Files**

**75**  On a number of occasions the law firm transferred funds held in trust in one matter to pay an account receivable in another matter. This seems to have been done fairly liberally, with the solicitors utilizing whatever funds were available in either of the files to pay whatever outstanding account they chose.

**76**  On one occasion funds in trust in the Second File ($855.58) were transferred to pay an unpaid account in a third matter (an account that was not before me in this hearing). The firm's accounting records also show a transfer of $2,500 from the First File to this third file. Both of these transfers were recorded on June 14, 2006.

**77**  Mr. Cook testified that when making payments he was specific about which file was to be credited and that he did not authorize the transfer of credits or trust funds from one file to another. Mr. Pyper did not lead any evidence that established that these transfers were authorized by Mr. or Ms. Cook. I therefore conclude that these transfers were not authorized. Accordingly, any amounts paid on a particular matter ought to be credited to that file, and to that file alone.

1. **The Agreed Fee Maximum**

**78**  There are two issues concerning the $25,000 "ceiling" on the fees. The first is whether that maximum applies to the Second File. The other issue is whether, in any event, work was done outside the scope of the arrangement.

**79**  Mr. Cook maintains that the maximum fee arrangement was to have applied to the Second File because Mr. Pyper assured him that the second lawsuit would involve no further fees. He also notes that the retainer letter in the Second File is directed to Ms. Cook only and submits that the absence of a further retainer letter for Mr. Cook shows that the maximum fee arrangement was to apply to both files. Finally, Mr. Cook said that Mr. Pyper's frequent inter-file money transfers showed that the solicitor viewed the two matters as one.

**80**  Despite these arguments of the client I conclude that the matters were separate and therefore the Second File was not subject to the $25,000 fee maximum. There is evidence in this case that supports both conclusions, and inaccuracies in other aspects of Mr. Cook's evidence cause me to be sceptical of his evidence that Mr. Pyper told him that the second matter would not involve any further fees. The evidence that tips the scales in favour of the conclusion that the matters were to be separate is the retainer letter in the second matter, which states that fees would be billed at Mr. Pyper's hourly rate of $250, with no maximum being mentioned, and which contradicts Mr. Cook's assertion that no fees were to be billed on that file. I note, as well, that a separate retainer amount ($3,000) was requested and paid, an amount that would seem to be excessive if the arrangement was that only disbursements could be billed. Importantly, Mr. Cook himself viewed the matters as separate, as shown by his insistence that any billings and payments on the two files were to be kept entirely separate. Finally, I note that as early as the March 29, 2006 bill Mr. Cook had notice that Mr. Pyper was billing fees on the Second File (and further fees were billed in later accounts, including ones dated July 10, 2006 and November 6, 2006), and not only did this account show fees being billed but it also showed the account being paid from the retainer monies. Yet despite the regular correspondence and discussions between lawyer and client throughout this matter there is no email or letter from Mr. Cook, or note made by anyone, which indicates or evidences any objection to fees being billed - and paid - on the Second File. For these reasons, and in light of other credibility concerns I have with respect to Mr. Cook's evidence, I do not accept that he verbally objected to the fees portion of the bills rendered on the Second File.

**81**  As to whether work was done outside the scope of the arrangement, I discuss this under "Review of the Bills", below.

1. **Other Client Complaints**
2. The Default Judgment

**82**  Mr. Pyper testified that in the second action he purported to serve the individual defendants by leaving the documents with a Department of Justice receptionist. When no appearances were filed he attempted to take default judgment, which failed for lack of personal service.

**83**  I agree that the attempt to take default judgment in the absence of proper service was a waste of time and money. I will take this into account under "Review of the Bills", below.

1. The Drafting of the Orders

**84**  Mr. Cook complained that Mr. Pyper failed to add certain favourable terms to the orders of Loo J. and Leask J. His submission stems from a misunderstanding of the process. Orders are not documents to which parties may add any provisions they might wish to have; instead, they must be drawn to reflect just what the judge has pronounced. In the case of the costs provision relating to Loo J.'s order, the general rule is that costs awarded on an interlocutory matter are assessed only at the conclusion of the case and not at the time, although judges occasionally make special provision that costs are to be payable forthwith. The costs provision in Loo J.'s order was therefore drawn in proper fashion. In the case of the order of Leask J., Mr. Pyper cannot be faulted for failing to add an additional term after the court hearing because that was not a provision that the judge had pronounced.

1. The Action

**85**  Mr. Cook's complaints are twofold: first, that Mr. Pyper's unreasonably optimistic views persuaded him to commence an action that turned out to have a slim chance of success and, second, that the injunction application that was to have been made was never brought to court.

**86**  The first complaint is problematic because the evidence on which it is based is so thin. For a start, I am not persuaded that at the outset of the case Mr. Pyper conveyed to Mr. Cook an inappropriate sense of optimism about Mr. Cook's prospects. Merely because there was a discussion of the possible damages that might be awarded does not mean that Mr. Pyper acted unreasonably in this regard. Second, even if an opinion on the prospects for the case had been given, whether explicitly or implicitly, I think it would be a rare case in which a registrar would wade in to second-guess advice of this kind, and if it were to be done at all it would only be done where there was clear evidence that the original advice was unsound, evidence that is not present here. Even then, the objection might be made that the client's complaint was really an allegation of ***negligence***, an issue that a registrar cannot decide.

**87**  For these reasons I conclude that this complaint does not provide a proper basis to reduce fees, much less to deny them entirely.

**88**  The final specific complaint of the client is that he did not get what he contracted for, that is (as per the terms of the retainer letter):

To make application for an injunction to have Canada Customs and Revenue Agency and/or Her Majesty the Queen in Right of Canada and/or the Attorney General of Canada to refrain from pursuing, harassing and/or prosecuting you maliciously for unfounded tax assessments.

**89**  Again, the evidence on this point is most unsatisfactory. Clearly no application was made for an interlocutory injunction, but an injunction was sought in the action generally (it was included in the prayer for relief in the Statement of Claim) and a trial date had been set for determination of all the claims, including the claim for an injunction. Mr. Cook discharged Mr. Pyper eight weeks before that trial took place.

**90**  There is no evidence that establishes what the parties had in mind when they agreed that Mr. Pyper would "make application for an injunction" except, perhaps, the evidence that Mr. Pyper told Mr. Cook that the proceedings would take one to three years. There is also no evidence that the parties discussed, at any time, the bringing of an application for an injunction prior to trial and there is no evidence of any contemporaneous complaint by Mr. Cook that Mr. Pyper had failed to carry out this task. In these circumstances I am unable to conclude that Mr. Pyper failed to do what he promised prior to his discharge.

**91**  A solicitor who is discharged by a client before completion of the work contracted for is entitled to a fee on a *quantum meruit* basis. Here, the evidence is that Mr. Cook discharged Mr. Pyper. Although Mr. Cook alleges that he was forced to do so I am not persuaded that this was the case. The law firm is therefore entitled to fees on a *quantum meruit* basis, the assessment of which I discuss below.

1. **Review of the Bills**

**92**  Section 71(4) of the ***Legal Profession Act***requires that on a review of a solicitor's bill or bills the registrar must consider all of the circumstances, including:

1. the complexity, difficulty or novelty of the issues involved,
2. the skill, specialized knowledge and responsibility required of the lawyer,
3. the lawyer's character and standing in the profession,
4. the amount involved,
5. the time reasonably spent,
6. if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
7. the importance of the matter to the client whose bill is being reviewed, and
8. the result obtained.

**93**  I do not propose to provide an analysis of each of these factors, but I will refer to a few of the more significant ones and suffice it to say that I have considered them all, as well as all the circumstances of the case generally, in coming to my decision.

1. Difficulty & Complexity/ Skill Required

**94**  The claim of misfeasance in public office was somewhat unusual, but otherwise the matter was not overly complex, involving primarily an investigation of the relationship and dealings between the various government agencies as well as the actions by CRA against Mr. and Ms. Cook. The skill level required was well within that of any reasonably experienced civil litigator.

1. Amount Involved/Importance to the Client

**95**  It is difficult to assess the amount involved as this was not a specific monetary claim. The matter was of very high importance to the client, as he felt he and his wife were being harassed by CRA, he found that he could not handle the perceived CRA onslaught and he felt his rights were being violated, something which he felt was an important point of principle.

1. Time Spent

**96**  The fees billed are "straight-time" fees, that is, the arithmetic product of the time spent and the hourly rate. However, an examination of the time records shows that some of the recorded time is not properly billed to the clients.

**97**  There are many time entries by what appears to be secretarial staff for purely secretarial or administrative tasks. These tasks are described as "copywork", doing work from dictation by the lawyer (i.e., typing), "drafting account", "attending to credit card payment" and so on. As to the billing activities, it bears repeating - yet again - that lawyers cannot bill their clients for billing activities. As to mere secretarial or administrative work (as opposed to work that has a paralegal component), this too cannot be billed to a client.

**98**  The time involved is not inconsequential. I have reviewed all time entries in some detail and conclude that, on the First File, entries totalling about $1,800 plainly relate to these sorts of non-billable activities, and on the Second File those entries total $130. I would note, however, that it appears from the firm's accounting records that not all of this time was billed.

**99**  The steps taken by Mr. Pyper to settle the February 14, 2005 order of Loo J. are also problematic. From what I can glean from the unsatisfactory evidence on this point, and from an examination of the order itself (shown as having been entered on March 3, 2005), at the urging of Mr. Cook he attempted to re-attend before Loo J. to argue that costs should be payable forthwith but Loo J. declined permission on the basis that she was *functus officio*, since the order had already been entered. Yet despite this Mr. Pyper arranged and attended a registrar's hearing (before me, as it happened) on August 4, 2005 in a vain further attempt to settle an order that had already been entered. These activities were an utter waste of time. I appreciate that Mr. Pyper says he told Mr. Cook that these steps would cost extra (see his letter of May 16, 2005 which, it must be emphasized, is after the date of entry of the order), but there is no evidence that Mr. Pyper told Mr. Cook that the whole exercise was doomed to failure. In the circumstances I do not consider that this time was reasonably spent.

**100**  As to the use of the law firm as a "mail drop" and Mr. Cook's erroneous locating of the "wrong" Mr. Andrews, I am satisfied that both of these matters added unnecessary work for the solicitor and were outside the scope of any agreed fee. Some of the mail redirected to the firm was completely unrelated to the case (e.g., the traffic tickets), other mail had doubtful relevance, and even for documents that had arguable relevance to the CRA matter the process of redirecting that mail was a most time-consuming and inefficient way to deal with it.

1. Fee Rate

**101**  Mr. Pyper's fee rate at the outset of the First File was $195 per hour, although this increased over time to $220 per hour and finally to $250 per hour. Mr. Pyper's fee rate on the Second File was $250 per hour. Mr. Cook said during the hearing that the fee rate was not in issue.

1. Result Obtained

**102**  Mr. Pyper said that with the exception of expert evidence the matter was ready to go to trial. Mr. Cook said that the case turned out to be a weak one. This factor is always difficult to assess when a solicitor has been discharged prior to trial or other defined event. Here, I consider this factor to be neutral as I am unable to draw any conclusion with respect to it.

**G. Conclusion**

**103**  Having given careful consideration to all of the circumstances of this case, and applying the expertise that I have in these matters (which the authorities confirm I am entitled, indeed expected, to do), I consider that a fair overall fee is $22,000 for the First File and $2,700 for the Second File. The fee reductions are therefore $4,063.45 and $507.00 respectively. Taxes must also be taken into account and here there is some difficulty insofar as the GST rate changed from 7% to 6% on July 1, 2006. An examination of Schedule A reveals that roughly half of the billings occurred before that date and half after and therefore substantial justice can be done by applying the rate of 6.5% to the amounts of the reductions. With the addition of both GST and PST the respective reductions are therefore $4,612.01 and $575.45.

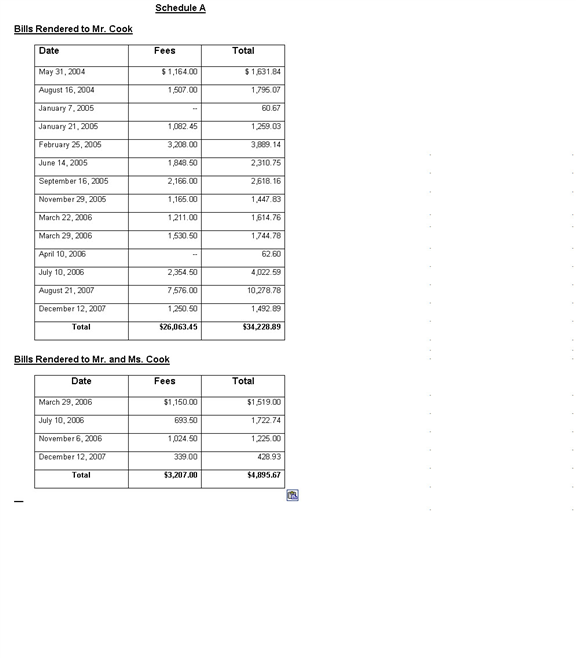
**104**  I would reduce disbursements by $200, inclusive of taxes, to reflect the ill-advised default judgment application on the Second File (approximately $70) and the registrar's hearing on the First File (about $130). The two disallowed bills (totalling $123.27) must also be deducted from the amount owing on the First File.

**105**  The result of these reductions is that the accounts rendered on the First File are allowed at $29,363.61. Mr. Cook has paid $29,121.61, which leaves a balance of $242.00 owing to the firm.

**106**  The accounts rendered on the Second File are allowed at $4,250.22. Mr. and Ms. Cook have paid $3,375.00, thus leaving a balance owing to the firm of $875.22.

**107**  The total of the accounts in the two matters have been reduced from $39,124.56 to $33,613.83, a difference of $5,510.73. Although the accounts have not been reduced by more than one-sixth, which would normally mean that the solicitors would get costs (see s. 72 of the ***Legal Profession Act***), my present inclination is that each party should bear their own costs. The various inter-file transfers were difficult to follow and, as I have found, were unauthorised and thus the clients were successful on this important aspect of the case. However, it may be that there are circumstances of which I am unaware and if either party wishes to make submissions on costs they may do so in writing within 14 days of the date of these reasons, with 7 days after that for any reply.

REGISTRAR M.B. BLOK



**End of Document**

[***Martin v. Lavigne, [2010] B.C.J. No. 1620***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-212R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.D. Burnyeat J.

Heard: May 31, June 1-4, 28 and 29, 2010.

Judgment: August 17, 2010.

Docket: S086433

Registry: Vancouver

**[2010] B.C.J. No. 1620** | 2010 BCSC 1136 | 2010 CarswellBC 2165 | 192 A.C.W.S. (3d) 692

Between Peter Martin and Meah Martin, Plaintiffs, and Leo Lavigne and Andrew Neufeld, Defendants

(77 paras.)

**Case Summary**

**Tort law — Nuisance — What constitutes nuisance — Action by the Martins for damages for nuisance and defamation dismissed — The Martins and the defendants, Lavigne and Neufeld, were all unit holders within the same Strata Plan — Lavigne allegedly regularly stared into the Martins' ground floor unit in an intimidating fashion — Neufeld, the Strata Council president, allegedly defamed the Martins with a letter sent to the property owners — Staring could not be considered a substantial interference with the use or enjoyment of the Martins' unit — Also, while the headline of the letter was defamatory, the letter was communicated on an occasion of qualified privilege.**

**Tort law — Defamation — Defamatory statements — What constitutes defamatory words — Imputations of crime — Defences — Qualified privilege — Action by the Martins for damages for nuisance and defamation dismissed — The Martins and the defendants, Lavigne and Neufeld, were all unit holders within the same Strata Plan — Lavigne allegedly regularly stared into the Martins' ground floor unit in an intimidating fashion — Neufeld, the Strata Council president, allegedly defamed the Martins with a letter sent to the property owners — Staring could not be considered a substantial interference with the use or enjoyment of the Martins' unit — Also, while the headline of the letter was defamatory, the letter was communicated on an occasion of qualified privilege.**

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| Action by the Martins for damages for nuisance and defamation. The Martins and the defendants, Lavigne and Neufeld, were all unit holders within the same Vancouver Strata Plan. After noticing some problems with the Strata Corporation's bookkeeping, the Martins brought the problems to the attention of the Strata Council. Subsequently, according to the Martins, Lavigne, who was a member of the Strata Council, began a daily routine of walking past the Martins' ground floor unit and staring into the unit in an intimidating fashion. The Martins took the position that Lavigne's behaviour caused them to lose all enjoyment of their property. Lavigne denied that he caused or permitted any nuisance. With respect to Neufeld, the president of the Strata Council, the Martins claimed that he defamed them with a letter which he prepared and forwarded to the property owners. That letter updated the property owners about the situation with the Martins and stated that legal advice had been sought in relation to the situation. The Martins took the position that the letter suggested they had been involved in criminal activity and it therefore damaged their reputation.  HELD: Action dismissed.  Staring could not be considered a substantial interference with the use or enjoyment of the Martins' unit. Considering that the Martins purchased a ground level unit with large windows, situated adjacent to a public walkway, they had to expect lesser privacy than if they had purchased a unit which could not be viewed from the ground level. Furthermore, the alleged staring was not accompanied by any threats or gestures. Therefore, the claim against Lavigne was dismissed. While the content of the letter sent to the property owners by Neufeld was not defamatory, its bolded headline was defamatory. The headline stated that a police complaint was going to be filed against the Martins, which could lead a reasonable person to conclude that the Martins had undertaken activities requiring police involvement. Such a conclusion could lower the reputation of the Martins in the eyes of those who received the letter. However, as president of the Strata Council, Neufeld had a duty to inform the property owners about the escalation of the dispute with the Martins and there was no malice involved. Consequently, the letter was communicated on an occasion of qualified privilege. |

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 37B

Strata Property Act, *SBC 1998, CHAPTER 43*,

**Counsel**

Counsel for the Plaintiffs: P.J. Dougan.

Counsel for the Defendants: S.L. Kovacs.

**Reasons for Judgment**

**from Trial**

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

**1**   At one time, the Plaintiffs and the Defendants lived in units within Strata Plan LMS4078, located at 2175 Salal Drive, Vancouver ("Property"). This Action arises out of the interaction between the Plaintiffs and the Defendants at that location.

**2**  Claiming against Mr. Lavigne, the Plaintiffs state that, in or about October, 2005, Mr. Lavigne began "an almost relentless daily routine" whereby Mr. Lavigne "... stared into the Plaintiffs' unit in an intimidating way from the sidewalk outside the Plaintiffs' unit", and that the "net effect" of the "staring" of Mr. Lavigne on the Plaintiffs was: "... a gradual increasing uneasiness, anger, fear, and sense of violation". The Plaintiffs submit that their privacy and peace were being attacked by the "... behaviour [of Mr. Lavigne]". The Plaintiffs claim that they were unable to enjoy: "... the sanctity of their own home, and lost all enjoyment of their property that had been intended as their retirement 'dream home'." As a result, the Plaintiffs claim against Mr. Lavigne for general, special, aggravated and punitive damages for nuisance.

**3**  In the Further Amended Statement of Defence, Mr. Lavigne states that the "facts as pleaded do not give rise to a claim in nuisance" so that the Amended Statement of Claim is bad at law. In the alternative, Mr. Lavigne denies that he caused or permitted the alleged or any nuisance.

**4**  As against Mr. Neufeld, who is the current president of the Strata Council for the Property, the Plaintiffs claim that they were defamed as a result of an October 13, 2006 letter entitled "The Savona Update" ("Update"), which was prepared by Mr. Neufeld and forwarded to the owners of the Property. The Plaintiffs state that the statements made in the Update in their plain and ordinary meaning, including their express and implied meanings in the full context of the letter "and previous antagonism", meant that the Plaintiffs had maliciously and groundlessly "villainized" Mr. Lavigne, had defamed Mr. Lavigne, and that Mr. Martin was criminally liable for initiating an "interaction" with Mr. Lavigne. The Plaintiffs state that the comments in the Update that suggest criminal, seditious, self-serving, misrepresentative, wasteful, defamatory words or behaviour are not true and that, as a result of the publication of the Update, the reputation of the Plaintiffs with their neighbours has been impugned, the professional competency of Mr. Martin has been called into question, and the Plaintiffs have lost the quiet enjoyment of their home so that the Plaintiffs felt compelled to sell their home and move from the Property in May 2007. As against Mr. Neufeld, the Plaintiffs claim for general, special, aggravated and punitive damages for defamation.

**5**  In the Further Amended Statement of Defence, Mr. Neufeld states that "... none of the words alleged have been spoken or written by ... [him] are defamatory in their plain or ordinary meaning". The words in the Update were not calculated "to maliciously disparage the Plaintiffs" but "rather [to] inform the strata owners" and that the Update was published on an occasion of "qualified privilege". The particulars of the qualified privilege are said to be as follows:

1. In the ordinary course and scope of his position as President of the Strata Council, Mr. Neufeld on behalf of the Strata Council had a duty arising including informing owners of events and activities material and relevant to the ongoing management of the common property and each of the recipient owners had a corresponding interest or duty arising to receive information and material relevant to the ongoing management of the common property; and
2. Mr. Neufeld made a decision in good faith and without malice that, in the interests of furthering and/or protecting the interest of owners, it was necessary to respond to certain allegations made by the Plaintiffs in their September 22, 2006 letter to the owners;
3. The words used in the Update were "fair comment made honestly and fairly in good faith and without malice upon a matter of public interest as amongst the strata unit owners and the Property Manager".

**BACKGROUND**

**6**  Mr. Martin is a retired chartered accountant. Mrs. Martin taught creative writing and had a career in the theatre before retiring. Mr. Lavigne is retired, is presently 74, is a former president of the Strata Council, and is now a member of the Strata Council for the Property. Mr. Neufeld has been a member of the Strata Council since June 2004, and has been the President of the Strata Council since September 2005.

**7**  Shortly after moving into their home ("Unit") in 2004, Mr. Martin noticed some problems with the bookkeeping and financial records of the Strata Corporation. Mr. Martin made a number of suggestions and offered to give assistance to rectify the errors. Mr. Martin declined an offer to join the Strata Council as a member.

**8**  Mr. Martin was of the view that the errors and omissions that he found had cost the owners over $11,000.00 in lost income or capital and that the loss came as a result of the ***negligence*** of the strata management company, and from "misunderstandings" as to the recordkeeping and investment requirements of the *Strata Property Act*, R.S.B.C. 1998, c. 43 ("*Act*"). The Plaintiffs state that, instead of accepting the offer of assistance and the suggestions of Mr. Martin about how the mistakes and omissions might be corrected and avoided in the future, the members of the Strata Council and the Defendants in particular began "to ridicule and harass the Plaintiffs."

**9**  In an October 11, 2005 letter that the Plaintiffs wrote to the Strata Council marked "Urgent and Confidential. For the eyes of council members only", the Plaintiffs set out what they referred to as "the significant errors made by the [Property] Manager". That letter was subsequently forwarded to the Property Manager. The Minutes of the November 15, 2005 meeting of the Strata Council contain the following notation: "This owner has previously made this suggestion [to terminate the employment of this Property Manager] along with the name of the Property Management company of his choosing."

**10**  The Plaintiffs were of the view that their complaints were not being addressed and that the underlying issues raised by them were not being resolved. The Plaintiffs state that they felt it was necessary "to defend themselves against the ridicule they were being subjected to by the Defendants". Accordingly, the Plaintiffs sent a September 22, 2006 letter of explanation to all owners of the Property outlining their actions and motivations. By this stage, the Plaintiffs felt that they had become "pariahs in their own home".

**11**  The Unit of the Plaintiffs was on the ground floor of the Property. Their Unit had a number of windows facing both north and east. Their Unit looked out onto that part of 11th Avenue that had been converted into an open public park-like space.

**12**  The Plaintiffs state that Mr. Lavigne almost invariably stared into their Unit and, as he was walking by their Unit, that he had to look over his right shoulder to do so. The Amended Statement of Claim sets out the following: "In about October 2005, Mr. Lavigne began an almost relentless daily routine. Mr. Lavigne stared into the Plaintiffs' unit in an intimidating way from the sidewalk outside the Plaintiffs' unit. He did this while making his regular two or more daily walks with his dog or doing errands."

**13**  The Plaintiffs state that Mr. Lavigne "escalated his regular staring" after the September 22, 2006 letter had been forwarded to the owners and that the matter "came to a head" on September 28, 2006. The Amended Statement of Claim sets out what is said to have occurred on September 28, 2006:

When Mr. Lavigne began his daily staring, Mr. Martin went into his ground floor garden to "stare back" at Mr. Lavigne. No words were spoken. Such was the level of animosity and intimidation that Mrs. Martin feared the worst and called 911. The Vancouver Police Department attended the scene, and the Plaintiffs filed a Police report. At that time, the Police felt the situation was a civil matter and they could do nothing.

**14**  After this incident and after discussing the matter, the Plaintiffs sought the advice of their lawyer. Ms. Martin then called 9-1-1. Somewhat after Ms. Martin called 9-1-1 and somewhat after a member of the Vancouver Police Department attended the scene, the Plaintiffs sent an email transmission to the Property Manager for the Property setting out the following and requesting that their communication be circulated "to the Council as soon as possible":

Since last September around the time we began communicating with the council about their non-compliance with the Strata Property Act regarding the Financial Reporting and Management of the Strata Corporation, Mr. Lavigne has made it a point to, when he walks by our suite, stare in all the windows in a deliberate and intimidating manner. We have for the most part ignored this, but still have had to put up with this for a year. However, since the two letters that were sent out to the council and the owners last week Mr. Lavigne has escalated his behavior letting us know in no uncertain terms how he feels. We feel he has crossed the line. We ask you to advise Mr. Lavigne to cease his intimidating behavior towards us. It is inappropriate for Mr. Lavigne to act out his displeasure with us because he is being requested to comply with the Strata Property Act regarding the Financial Reporting and Management of the Strata Corporation's funds.

This letter is to advise you that we consider this serious enough to warrant a complaint, which we filed today with the Vancouver Police Department regarding the behavior of Mr. Lavigne.

We trust you will convey this to Mr. Lavigne.

**15**  The Property Manager forwarded the letter to Mr. Neufeld and Mr. Neufeld sent a copy of the email to members of the Strata Council (including Mr. Lavigne) suggesting that there be "a quick meeting" to: "... discuss the latest attempts by the Martins, including the fiction below, to create even more of the chaos they seem to strive on ...". The members of the Strata Council were then given the following advice by Mr. Neufeld:

FYI, yesterday (well before we received this bit of nonsense from the Martins that is below), Leo [Lavigne] and I happened to be talking, and Leo described to me the most recent bizarre encounter he had with Peter [Martin] while walking the dog ... needless to say, Peter's account below is perverse and simply another feeble/weird attempt to single out Leo as the bad guy in all this, and to intimidate council in the process. Leo can bring us up to speed Sunday morning on what actually happened, which was in fact a blatant attempt by Peter to intimidate Leo as he walked by (and not the first such attempt).

**16**  After indicating that he was attempting to contact the lawyer for the Strata Corporation, Mr. Neufeld stated: "I've talked to the police about the situation, they are sympathetic, but because of confidentiality regs cannot disclose whether a complaint was actually filed by the Martins."

**17**  A meeting of the Strata Council was arranged. A proposed agenda, the views of Mr. Neufeld regarding what he thought should be on the agenda, and a "Statement of Leo Lavigne, re: Incident of September 28, 2006" were circulated to members of the Strata Council. A meeting with the lawyer for the Strata Corporation was arranged and a draft of what Mr. Neufeld recommended be sent to the owners was forwarded to all members of the Strata Council. Mr. Neufeld also provided his thoughts in a September 30, 2006 email to the members of the Strata Council which included the following:

The Martins are still attacking ... [the Property Manager] and council, and most recently have engaged in a despicable attempt at character assassination -- part of a bizarre effort to single out and portray Leo as the bad guy in the ongoing conflicts they continue to generate. The Martins' latest attacks are irrational even beyond what we have seen in the past, and are totally unacceptable. These attacks merit a well-reasoned and blunt response from council. I'll run out a few thoughts below on how I believe we should proceed in dealing with the Martins, and look forward to everyone's input on this.

It is vital that in all our dealings with the Martins we continue to take the high road. Given their bizarre behaviour, I would strongly suggest it's prudent for everyone to refrain from contact of any kind with the Martins. Having said that, given the Martins latest attacks we have no choice but to respond decisively. As I see it, there are two main topics to address in our dealings with the Martins: ...

In their most recent correspondence, the Martins have launched an irrational attack on Leo, including filing a police report. This cannot go unchallenged, and deserves response ... a strong, rational, and measured approach that takes the Martins on directly.

I believe we should take an escalating approach to communicating with Savona owners about the latest efforts of the Martins to disrupt council. I would suggest that we meet with our lawyer ... as soon as possible to review what the Martins have done and what we propose to do in response ... I'd like everyone to consider the following ideas for an escalating response to the Martins, and these can be points of discussion going forward:

1. Meet with John Logan [the lawyer].
2. File a police report of our own rebutting the nonsense the Martins have communicated to us in their Sept. 29 e-mail re: Leo.
3. Prior to the minutes that will stem from our Oct. 16 meeting, we issue a statement to all owners explaining we have once again been obliged to consult our lawyer as a result of the Martin's behaviour, that we have had to file a police report against the Martins as a result of their unwarranted attack on Leo, and that we will keep them informed of further developments.
4. In the October minutes we present a brief summary response re: the Martins' Sept. 23 document.
5. Immediately following the issuing of the minutes, we distribute to the owners a more comprehensive response to the Martins' Sept. 23 document, including the statement ... [the Property Manager] provides to us.
6. Next, we issue another update to the owners that clarifies and addresses other aspects of the conflict created by the Martins. We issue this prior to the November meeting minutes being distributed.
7. In the November minutes we deal with whatever exchanges have taken place with the Martins in the interim, or whatever else we deem appropriate on the topic.
8. Following distribution of the November minutes, we issue another communication to the owners challenging the Martins directly to call an SGM, or take us to court.

**18**  The members of the Strata Council met on Sunday, October 1, 2006 to discuss the various matters raised by Mr. Neufeld. After the meeting, Mr. Neufeld arranged for a meeting with the lawyer for the Strata Corporation. On October 3, 2006, Mr. Neufeld advised the members of the Strata Council: "We intend to get a legal opinion and advice on the police complaint issue, as well as our upcoming response to the Martins."

**19**  In an October 9, 2006 email, Mr. Neufeld forwarded what he referred to as a "brief news bulletin for owners" to the members of the Strata Council and made the following request:

... Please feel free to provide feedback ... it's not finalized, as we need Logan's [the lawyer's] input, and nor do I have the by-laws in front of me to cite, but I think it's a good starting document. I've structured it as a news bulletin with four different items, that way the Martins are appropriately portrayed as simply another item Council has to deal with.

**20**  Mr. Neufeld also stated in that email: "I think there are legal reasons we need to file [a police complaint], as the Martins have shown themselves to be capable of flat-out lying, and may attempt to case-build against Leo and/or us if we so much as walk by his place ... Anyway, I'm sure Logan can advise us ... Thanks again."

**21**  In response to what was circulated, one member of the Strata Council had concerns which he expressed as follows:

I think the bulletin looks fine, but obviously needs to be tweaked a little bit.

My one concern is with this paragraph:

"To make matters worse, Council/Leo (?) was forced to file a police complaint with the Vancouver Police against the Martins. The complaint had to be filed as a defensive response to a bizarre claim made by Peter Martin to the police against Leo Lavigne after Mr. Martin precipitated a would-be confrontation with Mr. Lavigne. (The text of the Council/Lavigne (?) complaint file is attached to this document)."

I think it should be made very clear that the Martins have filed a formal police complaint (not just a 'bizarre claim' as stated above) and Council must respond to their initial police complaint.

This also raises another question which I know will be addressed tomorrow when we meet with the lawyer (and may not be too popular, but here goes!): I know in a previous e-mail, we have stated that we wish to "take the high road". By filing our own complaint, are we sinking to the Martin's level, in what could be seen as a 'tit for tat' response. Can we essentially ignore the Martins complaint, as I am sure the police will do? Or are there legal reasons why we must file a complaint of our own? I am sure it will come as a shock to the owners that the Martins have filed a police complaint (especially when they hear the circumstances), and if we file a 'counter-complaint', I think the letter should clearly state why we have chosen to take that course of action, and not simply state that we were 'forced' to file a complaint.

**22**  Mr. Lavigne, Mr. Neufeld and one other member of the Strata Council met with Mr. Logan on October 10, 2006. As the Strata Corporation was not prepared to waive privilege, it is not known what advice Mr. Logan gave to the members of the Strata Council who met with him that day. At the same time, no application was made on behalf of the Plaintiffs that the advice given by Mr. Logan be available to the Court.

**23**  After the meeting with Mr. Logan, Mr. Neufeld sent an email to members of the Strata Council attaching a "statement" from Mr. Lavigne advising:

... This statement could be filed by Council with the Vancouver Police (rather than Leo alone). Because the Martins' ridiculous accusations can have an impact on all Council members who dare to walk by their suite, it makes sense that it be filed by Council with the police, and that owners understand that as much as the Martins may want to attack Leo, we view them as attacking us all. Please review the complaint doc asap, and if you have any concerns, get back to me promptly .... The plan is to file the complaint Thursday [October 12, 2006] and have the Update distributed to owners on Friday [October 13, 2006].

**24**  On October 13, 2006, Mr. Neufeld forwarded a letter headed "Update" to all 102 owners of the Strata Corporation as well as the Property Manager. The Update dealt with a number of matters including a proposed change of the Property Manager, a "friendly reminder" regarding the recycling/garbage room, and a potential violation of strata bylaws relating to the Balcony/Patio areas within the Property. The Update also set out the following statement:

**Savona Council Forced To Consult Strata Lawyer; Police Complaint To Be Filed Against Peter and Meah Martin of Suite #105**

Recent further incidents involving Peter and Meah Martin of suite #105 have caused the Council to once again consult the strata's lawyer for legal advice and assistance.

Martins distributed a document dated September 22, 2006 to Savona owners and residents. The document once again called into question the state of the Savona' s finances. Council felt that in the document, the Martin's made misrepresentations of actual events and interactions that took place with them, interpreted events in a self-serving way, and continued with their efforts to undermine the Property Manager ... and the elected strata Council.

Also of concern to Council was the Martin's apparent effort to single out and portray Council member Leo Lavigne as the "villain" and the primary cause of the shortcomings they perceive Council to have. (For the record, Savona Council discusses all issues as a group, and makes decisions by consensus.) Council views the Martins' characterization of Leo as a distasteful attempt at character assassination, and an affront to all those who know Leo. Council believes that the decency with which Leo Lavigne has conducted himself and his fundamental commitment to the well-being of the Savona is clearly evident, and makes the Martin's behaviour nothing short of offensive.

Subsequent to the Martin's distributing their September 22 document, matters escalated in a very troubling way. A recent interaction between Peter Martin and Leo have prompted Council to prepare a report to be filed with the Vancouver Police. (A copy of the report is available to whomever wishes to see it -- contact Council President Andy Neufeld).

Council takes no pleasure in having to take these steps and having to take up owner's time and money with such distractions. The ongoing issues with the Martins, which appear to be escalating, take up a good deal of the time and energy of Council. The Strata Corporation's lawyer has advised Council that owners should be kept apprised of developments involving the Martins, and that owners should promptly report any concerns or questions with respect to the Martins. Any such concerns or questions should be reported to ... [the Property Manager], or Council President Andy Neufeld ....

**25**  While it is noted in the Update that "Council felt it important to provide the following update to Savona owners and residents", I find that no formal meeting of the Strata Council was convened to discuss the matters set out in the Update, no minutes of any such meeting were ever provided to the owners, no "Police Complaint" was ever filed, and that the "statement" prepared by Mr. Lavigne was never forwarded to the Vancouver Police Department.

**DISCUSSION AND CASE AUTHORITIES: NUISANCE CLAIM AGAINST MR. LAVIGNE**

**26**  While there is no major disagreement between Mr. Moore and Mr. Lavigne as to what occurred on September 28, 2006, there is significant difference between what Mr. Lavigne recalls and what Mr. Martin and Ms. Martin recall relating to the period of time leading up to the September 28, 2006 "incident".

**27**  In his June 26, 2009 Affidavit, Mr. Lavigne stated:

I am aware of the Martins' allegation that I routinely stared into their unit "in an intimidating way". While I deny this allegation vehemently, I admit that in the usual course I would - while walking my dog or running errands - walk by the Martins' home on a regular basis. I would not, however, make a habit of staring into their unit. I would simply walk past the unit without stopping. On some occasions that I walked by my view was attracted to the Martins' window by Mr. Martin's overt attempts to get my attention. One example of several is when Mr. Martin rushed to his large window as I was walking past, putting his face a couple of inches from the glass with an angry look on his face. This occurred one or two days after Mr. Martin was sent a letter by our strata's lawyer, John Logan, in response to a letter Mr. Martin directed to the owner and president of our property management company, ... demanding he fire our Property Manager and threatening to have council removed and replaced by an Administrator.

**28**  My notes indicate that Mr. Martin stated at Trial that Mr. Lavigne "would look in windows as he walked by", "always staring in our windows" and "we finally said it cannot go on any longer". When asked by his counsel to advise what Mr. Lavigne looked like when he was staring, Mr. Martin stated: "Mainly just staring." "Others would glance at the garden.", and that Mr. Lavigne "never made any effort to avert his eyes - not sure if he could see in - light changes during the day". "My wife told me Mr. Lavigne came out and stared at her in the dining room." He described the frequency of the staring as "most days once or twice". He also described it as being between 100 and 200 times in total.

**29**  I record Ms. Martin stating at Trial that she saw Mr. Lavigne "staring in the window" 2-3 times a day, he would "have to turn his head to look in", he was "just staring in", "not smiling", and the difference between staring and looking was that it was "constant gazing - not a glance then turning away". Ms. Martin stated that she "found it more difficult to handle when the minutes also came out".

**30**  Regarding the incident on September 28, 2006, Mr. Lavigne in his June 26, 2009 Affidavit stated:

I do recall one other very significant event which occurred on September 28, 2006, about midday. I walked our dog up the north side walkway of the Arbutus Walk (west to east). I walked to the nearby garbage bin (adjacent to the giant kettle on the east end of Arbutus Walk) to deposit a doggy bag, and started to proceed to the south side walkway of Arbutus Walk, adjacent to the patio of the Martins' unit, on my way back to my own unit. As I did so, Mr. Martin exited his unit and positioned himself inside the fence on the outer perimeter of his patio immediately in front of the direction in which I was walking and glared at me. I walked over to the south side, turned east on the Arbutus Walk and to the corner of Cranberry, and proceeded along Cranberry. During this time, as I walked, Mr. Martin proceeded to move with me so as to continually face me. He continued to glare. As I continued down the sidewalk past his patio gateway near the boundary of his property, I glanced back and he was at the foot of the steps still glaring at me.

Upon my arrival home, I immediately contacted and informed the strata council president, Andy Neufeld, of the exchange. I did so because in my view Mr. Martin's behavior on September 28, 2006 was threatening and was directed at me because of the ongoing animosity that existed between the Martins and the strata council for the Savona.

**31**  In his July 15, 2009 Affidavit, Mr. Martin described the September 28, 2006 incident as follows:

On September 28, 2006 about late morning, I saw Mr. Lavigne outside our suite and I went out to confront him. I had made up my mind not to speak to him, but I wanted to convey to him that his behaviour was unacceptable. He stared down and walked right toward me. I followed him around our patio as he began to move away, he was obviously unfazed by the incident

My wife was greatly upset by this, and once I came inside, I felt shaken by the experience. We called ... [their lawyer] for advice and he advised to call the Police. My wife dialled 911 and we had a policeman around at our home within an hour or so. We gave a statement to him and he filed a police report.

**32**  My notes indicate that Mr. Martin stated at Trial that he saw Mr. Lavigne walking along the greenway with his dog, and that he then "walked out on the patio and glared at him", and that he was approximately 15-20 feet away from Mr. Lavigne at the time. He described Mr. Lavigne as passing by the edge of the apartment and "looking back he mumbled something". Mr. Martin indicated that he did it in order show Mr. Lavigne what he had been doing for about a year was "no longer acceptable".

**33**  Regarding whether Mr. Martin ever felt "physically threatened", I record him as stating at Trial: "No, simply staring in our windows." He described that he and his wife were "very shaken" after the incident on September 28, 2006. Mr. Martin described his wife as stating: "You broke agreement to proceed in a professional way - only write letters, not confront." "My wife was upset because I went outside to stare at him."

**34**  Regarding the September 28, 2006 incident, Ms. Martin stated that she asked her husband what he had done, and that he indicated he had stared at Mr. Lavigne. She stated that she told him "I was very upset - it changed how we dealt with something - we had agreed not to engage" and that "confronting or engaging would involve a different way of dealing with the matter". She stated that she advised the police that her husband "had broken our agreement not to interact", but that it was "clear we had to deal with the ongoing staring and the escalation". Under cross-examination, Ms. Martin was asked whether observing Mr. Lavigne would take some time, including observing him as long as he was walking by so that she could be accused of staring, and she stated: "staring assumes I was doing something wrong - I was observing." When it was put to her that Mr. Lavigne "was observing you observing him", she stated: "I can't speak for him." Ms. Martin confirmed that Mr. Lavigne "never spoke, never made gestures, never made threats, and did not make physical gestures". She stated that her husband told her: "He stared back to get even."

**35**  While I do not assume that the comments were recorded accurately or that the Plaintiffs made the statements attributed to them, the "General Occurrence" form obtained from the Vancouver Police Department contained the following comments:

Related Date: Thu, 28 Sep. 2006 at 18:56

MARTINS are in a civil action against the strata president over financial statements no [sic] being provided to property owners in the THE SAVONA [sic] condo.

... [the] strata council pres. has been walking by MARTIN's ground level suite and looking in the window as he passes.

On 060928 at 1720 hrs., u/s attended 105-2175 SALAL DR and spoke with MARTINS about suspicious circumstances involving ... (strata council president of 2175 SALAL DR) MEAH MARTIN states, approx. 1 year ago my husband (PETER) and I approached the strata council regarding the lack of financial statements being forwarded to property owners at 2175 SALAL DR. ... [MR. LAVIGNE] did not receive this request very well, he took it very personally. ... [MR. LAVIGNE] would take every opportunity to slander our name at the council meetings. ... [MR. LAVIGNE] would also look in our ground floor window every time he walked by, nothing would be said or done, he would just look at us as he walked by.

This was kept up for approx 2 weeks, then stopped.

Almost 1 year later, we involved a lawyer into our investigation of property financial statements. Once again, ... [MR. LAVIGNE] would be in the courtyard walking by our suite and looking in our window. This action is starting to unnerve us, we feel ... [MR. LAVIGNE] may escalate his actions towards us. To this date, ... [MR. LAVIGNE] has not done or said anything towards us.

Related Date: Thu, 28 Sep. 2006 at 19:22

MARTINS state that they would be satisfied with a report for documentation purposes only. Adv by u/s, so for ... [MR. LAVIGNE] - has not done anything criminal, for now report will be for suspicious circumstance.

NO FURTHER FOLLOW-UP/POLICE ACTION REQUIRED.

**36**  In its broadest sense, nuisance can be described as an activity which results in an unreasonable and substantial interference with the use and enjoyment of land. In addressing whether or not an activity is a nuisance, McIntyre J.A., as he then was, on behalf of the Court in *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=), stated:

When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of Street, *Law of Torts*, at p. 215 in these terms:

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.

This proposition stated in a variety of ways has been accepted generally in the authorities. (at p. 760)

**37**  In addressing whether or not something constitutes a nuisance, McIntyre J.A. made the following statement:

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. (at pp. 760-761)

**38**  In *Motherwell v. Motherwell* [*(1976), 73 D.L.R. (3d) 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-F5DR-232R-00000-00&context=) (Alta. C.A.), Clement J.A. on behalf of the Court stated that watching and besetting a property could constitute nuisance:

In *J. Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255, members of a trade union on strike picketed the plaintiff's works and the works of a subcontractor of the plaintiff. This was found to amount to watching and besetting. Lindley M.R. said at pp. 267-68:

The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for nuisance at common law: see *Bamford v. Turnley* [1862], 3 B. & S. 66 122 E.R. 27, *Broder v. Saillard* [1876], 2 Ch. D. 692 at 701, per Jessel M.R., *Walter v. Selfe* [1851], 4 De G. & Sm. 315, 64 E.R. 849, and *Crump v. Lambert* [1867], L.R. 3 Eq. 409.

Chitty L.J. held the same view. He said at pp. 271-72

But further, the acts of watching or besetting here proved in reference to the 4th sub-section, and done with the view mentioned, were acts in themselves unlawful at common law, and are not made lawful by the Legislature. In my opinion they constitute a nuisance at common law. True it is that every annoyance is not a nuisance; the annoyance must be of a serious character, and of such degree as to interfere with the ordinary comforts of life. To watch or beset a man's house for the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance of an aggravated character.

The acts of watching and besetting were not, of course, carried on within the premises occupied by the defendants. They were carried on, I infer, on property to which the public had access. The right of the defendants to be on a public place was so abused to the detriment of the plaintiffs that it was held they had committed a common law nuisance, as well as a breach of s. 7 of the Conspiracy and Protection of Property Act, 1875 [Imp], c. 86. The point is dealt with specifically by Devlin J. in *Esso Petroleum Co. v. Southport Corpn.*, [1956] A.C. 218 at 224, [1955] 3 All E.R. 864:

I think it is convenient to begin by considering whether there is a cause of action in nuisance. It is clear that to give a cause of action for private nuisance the matter complained of must affect the property of the plaintiffs. But I know of no principle that it must emanate from the land belonging to the defendant.

(at paras. 38-40)

**39**  A distinction must be drawn between "staring" and "watching or besetting". What is said to have occurred could not be described as watching or besetting. I make no finding regarding the question of whether Mr. Lavigne took it upon himself to stare into the Unit of Mr. and Ms. Martin on a number of occasions over a lengthy period of time. For the purposes of this decision, I am assuming that the recollection of Mr. and Ms. Martin should be preferred. On that basis and on that basis alone, I will deal with what was alleged to reach a conclusion as to whether the alleged "staring" of Mr. Lavigne constituted a nuisance.

**40**  The New Oxford Dictionary of English has various definitions regarding "staring". The noun "stare" is "a long fixed or vacant look". To "stare someone in the eye" is defined as to "look fixedly or boldly at someone". To "stare someone out or down" is defined as to "look fixedly at someone until they feel forced to lower their eyes or turn away".

**41**  Even if you define a "stare" as an intense gaze that lasts for a number of seconds, I cannot conclude that the law of nuisance was intended to address such a trivial grievance. It can hardly be said that staring constitutes substantial interference with the use or enjoyment of the Unit of the Plaintiffs. It can hardly be said that staring is "substantial and serious" or of a "serious character" in the context of a one-time event or in the context of what is alleged by the Plaintiffs to have been ongoing occurrences.

**42**  I also take into account that Mr. and Ms. Martin purchased a ground level apartment unit with floor to ceiling windows and that their Unit was immediately adjacent to a public walkway/greenway in an urban setting. I am satisfied that the Martins had to expect lesser privacy than would have been available if their Unit had been where it could not be viewed from ground level. I also take into account that the staring as described by Mr. and Ms. Martin was not accompanied by anything said, by any gestures, or by any threats.

**43**  The balance of reasonableness in the context of adjoining strata lots within a strata plan was described as follows in *Sauve v. McKeage* [*(2006), 46 R.P.R. (4th) 130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1C7-00000-00&context=) (B.C.S.C.) where Brooke J. stated:

It must be remembered that in an urban society (and the condominium regime can be seen as an urban society in microcosm), a certain amount of give and take is necessary among neighbours and between the users, both of the strata lots and of the common property. As Mr. Justice Smith said in *Sutherland v. Canada (Attorney General)* [*(1997), 15 C.P.C. (4th) 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-FJDY-X440-00000-00&context=) (B.C.S.C.), dealing first of all with the test for private nuisance:

The test is an objective one ... that is, whether there is an actionable nuisance will depend in each case upon whether the interference would be substantial, not just with reference to the plaintiff, but with reference to any reasonable person occupying the plaintiff's premises ...

... it was observed that the very existence of organized society depended on a generous application of the principle of "give and take, live and let live".

(at paras. 22-23)

**44**  Ironically, both Mr. and Ms. Martin admitted that, in order to observe the "staring", it was necessary for them to have to watch Mr. Lavigne as he walked by their Unit. Ms. Martin referred to her behaviour as "observing" and sought to distinguish her "observing" from the "staring" of Mr. Lavigne. Just as I cannot conclude that the "observing" of Mr. Martin or Ms. Martin constituted a nuisance, so also can I not conclude that the alleged staring by Mr. Lavigne constituted a nuisance. The law of nuisance is simply not intended to address such trivial complaints as are advanced by the Plaintiffs.

**45**  The claim against Mr. Lavigne is dismissed. As I am advised by counsel that the provisions of Rule 37B of the *Rules of Court* may apply, I make no order at this time as to the entitlement of Mr. Lavigne to his costs. Counsel will be at liberty to make application in that regard in due course.

**CASE AUTHORITIES AND DISCUSSION: DEFAMATION CLAIM AGAINST MR. NEUFELD**

**46**  In *Grant v. Torstar Corp.*, [*[2009] 3 S.C.R. 640*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GX-00000-00&context=), McLachlin C.J. on behalf of the majority stated:

A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism: see, e.g., R.A. Smolla, "Balancing Freedom of Expression and Protection of Reputation Under Canada's *Charter of Rights and Freedoms*", in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 272, at p. 282. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous per se: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions", like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice: see *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.). The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications: *Toogood v. Spyring* (1834), 1 C.M. & R. 181, 149 E.R. 1044, at p. 1050, per Parke B. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.

(at paras. 28-30)

**47**  There is no doubt that the words complained of refer to the Plaintiffs. There is no doubt that the words were published as copies of the Update were forwarded to the owners of the Strata Corporation and to the Property Manager. The Plaintiffs have established those elements on a balance of probabilities.

**48**  The question which arises is whether the words used were defamatory as tending to lower the reputation of the Plaintiffs in the eyes of a reasonable person. It is submitted by the Plaintiffs that a number of statements in their plain and ordinary meaning "including their express and implied meanings" in the full context of the Update and "previous antagonism" were defamatory. It is submitted by Mr. Neufeld that the words used were not defamatory and, if they are found to be defamatory, the defence of qualified privilege is available to him.

**49**  The Plaintiffs first submit that the words "a recent interaction between Peter Martin and Leo have prompted Council to prepare a report to be filed with the Vancouver Police" are defamatory as they would mean to the reasonable person: "It is implicit in filing a report with the Police that a crime is alleged;" and that the Plaintiffs "were engaged in criminal behaviour".

**50**  Regarding these words, it is the submission of Mr. Neufeld that the "ordinary reasonable reader" is mindful of the principle that a person charged with a crime is presumed innocent until proven guilty and, if a report that someone has been charged with a crime does not impute guilt, it cannot be the case that the preparation of a report to be filed with the Vancouver Police Department would tend to lower the reputation of the Plaintiffs in the eyes of a reasonable person. In this regard, Mr. Neufeld relies on the decision in *Mirror Newspapers Ltd. v. Harrison* (1982), 149 C.L.R. 293 (High Court of Australia), where Mason J. on behalf of the Court stated:

The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with a criminal offence are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted. In this situation the reader will view the plaintiff with suspicion, concluding that he is a person suspected by the police of having committed the offence and that they have ground for laying a charge against him. But this does not warrant the conclusion that by reporting the fact of arrest and charge a newspaper is imputing that the person concerned is guilty. A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. It is one thing to say that a statement is capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first, not by the second, proposition. Its importance for present purposes is that it focuses attention on what is conveyed by the published material in the mind of the ordinary reasonable reader.

(at pp. 300-301)

**51**  I agree with the submission made on behalf of Mr. Neufeld that the words "to prepare a report to be filed with the Vancouver Police" are not defamatory. There are number of reasons to file a report with the police. As occurred here, the police are often contacted over disputes between neighbours. However, it is only rarely that neighbours have committed a crime, are arrested and are charged criminally after police officers attend at the scene to intervene and often to mediate.

**52**  It would not be reasonable for anyone receiving this advice to conclude that Mr. Martin had done anything of a criminal nature. As well, it can hardly be said that the statement that a report was being prepared is defamatory even though it is clear that the report was being prepared so that it could or might be filed with the Vancouver Police Department. I am satisfied that a reasonable person would not assume that the filing of a "report" was the same as filing a complaint to seek the laying of criminal charges. I cannot conclude that Mr. and Ms. Martin were defamed by the statement that: "a recent interaction between Peter Martin and Leo had prompted Council to prepare a report to be filed with the Vancouver Police".

**53**  Second, the Plaintiffs also state that the following words in their plain and ordinary meaning, including their express and implied meanings in the full context of the Update and previous "antagonism" meant that the Plaintiffs had maliciously and groundlessly "villainized" Mr. Lavigne:

Also of concern to Council was the Martin's apparent effort to single and portray Council member Leo Lavigne as the "villain" ... Council views the Martin's characterization of Leo as a distasteful attempt at character assassination, and an affront to all those who know Leo. Council believes that the decency with which Leo Lavigne has conducted himself and his fundamental commitment to the well-being of the Savona is clearly evident, and makes the Martin's behaviour nothing short of offensive.

**54**  In this regard, Mr. Neufeld submits: "This alleged meaning is simply not defamatory. To 'villainize' means to defame. To allege someone has defamed someone is not itself defamatory. Further the words suggest they 'apparently' attempted ('effort') to portray Leo as the 'villain', not that they actually did."

**55**  The New Oxford Dictionary of English defines a "villain" as "a person guilty or capable of a crime or wickedness". I am not in a position to conclude that the suggestion that the plaintiffs had portrayed Mr. Lavigne as a "villain" would be defamatory as I cannot conclude that alleging someone has defamed someone else is in and of itself defamatory. I cannot conclude that the impugned words were defamatory in the sense that they would tend to lower the reputation of the Plaintiffs in the eyes of a reasonable person.

**56**  The most serious allegation relates to the heading in bold which preceded that part of the Update dealing with the Plaintiffs. Regarding the words "**Savona Council forced to consult strata lawyer: Police complaint to be filed against Peter and Meah Martin**", the Plaintiffs submit that this statement in its plain and ordinary meaning including its expressed and implied meanings in the full context of the Update and previous antagonism meant that the Plaintiffs "were engaged in criminal behaviour".

**57**  The New Oxford Dictionary of English defines the noun "complaint" as "a statement that a situation is unsatisfactory or unacceptable or that someone has done something wrong". "I intend to make an official complaint." There was no intent of the Strata Council to file a "Police Complaint" against Mr. and Ms. Martin but that is what the headline in the Update stated. What was drafted but never filed was a statement by Mr. Lavigne to answer the "complaint" that the Strata Council believed had been filed by the Plaintiffs. The Strata Council merely wished to respond to what had been complained of by the Plaintiffs so that their response would be on the record. The words "Police complaint" used in the heading are in bold print. Some owners may not have read beyond the heading to see the later words that the Council was preparing "a report to be filed with the Vancouver Police".

**58**  I am satisfied that the headline in the Update was defamatory. The fact that the Strata Council felt it necessary prepare a police complaint so it could be filed with the "Police" would tend to lower the reputation of the Plaintiffs in the eyes of those who receive the Update. It is obviously a very serious matter to file a complaint with the police. By including the words that the Council was "Forced to Consult Strata Lawyer", it was reasonable to conclude that the lawyer had given the advice that a police complaint was not only justified but necessary. In the ordinary meaning of the words, a reasonable person would conclude that the Plaintiffs had undertaken activities which required a police complaint to be filed.

**59**  The next question is whether Mr. Neufeld has established that the defamatory statement was made in a protected context.

**WAS THERE QUALIFIED PRIVILEGE?**

**60**  The Plaintiffs submit that there was no "occasion" of qualified privilege because there was no formal, minuted meeting of the Strata Council in which it was decided that the Update would be circulated to all owners. The Plaintiffs submit that Mr. Neufeld acted without proper authority and exceeded the scope of his duties as President of the Strata Council because a formal meeting of the Strata Council was not undertaken.

**61**  Although there is nothing in the *Act* which requires meetings to be held in person, meetings by telephone or by email are permissible: the gathering at the unit of Mr. Neufeld was a properly constituted meeting of the Strata Council. I reject the argument raised on behalf of the Plaintiffs that the failure to have a minuted meeting meant that there was not an appropriate occasion after which Mr. Neufeld should communicate to the owners on behalf of the Strata Council. The failure to produce meeting minutes did not invalidate the meeting of the Strata Council. Even if I am incorrect in coming to the conclusion that there was a meeting of the Strata Council, I am satisfied that the circumstances surrounding this matter are such that Mr. Neufeld as President of the Strata Council had an interest in making the statement that was made.

**62**  In *RTC Engineering Consultants Ltd. v. Ontario (Ministry of the Solicitor General and Correctional Services)* [*(2002), 58 O.R. (3d) 726*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JKPJ-G1VM-00000-00&context=) (Ont. C.A.), Laskin J.A. on behalf of the Court stated:

At the heart of the defence of qualified privilege is the notion of reciprocity or mutuality. A defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. "Interest", however, should not be viewed technically or narrowly. The interest sought to be served may be personal, social, business, financial, or legal. The context is important. The nature of the statement, the circumstances under which it was made, and by whom and to whom it was made are all relevant in determining whether the defence of qualified privilege applies.

(at para. 16)

**63**  In *Adam v. Ward*, [1916-17] All E.R. 157 (H.L.), Lord Atkinson made the following statement:

... the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. (at p. 339)

**64**  The factors to be considered by the Court in deciding if there is qualified privilege was summarized by Williams J.A., as he then was, on behalf of the Court in *Moises v. Canadian Newspaper Co.* [*(1998), 24 B.C.L.R. (3d) 211*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1KJ-00000-00&context=) (C.A.), as follows:

There are a number of factors which a court must consider when deciding whether or not any given occasion is one of qualified privilege. In *Sapiro v. Leader Publishing Co. Ltd.*, [*[1926] 2 W.W.R. 268*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-JS0R-2437-00000-00&context=) at 271, [*20 Sask. L.R. 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-JS0R-2437-00000-00&context=) (Sask. C.A.), Lamont J.A. said:

In determining whether or not it is so privileged, the Judge will consider the alleged libel, who published it, why, and to whom, and under what circumstances. He will also consider the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously volunteered the information, and determine whether or not what has been published was germane and reasonably appropriate to the occasion.

(at para. 19)

**65**  The defence of qualified privilege is available to the members of a Strata Council: *Bird v. York Condominium Corp. No. 340*, [*[2002] O.J. No. 1993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDG1-JGPY-X29V-00000-00&context=) (Ont. S.C.J.), at paras. 57 and 63-68; and *Maragoudakis v. Strata Plan LMS619*, [*[1999] B.C.J. No. 2936*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-234W-00000-00&context=) (S.C.) at paras. 38-39.

**66**  I find that Mr. Neufeld as President of the Strata Council and on behalf of the Strata Council had a duty to communicate to the owners information regarding the following: (a) escalation of the dispute with the Plaintiffs; (b) that the Strata Council had discussed the question; (c) that it was felt necessary to obtain advice of legal counsel and that advice had been obtained; and (d) that the Strata Council found it necessary to prepare and file a "Police Complaint" against the Plaintiffs.

**67**  I am also satisfied that the owners and the Property Manager had a corresponding interest to receive the information set out in the Update. The owners would need to know that legal costs had been incurred, that the time of the members of the Strata Council had been further taken up by matters between some owners and the Plaintiffs and between the Strata Council and the Plaintiffs, and that the owners might be well advised to limit their contact with the Martins.

**68**  Regarding the limits of the duty or interest, Lord Atkinson in *Ward*, *supra*, stated:

... These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

(at p. 173)

**69**  The language used by Mr. Neufeld could have been more precise - the preparation of a "report" as mentioned later in the Update would have been preferable to the use of the words "Police Complaint". However, I cannot conclude that the language which was used was so "violent or excessively strong" so as to disentitle Mr. Neufeld to a qualified privilege which protected his statement.

**70**  In *Hill v. Church of Scientology*, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) (at paras. 45-46), Cory J. set out the two circumstances in which qualified privilege might be lost: (a) where there is actual or express malice, publication from an indirect or ulterior motive that conflicts with the sense the sense of duty or the mutual interest which the occasion created, and the publication in which the defendant spoke dishonestly or in knowing or reckless disregard for the truth; or (b) where the limits of the duty or interest have exceeded anything that is relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege.

**71**  On the issue of malice, Kirkpatrick J.A. for the Court in *Smith v. Cross* [*(2009), 99 B.C.L.R. (4th) 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2FV-00000-00&context=) (C.A.) cited with approval the following speech of Lord Diplock in *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.) at pp. 149-150:

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. ... But despite the imperfection of the mental process by which the belief is arrived at it may still be honest', that is a positive belief that the conclusions they have reached are true. The law demands no more.

**72**  The Plaintiffs have the burden of proving that Mr. Neufeld acted with actual or express malice. I am satisfied that no malice has been established. The role of Mr. Neufeld as the President of the Strata Council is a volunteer position for which he receives no remuneration. Having received the September 28, 2006 email from the Plaintiffs notifying the Strata Council that a police complaint had been filed against Mr. Lavigne and after speaking to Mr. Lavigne about what had occurred on September 28, 2006, Mr. Neufeld was of the honest and reasonable belief that the owners had to be informed of the heightened tensions between the Plaintiffs and Mr. Lavigne, that it had been necessary to expend Strata Corporation funds to discuss the matters with the lawyer for the Strata Corporation, that it would be necessary for Mr. Lavigne to prepare a statement which could then be forwarded to the Vancouver Police Department in answer to what had been forwarded by the Plaintiffs, and that there was reason to believe that owners should avoid contact with the Plaintiffs in order that there would be no further escalation of incidents between the Plaintiffs and members of the Strata Corporation.

**73**  It is clear to me that the dominant motive of Mr. Neufeld was to perform his duties as President of the Strata Corporation, and that no other or no other improper motive has been shown. I find that Mr. Neufeld was acting in accordance with his sense of duty and that there was no desire on his part to injure the Plaintiffs.

**74**  Mr. Neufeld believed what was being stated was true. Mr. Neufeld had an honest belief in what was being published. I find that the Plaintiffs have not met the burden of showing that Mr. Neufeld acted with malice.

**75**  I also find that Mr. Neufeld did not exceed anything that was relevant or pertinent to the discharge of the duty that was imposed upon him as President of the Strata Council. In a fear that was shared by the other members of the Strata Council, Mr. Neufeld was of the honest belief that there might be an escalation of "incidents". In those circumstances, he acted appropriately and within the limits of the duties that were imposed upon him.

**76**  The claim against Mr. Neufeld is dismissed.

**77**  As I am advised by counsel that the provisions of Rule 37B of the *Rules of Court* may apply, I make no order at this time as to the entitlement of Mr. Neufeld to his costs. Counsel will be at liberty to make application in that regard in due course.

G.D. BURNYEAT J.

**End of Document**

[***Moore v. College of Physicians and Surgeons of British Columbia, [2013] B.C.J. No. 2504***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S424-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

J.K. Bracken J.

Heard: February 25-27, 2013.

Judgment: November 18, 2013.

Docket: S118730

Registry: Vancouver

**[2013] B.C.J. No. 2504** | 2013 BCSC 2081 | 235 A.C.W.S. (3d) 578 | 64 Admin. L.R. (5th) 110 | 2013 CarswellBC 3479

Between Alan Moore, Petitioner, and The College of Physicians and Surgeons of British Columbia and The Health Professions Review Board, Respondents

(126 paras.)

**Case Summary**

**Administrative law — Judicial review and statutory appeal — Standard of review — Reasonableness — Patent unreasonableness — Curial deference — Application by physician and College of Physicians and Surgeons for judicial review of decision of Health Professions Review Board that set aside decision of College's Registrar that dismissed complaint of prison inmate about care that he received from physician allowed — Board's decision was patently unreasonable for it failed to take into account statutory provisions regarding Registrar's role in dealing with complaints under Health Professions Act — Board's decision was set aside and Registrar's decision was restored.**

**Health law — Health care professionals — Government of — Registration and licensure — Registrar — Duties — Discipline — Complaint to governing body — Appeal or judicial review — Grounds for overturning decision — Particular professions — Doctors — Application by physician and College of Physicians and Surgeons for judicial review of decision of Health Professions Review Board that set aside decision of College's Registrar that dismissed complaint of prison inmate about care that he received from physician allowed — Board's decision was patently unreasonable for it failed to take into account statutory provisions regarding Registrar's role in dealing with complaints under Health Professions Act — Board's decision was set aside and Registrar's decision was restored.**

**Professional responsibility — Self-governing professions — Governing body — Complaints — Judicial review — Grounds — Failure to follow statutory procedures — Professions — Health care — Doctors — Application by physician and College of Physicians and Surgeons for judicial review of decision of Health Professions Review Board that set aside decision of College's Registrar that dismissed complaint of prison inmate about care that he received from physician allowed — Board's decision was patently unreasonable for it failed to take into account statutory provisions regarding Registrar's role in dealing with complaints under Health Professions Act — Board's decision was set aside and Registrar's decision was restored.**

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| Application by Moore and the College of Physicians and Surgeons for judicial review of a decision of the Health Professions Review Board. The governing legislation was the Health Professions Act. The petitioner Moore was a licenced physician and surgeon in British Columbia. As part of his practice he provided medical care to prisoners at Kent Institution. The complainant Castonguay was a prisoner in the federal institution. The day after he arrived he was seen by Moore. Castonguay had been injured in a motor vehicle accident sometime prior to his incarceration. When Moore first saw him he received methadone daily and he also took a prescription drug called Lyrica. Lyrica was a powerful painkiller that Castonguay used for the back and leg pain that resulted from the accident. Moore renewed both prescriptions at the first visit. The Correctional Service of Canada subsequently issued a policy directive that Lyrica would no longer be available in prison pharmacies except in exceptional circumstances. Moore saw Castonguay two days after the directive was issued and he discontinued the Lyrica prescription. He prescribed alternate pain medications because the Lyrica helped with the leg pain but not with the back pain. Moore saw Castonguay the following year and his notes indicated that the new drugs helped and the dosage of one of the prescriptions was increased. Moore referred Castonguay to a neurologist for further assessment of his back pain. The neurologist restored the Lyrica prescription. Prior to that appointment Castonguay complained to the College that Moore terminated his prescription for Lyrica without medical reason and he did so because of the directive. Moore's response to the College was that his decision was not influenced by the directive. He only discontinued the Lyrica because Castonguay told him that Lyrica was not fully effective to control his pain. The Registrar of the College considered the matter and the College advised Castonguay that it had no specific criticism of the care that Moore provided. Castonguay then requested a review of this decision and the Board made the decision under review that remitted this matter to the College and directed the Registrar to reconsider the matter and to interview Moore.  HELD: Application allowed.  The standard of review of the Board's jurisdiction was patent unreasonableness. The Registrar had sufficient authority to make the finding that the College had no criticism of Moore's conduct. The Board erred when it concluded that the Registrar was without jurisdiction to make the finding that he did. The Board's decision was patently unreasonable in that the Board failed to take into account the statutory provisions respecting the Registrar's role in dealing with complaints under the Act. As a specialized tribunal the Registrar was entitled to deference. The Registrar exercised his discretion not to proceed further with the complaint and he did so because it did not constitute a matter that would be subject to investigation by the inquiry committee under the Act. The complaint also was a serious matter as defined in the Act. Asking Moore the same questions again would not advance matters any further. Not every complaint warranted a full investigation and review and there had to be some confidence in the Registrar to exercise his discretion fairly and properly. The Board's decision was set aside and the Registrar's decision was restored. |

**Statutes, Regulations and Rules Cited:**

Administrative Tribunals Act, [*SBC 2004, CHAPTER 45, s. 58*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5J77-2RG1-FBV7-B44F-00000-00&context=), s. 58(3), s. 58(3)(d)

Health Professions Act, [*RSBC 1996, CHAPTER 183, s. 16(1)*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5R0N-PVC1-FJM6-62HX-00000-00&context=), s. 26, s. 32, s. 32(2), s. 32(3), s. 32(5), s. 33, s. 33(4), s. 33(6), s. 33(6)(b), s. 33(6)(d), s. 34, s. 36(1), s. 37, s. 39(1), s. 39(2), s. 50.51(2), s. 50.53, s. 50.6, s. 50.6(5), s. 50.63, Part 4.2

Health Professions (Regulatory Reform) Amendment Act, 2008,

Health Professions Procedural Code, s. 33(1)

Regulated Health Professions Act, [*S.O. 1991, c. 18, Schedule 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5TMR-9121-FBV7-B2K6-00000-00&context=)

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| **Appeal from:**  On judicial review from: Decision No. 2010-HPA-0108(b) of the Health Professions Review Board, dated October 20, 2011. |

**Counsel**

Counsel for the Petitioner: W. S. Clark.

Counsel for the Respondent College of Physicians and Surgeons of British Columbia: S. A. Hellmann.

Counsel for the Respondent Health Professions Review Board: F.A.V. Falzon, Q.C.

**Reasons for Judgment**

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| **J.K. BRACKEN J.** |

**1**   This is an application for judicial review of a decision of the Health Professions Review Board, (the "Board") remitting the matter to the College and directing the Registrar of the College of Physicians and Surgeons of British Columbia (the "College") to reconsider the matter and to interview Dr. Moore, ("the petitioner"), with directions to determine:

1. How he explains the two different interpretations of the event, i.e., the reason for terminating the Lyrica prescription;
2. How he explains the date of the Lyrica document and, coincidentally, the date of his decision with respect to terminating the prescription two days later;
3. How he explains the Complainant could possibly have known about the Lyrica document if he had not been advised by the registrant;
4. Whether the decision to terminate the Lyrica prescription was influenced by the new complexity, established by the Lyrica document, of being approved only in exceptional circumstances with appropriate justification; and
5. How he explains the discrepancy in dates of the referral to the specialist and who re-prescribed Lyrica.

Dr. Moore and the College submit that the decision of the Board is in error on either the standard of correctness or patent unreasonableness and that it should be set aside and the decision of the Registrar restored.

**Background Facts**

**2**  The facts giving rise to this application are surprisingly simple. The petitioner is a licenced physician and surgeon in British Columbia. As a part of his practice he provides medical care to prisoners at Kent Institution at Agassiz, British Columbia. Christopher Guy Castonguay, (the "complainant") was a prisoner in the federal prison system and was transferred to Kent Institution on March 29, 2008. He was first seen by Dr. Moore on March 30, 2008.

**3**  Mr. Castonguay had been injured in a motor vehicle accident sometime prior to his incarceration. At the time he was first seen by Dr. Moore he was receiving methadone daily, and he was also taking a prescription drug called Lyrica, a powerful painkiller, for back and leg pain resulting from his motor vehicle accident. On the complainant's first visit to Dr. Moore, both prescriptions were renewed.

**4**  On July 16, 2008, the Correctional Service of Canada ("CSC") issued a national directive to physicians engaged in treating prisoners within the federal prison system stating that as a result of problems arising from its abuse CSC would no longer make Lyrica available in prison pharmacies except in exceptional circumstances.

**5**  On July 18, 2008, two days after the directive was issued, the petitioner saw the complainant again. On that visit the petitioner discontinued the Lyrica prescription and instead prescribed alternate pain medications. The petitioner's clinical notes indicate that Lyrica was discontinued because Lyrica was helping with the complainant's leg pain but not with his back pain.

**6**  On May 25, 2009, the petitioner saw the complainant again. The petitioner's clinical notes indicate that the new drugs had helped and the dosage of one of the prescriptions was increased. Two days later, the petitioner referred the complainant to a neurologist for further assessment of persistent back pain. The neurologist restored the prescription for Lyrica and the drug was supplied by CSC, however several months went by when the complainant was without the benefit of Lyrica.

**7**  The complainant met with the neurologist in August of 2009; however, prior to that date he complained to the College that the petitioner had terminated his prescription for Lyrica without medical reason, and alleged that the petitioner discontinued the prescription as a result of the policy directive issued by CSC on July 16, 2008.

**8**  The College requested a response from the petitioner; however, it took him several months to reply. After prompting by the College, the petitioner provided a written response that was received by the College on December 8, 2009. In his response, the petitioner denied his decision to discontinue Lyrica was influenced by the directive from CSC and denied he knew about the directive at the time the prescription was discontinued. He said he discontinued the drug as a result of the complainant's advice that Lyrica was not fully effective to control his pain.

**9**  The matter was considered by the Registrar of the College, and on May 19, 2010, the College wrote to the complainant and advised him that after reviewing the complaint the College had no specific criticism of the care the petitioner had provided.

**10**  In its letter to the complainant the College advised that:

In summary it appears that Mr. Castonguay has had ongoing problems with his back and leg. The exact diagnosis is unclear from reviewing the documents. It appears that he was given Lyrica for a period of time. It was suggested that it had lost its effectiveness and was discontinued. He was subsequently referred back to the neurologist, Dr. Tanha, and the Lyrica was restarted. Dr. Moore, in his letter to the College, stated that the medication was discontinued owing to lack of effectiveness, and not any regulations from the institution.

It is hoped that Mr. Castonguay's circumstances have settled and that he has found this medication effective. Under the circumstances, the College would have no specific criticism of Dr. Moore.

**11**  On July 8, 2010, the complainant requested a review of the College's decision pursuant to s. 50.6 of the *Health Professions Act*, *R.S.B.C. 1996, c. 183* (the "*HPA*").

**Issues**

**12**  These issues arise:

1. On what standard does the Board review decisions of the College of Physicians and Surgeons Inquiry Committee?
2. What is the jurisdiction of the Registrar to investigate and dismiss complaints?
3. What authority does the Board have to direct an Inquiry Committee as to how it conducts its investigation?

**Statutory Authority**

**13**  The Board was established by the *Health Professions (Regulatory Reform) Amendment Act, 2008*, an amendment to the *HPA* that came into force on April 10, 2008. The Board came into existence on December 9, 2008, but the College was not subject to the decisions of the Board until June 1, 2009.

**14**  The *HPA* creates three stages of authority for processing complaints. The first stage is the Registrar of the College who conducts the initial response when a complaint is received by a College. The second stage of the process is the Inquiry Committee and the third and final stage is the Discipline Committee. Each stage has certain defined authority, including the authority to dispose of the complaint without referral to the next stage.

**15**  All complaints are required to be in writing and are first submitted to the Registrar of the College. As required by s. 32(2) of the *HPA*, as soon as possible after receiving a complaint the Registrar must deliver a copy of the complaint along with his assessment and any recommendations he wishes to make to the Inquiry Committee for disposition. However, s. 32(3) of the *HPA* provides that:

Despite subsection (2), the registrar, if authorized by the board, may dismiss a complaint, or request that the registrant act as described in section 36 (1), without reference to the inquiry committee if the registrar determines that the complaint

1. is trivial, frivolous, vexatious, or made in bad faith,
2. does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under section 33 (4), or
3. contains allegations that, if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33 (4).

The Bylaws of the College authorize the Registrar to dismiss complaints pursuant to s. 32(3) and in this case the Registrar chose to use that authority in making the determination that the College had no criticism of the petitioner.

**16**  If the Registrar chooses to refer the complaint to the Inquiry Committee that committee is authorized to act under s. 33 of the *HPA*. It is also authorized under s. 33(4) to conduct an investigation of certain matters on its own, without first receiving a complaint. After consideration of a complaint that is referred to the Inquiry Committee by the Registrar the Inquiry Committee has certain power to deal with the complaint pursuant to s. 33(6) of the *HPA*.

**17**  Section 36 (1) of the *HPA* provides:

36 (1) In relation to a matter investigated under section 33, the inquiry committee may request in writing that the registrant do one or more of the following:

1. undertake not to repeat the conduct to which the matter relates;
2. undertake to take educational courses specified by the inquiry committee;
3. consent to a reprimand;
4. undertake or consent to any other action specified by the inquiry committee.

Thus, in addition to its powers under s. 33(6) of the *HPA*, the Inquiry Committee has the ability to resolve a complaint through a consent undertaking entered into by a registrant. If the registrant refuses to provide the requested undertaking, the Inquiry Committee may issue a citation.

**18**  If a citation is issued the Registrar must comply with s. 37 of the *HPA* to provide certain information to the registrant and to set a date for the hearing of the citation. The *HPA* provides a procedure to be followed by the Discipline Committee in conducting the hearing and s. 39(1) grants the Discipline Committee the authority to dismiss a complaint or make a finding of misconduct.

**19**  In the event a citation results in a finding of misconduct committed by a registrant s. 39(2) of the *HPA* gives the Discipline Committee the authority to do one or more of the following:

1. reprimand the respondent;
2. impose limits or conditions on the respondent's practice of the designated health profession;
3. suspend the respondent's registration;
4. subject to the bylaws, impose limits or conditions on the management of the respondent's practice during the suspension;
5. cancel the respondent's registration;
6. fine the respondent in an amount not exceeding the maximum fine established under section 19(1)(w).

**20**  Part 4.2 of the *HPA* deals with the authority of the Board. Section 50.6(5) of the *HPA* provides that in reviewing dispositions of a Registrar which are considered to be Inquiry Committee determinations, the Board must review for one or both of:

1. the adequacy of the investigation; and
2. the reasonableness of the disposition.

**The Decision of the Board**

**21**  The decision for review in this case is from a substantive review of a decision of the Registrar of the College. The complainant has requested that the Board:

... make a disposition that finds Dr. Moore breached the Canadian Medical Association code of ethics by failing to consider the wellbeing of the patient and failing to resist any influence or interference by knowingly or recklessly denying him the most effective treatment for his condition or, in the alternative, directing the matter back to the College Inquiry Committee for reconsideration upon undertaking a full and adequate investigation into the circumstances of the complaint.

**22**  The review was upon written submissions to a member of the Board. The Board's decision was released on October 20, 2011. The Board concluded that the investigation conducted by the Registrar was inadequate "both substantively and on jurisdictional grounds and that the decision was beyond the jurisdiction of the Registrar".

**23**  The Board directed that the matter be remitted to the College with directions to review the file, to interview the petitioner and to ask him certain specified questions.

**24**  The Board decision first considered the issue of whether the Registrar had jurisdiction to make the finding that the College had no specific criticism of the petitioner. The Board concluded that the Registrar did not have such power; however, subsequent to the issuance of the Board's decision in this case, the Board, sitting as a panel of five concluded that the Registrar does have implicit authority under s. 32(3) of the *HPA* to investigate, evaluate and dismiss a complaint about a matter other than a serious matter: (See Decision No. 2011-HPA-0018(a), January 6, 2012.

**25**  The term "serious matter" is defined in s. 26 of the *Act* to be "... a matter which, if admitted or proven following an investigation under this Part, would ordinarily result in an order being made under section 39 (2) (b) to (e)" which provisions generally involve limits or conditions on registrant's practice or a suspension, cancellation of the registrant's registration, or the imposition of a fine.

**26**  The Board reviewed the record before the College and concluded that there were conflicts between the statement of the complainant and the response of the petitioner. The Board concluded at para. 45 that:

In my view, the College's investigation was inadequate, both substantively and on jurisdictional grounds as this was a Registrar's decision but the nature of the disposition, being represented as a decision of the Inquiry Committee, was clearly beyond the Registrar's jurisdiction.

**The Petitioner's Position**

**27**  The petitioner argues that the decision of the Board is patently unreasonable. He says it fails to properly consider the Registrar's jurisdiction to investigate and resolve complaints and gave directions which cannot possibly add anything to the facts that gave rise to the complaint. He submits that the application for judicial review should be allowed, the decision of the Board set aside, and the decision of the Registrar should be confirmed.

**28**  The College supports the submissions of the petitioner. It argues that the Board has inappropriately conflated the roles of the Inquiry Committee which investigates and "screens" complaints and the Discipline Committee of the College which hears citations alleging professional misconduct or incompetence. It submits that the decision of the Board is patently unreasonable and that the Board erred in finding that the investigation of the College was inadequate because it did not assess issues of credibility and that it also erred in concluding that the College's investigation was beyond the jurisdiction of the Registrar. It further submits that the Board has improperly directed the College to ask the petitioner questions that are outside the scope of his knowledge and, in any event, will not offer any probative information or evidence of value to the investigation.

**29**  The respondents both submit that ss. 32 and 33 of the *HPA* respecting the investigation of complaints by the Registrar and the Inquiry Committee constitute a screening or "streaming" process and are not part of an adjudicative function. Thus no issues of credibility should arise at that stage of the process.

**30**  Section 32(5) provides that if the Registrar determines that the complaint falls under s. 32(3) and the complaint is then dismissed without reference to the Inquiry Committee pursuant to s. 32(2), then pursuant to s. 32(5) the Registrar's determination is nevertheless "considered to be a disposition by the Inquiry Committee".

**31**  The petitioner submits that and adjudicative function is only engaged if the complaint is ultimately referred to the Discipline Committee and the credibility of the registrant or the complainant have no relevance at the initial stages of investigation. He further submits that the College has no power to compel answers to questions unless the matter proceeds to a discipline hearing following the issuance of a citation under s. 37 of the *HPA.*

**32**  The Inquiry Committee has certain powers under s. 33(6) which provides:

After considering any information provided by the registrant, the inquiry committee may

1. take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,
2. in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,
3. act under section 36, or
4. direct the registrar to issue a citation under section 37.

**33**  The petitioner submits that unless the Inquiry Committee elects to act under s. 33(6)(b) to (d) there can be no reason or authority to inquire into the inconsistency between his version of the facts and the version advanced by the complaint.

**34**  If the Inquiry Committee chooses to act under s. 37 and issue a citation, the citation is heard by the Discipline Committee which has the responsibility of hearing citations for professional misconduct or deficiencies in competence to practice medicine.

**35**  The petitioner makes three arguments:

1. That the Board held that the College's failure to resolve credibility issues rendered the investigation inadequate. This conclusion is inconsistent with the statutory scheme and is therefore patently unreasonable.
2. The Board directed the College to reconsider the matter and in doing so dictated the nature of any further investigation. Again, this decision is inconsistent with the overall statutory scheme and is thus patently unreasonable. Further, the questions posed are said to be "preposterous" and not capable of shedding any additional light on the issue related to the complaint.
3. The Board failed to properly consider whether, given the nature of the complaint, the decision was reasonable on its merits. This constitutes a fundamental error of the law in that the Board failed to comply with its governing statute.

**36**  The petitioner also submits the Registrar acted within its jurisdiction in dismissing the complaint under s. 32(3) of the *HPA*. The petitioner submits that the Registrar's role is simply that of a gatekeeper, a role that did not permit the Registrar to assess the facts of the complaint. The Registrar may conduct an evaluation of the complaint or assessment of the complaint to determine if it requires further investigation or action and the petitioner submits that that is exactly what the Registrar did in this case.

**37**  The petitioner submits that the court as part of this judicial review should determine the role of the College when a complaint is made. It submits further that the primary responsibility of investigating complaints rests squarely with the College Registrar and the Inquiry Committee, and the investigation, or parts of the investigation, should not be directed by the Board.

**38**  The petitioner says that both the *HPA* and the bylaws of the College contemplate that complaints which are not considered "serious" may be dealt with in a more or less summary manner; that is, without the issuance of a citation and a discipline hearing. In particular, complaints that fall under s. 32(3) of the *HPA* may be delegated to the Registrar as was done in this case.

**39**  All complaints received by the College, and the petitioner points out that there are a large number of them, are initially received by the Registrar of the College and the Registrar then makes the initial decision as to how best to deal with the complaint.

**40**  The petitioner suggests there are two "streams". The first stream (stream 1) is comprised of those complaints, perhaps the majority, which are assessed by the Registrar and then submitted to the Inquiry Committee together with the recommendation of the Registrar for the disposition of the complaint. The complaints in stream 1 are those that will likely involve further action by the Inquiry Committee pursuant to its powers under s. 33 of the *HPA*. If the Inquiry Committee decides the matter is one requiring further analysis, it may issue a citation and refer the matter to the Disciplinary Committee. (See: Decision No. 2011-HPA-0018(a) at para. 71).

**41**  The second stream (stream 2), are complaints that may be assessed by the Registrar pursuant to s. 32(3) of the *HPA* and may be dismissed without reference to the Inquiry Committee if:

the Registrar determines that the complaint is:

1. trivial, vexatious or made in bad faith,
2. does not contain allegations that if admitted or proven would constitute a matter subject to investigation by the Inquiry Committee under s. 33(4)
3. a complaint initiated on the motion of the Inquiry Committee.

**42**  In this case the Registrar decided to dismiss the complaint. It is not clear from the materials which part of s. 32(3) was relied upon by the Registrar, but there is no suggestion in the material that the Registrar thought the complaint was trivial, vexatious or frivolous. Thus, by a process of elimination, it must have been because the Registrar determined the complaint did not contain allegations that, if admitted or proven, would constitute a matter that would be subject to investigation by the Inquiry Committee under s. 33(4).

**43**  Section 33(4) lists several categories upon which the Inquiry Committee might investigate a registrant of a college. The other alternative is that the complaint was a matter other than a "serious matter" that would be the subject of an investigation by the Inquiry Committee under s. 33(4).

**44**  The petitioner submits that the *HPA* allows the delegation of the investigation and disposition of "less serious" matters to the Registrar. The authority for that conclusion comes from the Board in its five-member panel case, Decision No. 2011-HPA-0018(a) referred to above.

**45**  The petitioner says that in either of the two "streams" under ss. 32 and 33, the College conducts a "screening" process of complaints and not an adjudicative one. Only more serious complaints that are likely to result in the full spectrum of disciplinary remedies must be investigated and determined by the Inquiry Committee and the *HPA* permits the delegation of an investigation to the Registrar of the College.

**46**  In doing so, the legislation acknowledges that the resources of the College are not unlimited: Decision No. 2009-HPA-0034(a) at paras. 57-58; citing *Tahmourpou v. Canada (Solicitor General)*, [*[2005] F.C.J. No. 543*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M4B1-FG68-G3TT-00000-00&context=). Essentially the same point was made in *Farbeh v. College of Pharmacists of British Columbia,* [*2009 BCSC 1120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6254-00000-00&context=) at paras. 19-20.

**47**  At the heart of the petitioner's position is the submission that the College initially conducts a screening function to determine whether the complaint should be placed in one of the two streams; the less serious complaints require something other than a full, comprehensive investigation.

**48**  The petitioner submits that at the investigative or screening stage it is neither necessary nor proper for the College to carry out an extensive process to assess the credibility of the complainant or the petitioner. It is sufficient if the Inquiry Committee conducts a "... meaningful, albeit provisional, assessment of the evidence: Decision No. 2010-HPA-0003(a), at para. 24. Even though the Inquiry Committee can investigate the matter sufficiently to make an initial assessment of the available evidence it cannot adjudicate on matters of credibility.

**49**  The petitioner relies, in part, on *McKee v. Health Professions Appeal and Review Board,* [*[2009] O.J. No. 4112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-JTGH-B4TR-00000-00&context=) (Ont. S.C.J.); [*254 O.A.C. 368*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-JTGH-B4TR-00000-00&context=). In that case, the court considered similar legislation in Ontario that established the *Health Professions Appeal and Review Board*. The complaint was from the mother of an aboriginal patient who had a history of alcohol and drug abuse. He was brought to the emergency room of a hospital with a history of a cough and diarrhea. He was given antibiotics and sent home. Six days later he died. His mother complained that he was treated with contempt and prejudice.

**50**  The complaint was considered by a panel of three members of the Complaints Committee of the College of Physicians and Surgeons. The panel decided to take no further action and it did not find the physician's treatment deficient in any way. There was an allegation that in the course of treating the patient, the physician told him to "go home and continue his lifestyle". The inference was that the comment was a sarcastic reference to the patient's use of drugs and alcohol.

**51**  The matter was referred to the Review Board and it decided that the investigation conducted by the panel was inadequate and referred the matter back to the panel for further investigation. Specifically, the Review Board criticized the physician's written response to the complaint and directed the panel to investigate further with respect to his credibility. The physician sought a judicial review.

**52**  At paras. 32-36 of its decision the three judge panel of the court said:

[32] The difficulty with the Board's decision is that having apparently appreciated that it owed deference in its review of the Committee's decision, the Board failed to extend it. The question the Board ought to have asked is whether the Committee exercised its investigative discretion reasonably having regard to the Committee's function as a screening process to determine how and in what manner the particular complaint should be dealt with.

[33] As is apparent from the powers conferred on the Complaints Committee under the Code, the nature of complaints that arise and which are to be screened by the Committee is wide ranging and includes issues of incapacity, incompetence, ***negligence*** and moral turpitude as well as allegations of unprofessional conduct of an attitudinal nature as was the case in this complaint.

[34] The question as to the adequacy of investigation that was properly before the Board was whether the investigation undertaken was reasonable in the circumstances.

[35] What the Board did was to make its own assessment of the complaint and then criticize the Committee's investigation for its failure to interview witnesses that the Board thought appropriate in order to arrive at "... a determination of the credibility both of [the complainant] and [Dr. McKee]. ..." (emphasis added)

[36] Here the Board appears to misconstrue the Complaints Committee's role. It is not an adjudicative tribunal. It cannot arrive at findings of fact. It is not the role of the Complaints Committee to determine credibility. To repeat, the Committee serves a screening function to determine whether a complaint should proceed to the adjudicative tribunal (the discipline committee of the College) or elsewhere, and although it may investigate, it has no power to compel testimony.

**53**  Similarly, this court in *Farbeh* commented on the role of the Inquiry Committee at paras. 19-20 and said that it served largely in an "investigative and screening" role. The Ontario Appeal and Review Board made the same point in *Muracura v. Deonandan,* unreported, File Nos. 8616 and 8619, June 6, 2007 (Ont. HPARB) at para. 25, as cited in Decision No. 2009-HPA-0034(a), at para 72:

When presented with conflicting information based on personal recollections, or when credibility is questioned, the Committee is not required to carry out an exhaustive fact-finding process to assess the truthfulness of one version of events over another. Our function, as a review body is to review the Committee's decisions to determine if those decisions are supported by information in the record of investigation and if they can withstand somewhat of a probing inquiry.

**54**  Here, the petitioner argues that the Registrar and Inquiry Committee conducted a proper investigation of the complaint even though he was not personally interviewed. He submits that the Board's direction that he be interviewed and asked certain questions related to conflicts between the assertions of the complainant and the response of the petitioner "... imparts a standard of perfection in the investigation of relatively minor matters; as part of the investigation into routine complaints (that almost certainly would never result in a finding of professional misconduct ..."

**55**  The petitioner submits that the Registrar obtained a response from the petitioner, reviewed his clinical notes and considered the material received from and on behalf of the complainant before reaching his decision. The petitioner says that the investigation conducted by the Registrar was sufficient to carry out his mandate and did contain sufficient information to support the decision of the Registrar. In all of the circumstances he says the Registrar reached a proper and reasonable conclusion. He submits that, as in *McKee,* the Board owed deference to the Registrar and it should have concluded the decision of the Registrar was reasonable. The petitioner and the College submit the decision of the Board should be set aside and the decision of the Registrar restored.

**The Submissions of the Board**

**56**  The Board submits that its decision in this case is not patently unreasonable, nor was it an unreasonable exercise of judgment and discretion.

**57**  The Board notes that pursuant to the *HPA* only the complainant can apply for a review pursuant to s. 50.6; not a registrant. The Board says that provision demonstrates that the purpose of the Review Board is to increase accountability to the public.

**58**  The Review Board was created as part of a broad initiative that resulted in amendments to the *HPA*. The purpose of the amendments is to ensure the sustainability of the health care system and to enhance the transparency and accountability of self-governing health professions.

**59**  The creation of the Board constituted a significant change to self-governing health professions. It established a system of oversight to bodies that had previously been abiding by their own policies and bylaws, and in some cases their own statute.

**60**  Under s. 50.53 of the *HPA*, the Board has authority to review three types of decisions made by the colleges. First, with some exceptions, it can review a decision made by a college not to allow an individual professional to register as a member or registrant of that college. Second, it can review the length of time a college's inquiry committee has taken to review a complaint against a college registrant. In appropriate cases, it can take over the investigation if it considers that to be necessary. Third, it can review the process and outcome of a college's investigation of a complaint if that complaint was dismissed without referral to a disciplinary hearing. The Board can also develop guidelines and recommendations for colleges to ensure registration, inquiry and discipline procedures are "transparent, objective, impartial and fair".

**61**  Prior to the creation of the Board, an investigation conducted by the college of one of the health professions was without oversight other than by the court. If a complaint was dismissed by the college at a stage prior to a discipline hearing, the complainant's only review was to the college's board: see *Health Professions Act*, [*R.S.B.C. 1996, c. 183, s. 34*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FP1-JKHB-60M9-00000-00&context=) (prior to the amendments). If a complaint was referred to a discipline committee, only the college and the registrant were parties to the proceeding with a right to a review by way of judicial review to the British Columbia Supreme Court. That is still the case under the *HPA* if a discipline hearing is conducted. The only role of the complainant at a discipline hearing is as a witness.

**62**  Unlike appeals to the court by way of a judicial review, the complainant is a party to the proceedings at the Board (Review Board Decision No. 2009-HPA-0027(a), at para. 31). Under the *HPA* the Board has authority to review decisions respecting complaints that were dealt with in a manner other than by way of a full disciplinary hearing.

**63**  The Board has jurisdiction over all 22 health profession colleges that are governed by the *HPA*. Through its jurisdiction the Board seeks to ensure consistent and fair procedures and that all actions taken by colleges are transparent and reviewable.

**64**  The provisions of the *HPA* ensure that the Board is independent of government and the governing bodies of the health professions. No member of the Board may be a registrant of a college that is subject to the Board's jurisdiction, or be a member of a self-regulating health professions body of another jurisdiction. The chair of the Board must be a member or former member of the Law Society (*HPA*, s. 50.51(2)).

**65**  The *HPA* adopts many provisions of the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45*, respecting its administration and procedure. Thus, it has the power to make its own rules and to compel witnesses and make evidentiary rulings. The *HPA* also contains a privative clause and by reference incorporates s. 58 of the *Administrative Tribunals Act* that directs a reviewing court to apply the standard of patent unreasonableness to most of its decisions.

**66**  Thus the purpose of the Board is to make colleges more accountable to the public for its decisions and to give the complainant a more active role in the process, as well as to create transparent, consistent and fair procedures across all of the health colleges.

**Standing of the Board on Judicial Review**

**67**  The first submission of the Board relates to the role of the Board in judicial review proceedings. The leading authority on this point is *Northwestern Utilities Ltd. v. Edmonton,* [*[1979] 1 S.C.R. 684*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-2550-00000-00&context=). In that case the court concluded that it was not proper for the Board to "justify its action" or to debate the correctness of its decision at the hearing of an appeal; it had that opportunity in its reasons for its decision. See also: *Canada Labour Relations Board v. Transair Ltd.*, [*[1977] 1 S.C.R. 722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24RP-00000-00&context=) at paras. 746-747.

**68**  Counsel for the Board argued that recent decisions of our Court of Appeal have held that where there is no proper adversary appearing at a hearing, it is not improper for the Board to argue to other side: *Lang v. Superintendent of Motor Vehicles,* [*2005 BCCA 244*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0NB-00000-00&context=) at paras. 53-54. In *Timberwolf Log Trading Ltd. v. British Columbia (Commissioner Appointed pursuant to s. 142.11 of the Forest Act),* [*2011 BCCA 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G32V-00000-00&context=), at para. 11, Hinkson J.A. (as he then was) said:

Three exceptions to the rule in *Northwestern Utilities* are described by Frank A.V. Falzon, Q.C. in *Tribunal Standing on Judicial Review,* 21 Can. J. Admin. L. & Prac. 21 as "encroachments" arising:

1. where the question is whether the tribunal has made a patently unreasonable interpretation of a statutory right to be heard;
2. where the tribunal is defending a long standing policy; and
3. where there is no one else to argue the other side.

**69**  In *CAIMAW v. Paccar of Canada Ltd.*, [*[1989] 2 S.C.R. 983*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6525-00000-00&context=), La Forest J. cited approval a passage from the reasons for judgment of Taggart J.A. in *British Columbia Government Employees' Union v. Industrial Relations Council* [*(1988), 26 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-60MC-00000-00&context=) at 153, [*32 Admin L.R. 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-60MC-00000-00&context=) (C.A.):

The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them. [emphasis added by Donald J.A.]

**70**  In *Lang*, Donald J.A. commented at para. 54:

When read closely, the passage adopted by La Forest J. does not in my view provide the tribunal a broad opportunity to argue the merits. The matters before the adjudicator, breathalyzer analysis and refusing a breath sample demand, are hardly unfamiliar to the regular courts and so it will seldom be necessary for the tribunal to expose some arcane or esoteric feature of the case in order to understand why it arrived at its decision. While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed. It will be up to the judgment of the reviewing judge in each case to determine if the tribunal, or the Attorney General on its behalf, has gone too far.

**71**  In *Henthorne v. British Columbia Ferry Services Inc.*, [*2011 BCCA 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22HM-00000-00&context=), the court considered the authorities on this point. It noted that the principle that emerged from *Northwestern Utilities* has been somewhat softened recently as a result of the decision of LaForest J. (with Dickson C.J.C. and L'Heureux-Dubé J.) in *CAIMAW v. Paccar* referred to above.

**72**  Newbury J.A. referred to *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [*75 O.R. (3d) 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B31N-00000-00&context=). In that case the court took a more flexible approach to the issue of the standing of the tribunal at a judicial review hearing. At para. 36 she said:

Mr. Justice Goudge for the Court in *Children's Lawyer* outlined some factors that should guide courts in the exercise of their discretion, including the nature of the problem, the purpose of the legislation, the tribunal's expertise, and the availability of another party to respond to the attacks on the tribunal's decision. (Para. 43.) Most important were the need for a "fully informed adjudication of the issues before the Court" and maintaining the impartiality (and one might add, the appearance of impartiality) of the tribunal. The Court agreed with Professor David J. Mullan (*Essentials of Canadian Law: Administrative Law* (2001)) that the former objective will often prevail where the matter in issue involves factors "peculiarly within the decision maker's knowledge or expertise", where the tribunal "wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent" or where its decision is unlikely to be presented adequately by the losing party or some other party such as the Attorney General. (Mullan at 459, quoted at para. 37 of *Children's Lawyer*.) Goudge J.A. continued at para 44:

The last of these factors will undoubtedly loom largest where the judicial review application would otherwise be completely unopposed. In such a case, the concern to ensure fully informed adjudication is at its highest, the more so where the case arises in a specialized and complex legislative or administrative context. If the standing of the tribunal is significantly curtailed, the court may properly be concerned that something of importance will not be brought to its attention, given the unfamiliarity of the particular context, something that would not be so in hearing an appeal from a lower court. In such circumstances the desirability of fully informed adjudication may well be the governing consideration.

**73**  Newbury J.A. went on to thoroughly discuss the recent authorities respecting standing and whether the principles of *Northwestern Utilities* are still current in British Columbia. At para. 41 she concluded:

In the meantime, the authorities in this province are in my opinion clearly in favour of applying *Northwestern Utilities*, subject to some exceptions (or "encroachments") arising from *Paccar.* But even if a more nuanced 'balancing' approach like that suggested in *Children's Lawyer* were to be mandated in British Columbia, that approach would not in my view militate in favour of permitting WCAT to make the submissions it has in the case at bar.

**74**  It is clear from *Henthorne* that the approach of Goudge J.A. in the *Ontario Children's* case has not been fully embraced in British Columbia. The Board will be afforded more latitude to participate fully where there are allegations of jurisdictional error or in the choice of the appropriate standard of review. However, where the matter is clearly a private matter between, for example, Mr. Henthorne and his employer, or where there is no public law principle at stake there will be a more restrictive approach.

**75**  In this case, the Board emphasized the fact that without its participation, there is no one to oppose the relief sought by the petitioner. However, counsel for the Board also submitted that there are other policy reasons that have significant implications beyond the facts of this case. He submits the import of this case includes the proper interpretation of the *HPA,* the proper role of decision-makers within the various colleges in interpreting what counsel referred to, correctly in my view, as "deceptively complex legislation."

**76**  The Board also argued that this is not a case where the review is simply to determine whether the tribunal was correct in its decision. Rather, the Board seeks to make submissions as to why its decision was "within the scope of rational options" available. The Board says the issue is the proper institutional relationship between it and the court. It does not take a strong adverse position to the petitioner or the College, but rather to submit that the decision of the Board was within its exclusive jurisdiction and to make submissions as to why its decision is not patently unreasonable.

**77**  Given the absence of the complainant or any other party to oppose the relief sought by the petitioner, it is my view that it is appropriate in this case for the Board to fully participate in this review. Partly, I base my decision on the absence of any serious opposition to the right of the Board to make submissions by either the petitioner or the College; however, issues related to the role of the *HPA* in reviewing decisions from the colleges governed by the *HPA* are significant issues that deserve examination with the assistance of full argument by counsel.

**78**  Based upon my review of the authorities, it is my view that in this case, there is an issue that raises the proper interpretation of the *HPA,* in particular the jurisdiction of the Board in reviewing decisions of a College, or the role of participants within the legislative scheme, the court should have the benefit of the most complete submissions available. While counsel for the Board may arguably have crossed the "blurry line" referred to by Donald J.A. in *Lang v. British Columbia (Superintendent of Motor Vehicles),* [*2005 BCCA 244*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0NB-00000-00&context=) at para. 54, his submission focusses largely on the Board's jurisdiction. Therefore, I conclude that in the circumstances of this case the Board should be granted the right of full participation upon the judicial review.

**79**  Counsel for the Board objects to the admission of the petitioner's affidavit sworn January 27, 2012 and filed in support of the petition. The objection is based upon the principle in *Spencer v. British Columbia (Superintendent of Motor Vehicles),* [*2011 BCSC 1311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B5-00000-00&context=), that the review must be conducted on the record before the tribunal and the court must not conduct its own investigation of the facts. While I accept that principle, the affidavit of the petitioner is simply a statement of the facts supporting the petition and it does not contain any significant new material. Nevertheless, I confirm that the review is properly conducted only on the record as it was before the Board and not on any new material designed to reinforce the position of the petitioner.

**80**  As a starting point, the Board submits that the issue before the College was that the petitioner had breached an ethical duty by terminating a medication the patient required. It submits that the complaint was that the prescription was terminated for reasons unrelated to the patient's health. Thus, the Board says that the complaint involved an allegation of a breach of medical ethics that was never addressed by the College. The Board submits that as it is not able to inquire into the facts, the matter was sent back to the College with the direction to conduct the appropriate inquiry.

**81**  In its decision the Board commented on that fact that it took the petitioner a long time to respond to correspondence about the complaint from the College, which created the appearance that the petitioner did not take the matter seriously. It also noted that when the petitioner did respond he said that the change in medication was because Lyrica was not effective for all of the pain the complainant was experiencing.

**82**  The petitioner's clinical notes indicate that other medications were tried and the complainant was referred to a specialist. After seeing the specialist the Lyrica was restarted. In his notes of July 18, 2008 the petitioner wrote "Lyrica helps (with) leg pain but not back pain..." and an alternate drug, Arthrotec, was prescribed instead.

**83**  The Board formed the view that there was a credibility issue between the complainant and the petitioner that should have been explored in more detail. It questioned how the complainant knew of the policy not to prescribe Lyrica if the petitioner did not tell him and directed the College to make further inquiries. The Board says this is part of the Board's obligation to ensure there is an adequate investigation and it decision should not be interfered with unless it is clearly beyond reason.

**84**  The Board acknowledges that the complainant is not entitled to a perfect investigation but he is entitled to an adequate investigation: Decision No. 2009-HPA-0034(a) at para. 59. While the extent of the investigation will vary depending on the nature of the complaint, the Board concluded that the College should have taken steps to try and explain the conflict between the complainant's version of events and the petitioner's version. The Board concluded that in this case the College simply accepted the statement of the petitioner and rejected that of the complainant. In those circumstances, the Board decided that the investigation conducted by the College was not adequate and that therefore the conclusion reached by the College was not reasonable: Decision No. 2010-HPA-0108(b) para. 43.

**85**  The Board points to the existence of a privative clause in the legislation and argues that the Board is therefore entitled to the highest level of deference. The Board emphasizes its responsibility to "serve and protect the public, and to exercise its powers and discharge its responsibilities under all enactments in the public interest". (*HPA* s. 16(1)).

**86**  In particular, the Board notes the role of a complainant is limited in judicial review of decisions of professional associations or colleges as related to the health professions: *Emerman v. Assn. Of Professional Engineers and Geoscientists of British Columbia,* [*[2008] B.C.J. No. 1663*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M3BC-00000-00&context=) (S.C.).

**87**  The Board clearly considers that it has a strong mandate under the *HPA*. For example, in Decision No. 2009-HPA-0027(a), a case involving the College of Registered Nurses of British Columbia, after a review of the *HPA*, the Board held at para. 36:

A close reading of ss. 36 and 37.1 makes clear that many of the dispositions the Legislature has decided to open up to challenge by a complainant are dispositions arrived at after discussion and negotiation between the college and the registrant. The remedies open to the Review Board on a review of any of these dispositions include directing the inquiry committee to make any order that could have been made by the inquiry committee in the matter, which includes the issuance of a citation. The legislative interests at play here are clearly transparency and accountability.

**88**  Thus, it is submitted that the legislature has created a dedicated administrative tribunal as a specialized forum in which complainants can seek review and reconsideration of college investigations and dispositions, including decisions of a college registrar not to pursue a complaint. By s. 50.6(5) of the *HPA* the Board must consider "the adequacy of the investigation conducted respecting the complaint and the reasonableness of the disposition".

**89**  Counsel for the Board notes that its structure is such that it is an independent tribunal in that a registrant or member of any body that regulates health professions cannot sit on the Board. Its expertise is acknowledged by the existence of a privative clause granting the Board exclusive jurisdiction and by s. 58 of the *Administrative Tribunals Act*, *S.B.C. 2004, c. 45*; *HPA*, s. 50.63.

**90**  The Board argues that it is an expert, specialized forum entitled to exercise judgment and to issue meaningful remedies arising from its authority under the *HPA*.

**Standard of Review**

**91**  Counsel for all parties to this review submit that the proper standard of review is patent unreasonableness. As the jurisdiction of the Board is arguably at the root of this case, the correctness standard also seems applicable. It seems to me that either standard has some application; however, I find that the standard of review is patent unreasonableness and I adopt that standard of review in my analysis.

**92**  It is useful to set out s. 58 of the Administrative Tribunals Act:

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

1. In a judicial review proceeding relating to expert tribunals under subsection (1)
2. a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
3. questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
4. for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
5. For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
6. is exercised arbitrarily or in bad faith,
7. is exercised for an improper purpose,
8. is based entirely or predominantly on irrelevant factors, or
9. fails to take statutory requirements into account.

**93**  The situation here is unusual in that the Board has exclusive jurisdiction under s. 50.63 of the *HPA* to review decisions of another tribunal with expertise in interpreting and applying its home statute. Pursuant to s. 58 of the *Administrative Tribunals Act,* the court must accord a high level of deference to the Board. The question is how much, if any, deference is owed by the Board to the College?

**94**  The Board argues that the Legislature, through the *HPA,* has established an autonomous Board of specialized decision-makers with the intention that the Board will develop its own jurisprudence to promote finality and to avoid unnecessary costs and delay "by those who may be able to afford the delay and fund litigation". The essence of the Board's submission is that the Board, as an appellate tribunal, is the body chosen by the Legislature to make decisions such as the one under review and unless its decision is patently unreasonable the principles of curial deference should prevent the court from interfering.

**95**  The expression curial deference was explained in *Health Sciences Association of British Columbia v. British Columbia (Industrial Relations Council),* [*[1992] B.C.J. No 1113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M0W6-00000-00&context=) (C.A.) in this way:

The term "curial deference" is a way of expressing the notion that when the Legislature sets up a specialized tribunal, invests it with broad powers and incorporates a privative clause into the enabling statute, it is telling the courts that it intends the tribunal to have the right, because it understands the subject-matter better than do judges, to make decisions which the judges might think to be wrong decisions.

To put it another way, where, by the terms of its legislation, the Legislature requires curial deference, the courts are bound, where no constitutional question arises, to obey the Legislature and not subvert its intention.

**96**  The patently reasonable standard of review has not been altered by the reasonableness test in *Dunsmuir v. New Brunswick,* [*2008 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BH-00000-00&context=) and *Manz v. British Columbia (Workers Compensation Appeal Tribunal)*, [*2009 BCCA 92*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X0-00000-00&context=). The same point was made in *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung,* [*2011 BCCA 527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22WM-00000-00&context=).

**97**  In *Mitchell v. British Columbia (Worker's Compensation Board,* [*2012 BCSC 986*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24N9-00000-00&context=), at paras. 9-10, Wedge J. said:

The scope of judicial review on the standard of patent unreasonableness as mandated by s. 58(2)(a) of the *ATA* has not been altered by recent changes in the common law. That was made clear by our Court of Appeal in *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, [*2011 BCCA 527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22WM-00000-00&context=). The term "patently unreasonable" has been described in the authorities to mean "clearly, evidently, and openly unreasonable or irrational."

A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not. A court on review cannot weigh or reweigh the evidence before the tribunal: *Speckling v. Workers' Compensation Board*, [*2003 BCSC 1487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B04X-00000-00&context=). Further, the review test must be applied to the result of the decision and not to the reasoning which led to it. In other words, a decision will not be disturbed simply because of defects in the tribunal's reasoning; *Kovach v. British Columbia (Workers' Compensation Board)*, [*[2000] 1 S.C.R. 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M442-00000-00&context=).

**98**  As noted in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* [*2007 SCC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18R-00000-00&context=) at para. 101, there rarely is a single "right" answer to the questions under review and the court must be careful not to find unreasonableness or, in this case, patent unreasonableness, simply because the court disagrees with the conclusion of the Board.

**The Registrar's Jurisdiction**

**99**  The jurisdictional issue arises from an earlier decision of the Board which held the Registrar did not have the authority to dismiss a complaint except upon one of the grounds set out in s. 32(3) of the *HPA* on the basis that the complaint is:

1. is trivial, frivolous, vexatious, or made in bad faith,
2. does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under section 33 (4), or
3. contains allegations that, if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33 (4).

**100**  In Decision No. 2009-HPA-0045(a), the Board held that only the Inquiry Committee of the College could make a determination that a registrant's conduct or competence was satisfactory. As the Registrar made a determination in this case that the College had "no criticism" of the petitioner, the Board, in reliance on its earlier decision, held that the Registrar's determination amounted to a finding under s. 33(6)(a) of the *HPA* that the petitioner's conduct was satisfactory. The Board held the Registrar had no jurisdiction to make that determination as it was within the authority of the Inquiry Committee and not the Registrar.

**101**  However, in a later decision, released subsequent to the Board's decision in this case, the Board, sitting as a panel of 5 members, decided that there were "... no constraints on the reasons the Registrar may give for the dismissal of a complaint including that the conduct or competence of a registrant was satisfactory": Decision No. 2011-HPA-0018(a), at para. 71.

**102**  Given that decision, I am satisfied that the Registrar did have sufficient authority to make the finding that the College had no criticism of the petitioner's conduct and that the Board was in error in concluding the Registrar was without jurisdiction to make the finding he did.

**103**  Leaving the issue of the Registrar's jurisdiction aside, it appears the central concern of the Board related to the adequacy of the investigation and the Board focussed primarily on the apparent discrepancy between the petitioner's explanation that the change in medication was because Lyrica was not effective, and the complainant's assertion that the decision was made as a result of the CSC directive that Lyrica would no longer be available through CSC pharmacies except in exceptional circumstances.

**The Jurisdiction of the Board to Direct an Inquiry Committee on the Conduct of its Investigation**

**104**  The *HPA* requires the Board to determine whether or not the investigation conducted by the College was adequate and whether the disposition was reasonable.

**105**  The adequacy of any investigation must be considered relative to the matter being investigated. What might be inadequate in one case might be adequate in another. By way of a simple example a serious complaint about a physician might result in an admission by the physician of misconduct after very little investigation. Even though the investigation amounted to nothing more than drawing the complaint to the physician's attention and requesting a response, that is all that was required for an adequate investigation in that context. Conversely, an extensive investigation into a complaint might be considered inadequate where one line of inquiry was ignored or not properly pursued.

**106**  Thus, the nature of the complaint will inform the extent of the investigation required. Where the complaint is of a minor or trivial nature it may not be necessary in each case to conduct an extensive investigation.

**107**  Here, the complaint is cast in the frame of a violation of medical ethics by the petitioner. In that context, it is a serious matter worthy of a serious investigation. However, reduced to simple terms, and assuming the allegations made by the complainant are true; it amounts to a physician substituting one medication for another because he knew it was not available to the complainant within the prison. When the complainant sought a referral to a specialist, the petitioner made the referral and the original medication was subsequently supplied. Rather than an issue of a serious breach of medical ethics, it can easily be cast as a practical decision of the kind physicians make on a frequent basis where a particular medication or procedure is not available through the funding model available to the patient.

**108**  The Board seems to suspect that the petitioner was not honest in his response. However, the physician's notes reflect his response and he denied being influenced by the CSC directive. The petitioner recorded in his notes the day he saw the complainant that Lyrica helped with leg pain but not back pain.

**109**  The Board also questioned how the complainant could have known about the directive if the petitioner did not tell him. It is not clear to me how the petitioner could assist with the answer to that question, given his clear statement that he was not aware of the directive at the time he changed the complainant's medication. In addition, it is not beyond possibility that the CSC directive affected other prisoners who had been prescribed Lyrica and the matter may well have been a topic of discussion among inmates.

**110**  In response to the submission of the College that it has no power to compel the petitioner to respond to the questions directed to the College in this case, counsel for the Board suggests that the College make an attempt to question the petitioner as he may be willing to respond. With respect, it does not seem likely the petitioner would suddenly change his version of events or be able to assist with any other means of knowledge about the CSC directive the complainant may have had.

**111**  The petitioner and the College rely on *McKee v. Health Professions Appeal and Review Board*, *supra,* a case with a similar fact pattern to this case. The relevant Ontario legislation is almost identical to the equivalent provision of the *HPA*. The issues for consideration under the *HPA* are the same as in s. 33 (1) of the *Health Professions Procedural Code, Schedule 2 of the Regulated Health Professions Act,* [*S.O. 1991, c. 18*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W07-7G21-K0HK-245G-00000-00&context=) which says:

**33.** (1) In a review, the Board shall consider either or both of,

1. the adequacy of the investigation conducted; or
2. the reasonableness of the decision.

**112**  In this case, it is accepted that the standard of patent unreasonableness applies to a review of the Board's decision. Pursuant to s. 58(3) of the *Administrative Tribunals Act,* a discretionary decision is patently unreasonable if it fails to take statutory requirements into account, s. 58(3)(d).

**113**  It is my conclusion that the Board's decision in this case is patently unreasonable in that it failed to take into account the statutory provisions respecting the Registrar's role in dealing with complaints pursuant to s. 32(3) of the *HPA.*

**114**  As a specialized tribunal, the Registrar was entitled to deference. The *HPA* gives the Registrar discretion to dismiss a complaint if the complaint:

...

1. does not contain allegations that, if admitted or proven, would constitute a matter subject to investigation by the inquiry committee under section 33 (4), or
2. contains allegations that, if admitted or proven, would constitute a matter, other than a serious matter, subject to investigation by the inquiry committee under section 33 (4).

**115**  The Registrar exercised his discretion not to proceed further with the complaint and it is apparent he did so on the basis that it did not constitute a matter that would be the subject to investigation by the inquiry committee under s. 33(4) of the *HPA,* or that it contained allegations that would not constitute a serious matter as defined in s. 26 of the *HPA*.

**116**  The petitioner provided his version of the events leading to the complaint and he supplied his clinical notes. Pharmaceutical records respecting medications for the complainant were also supplied. The Registrar considered the nature of the complaint and the views of the complainant and exercised his discretion not to proceed further. I cannot see how asking the same questions again will advance matters any further.

**117**  There can be no doubt that the objects of protection of the public interest and promoting transparency are fundamental to the establishment of the Board. But not every complaint warrants a full investigation and review and there must be some confidence in the Registrar to exercise his discretion fairly and properly. In this case, the Board formed the view that the petitioner was somehow less than forthright in his response to the Registrar and it sought a further explanation from the petitioner on how the complainant came to know about the CSC directive. In my view, by doing so, it simply substituted its discretion for that of Registrar.

**118**  It is difficult to apply the patently unreasonable standard of review as the standard is clearly intended to grant a broad jurisdiction to the Tribunal. Nevertheless, it not an unlimited jurisdiction and the Board must accept the deference it owes to specialized tribunals in the exercise of the tribunals discretion.

**119**  The Board must approach its review with the context of the complaint at issue in mind. The College does not have unlimited resources available to process complaints. Thus, it must use its resources wisely when it makes its initial assessment. Some complaints will be easily categorized as serious and put into the proper "stream" to be dealt with by the Inquiry Committee or Discipline Committee. Others will fall at the opposite end of the spectrum and will require little more than a fair assessment of a registrant's response to the complaint to dispose of it.

**120**  It does not necessarily follow that simply because a complaint is disposed of in a summary way that the process warrants intervention by the Board. This is so even where there is a conflict between the complainant's statement and the response of the registrant. The nature of the complaint process will frequently result in conflicting versions of events and not all of them can be fully investigated and resolved.

**121**  The Board must defer to the College in cases where the investigation, given the context of the complaint and the disposition of the College fall within a range of outcomes that are reasonable and rational. The Board must intervene where there is either no investigation or only a cursory investigation that is inconsistent with the nature of the complaint, or where even though there has been a proper, full investigation the disposition of the College is unreasonable.

**Conclusion**

**122**  The Registrar of the College had jurisdiction to conduct an investigation and to dispose of the complaint by a finding that the College had "no criticism" of the petitioner and that determination was effective as a dismissal of the complaint by the Registrar.

**123**  There was no reason for the Registrar to resolve issues of conflict between the petitioner's version of events and the version of the complainant. There is no purpose to be served in seeking answers from the petitioner as to how the complainant came to know of the CSC directive. There was no useful purpose in the College conducting an interview with the petitioner to explain the conflict between the complainant's version of events and his own. There is no jurisdiction for the College to compel answers to such questions unless a citation is issued against the petitioner by the College.

**124**  The decision of the Board fails to respect the jurisdiction granted to the Registrar and the Inquiry Committee to assess and dispose of complaints in a reasonable manner after an adequate investigation has been conducted by the College. The decision of the Board is therefore patently unreasonable and must be set aside.

**125**  The petition is allowed, the decision of the Board is set aside and the decision of the Registrar restored.

**126**  Costs may be spoken to if necessary.

J.K. BRACKEN J.

**End of Document**

[***Nolting Estate v. Interior Health Authority (c.o.b. Vernon Jubilee Hospital), [2016] B.C.J. No. 1601***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KD1-W4V1-JC5P-G3DN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Master G. Taylor

Heard: June 20 and 24, 2016.

Judgment: July 27, 2016.

Docket: S152535

Registry: Vancouver

**[2016] B.C.J. No. 1601** | 2016 BCSC 1392

Between Shannon Nolting, Executor of the Estate of Eric Shanon Nolting, Deceased, Plaintiff, and Interior Health Authority operating as Vernon Jubilee Hospital, North Okanagan Medical Clinic, Dr. Dennis F. Waechter, Dr. Robert Prokopetz, Jane Doe 1, Jane Doe 2, John Doe 1, John Doe 2, Defendants

(54 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Adding or substituting — Necessary or proper — Third party procedure — Availability — Pleadings — Amendment of — Statement of claim — To alter or add to claim for relief — Application by plaintiff for leave to amend notice of civil claim to add two doctors as defendants and another head of damage, being loss of life insurance and benefits, allowed — Application by defendant Interior Health Authority for leave to file third party notice against same doctors allowed — Deceased died from cancer in 2012 — Two doctors each saw deceased once in 2007 regarding mole — No bar to proposed amendments by plaintiff — Granting leave to Health Authority to file third party proceedings was just and convenient, since limitation date for contribution and indemnity had not yet passed — Supreme Court Civil Rules, Rules 3-5(1)(a), 6-2(7)(b), 6-2(7)(c).**

**Health law — Health care professionals — Particular professions — Doctors — Practice and procedure — Parties — Pleadings — Application by plaintiff for leave to amend notice of civil claim to add two doctors as defendants and another head of damage, being loss of life insurance and benefits, allowed — Application by defendant Interior Health Authority for leave to file third party notice against same doctors allowed — Deceased died from cancer in 2012 — Two doctors each saw deceased once in 2007 regarding mole — No bar to proposed amendments by plaintiff — Granting leave to Health Authority to file third party proceedings was just and convenient, since limitation date for contribution and indemnity had not yet passed — Supreme Court Civil Rules, Rules 3-5(1)(a), 6-2(7)(b), 6-2(7)(c).**

**Professional responsibility — Self-governing professions — Liability — Contribution — Professions — Health care — Doctors — Application by plaintiff for leave to amend notice of civil claim to add two doctors as defendants and another head of damage, being loss of life insurance and benefits, allowed — Application by defendant Interior Health Authority for leave to file third party notice against same doctors allowed — Deceased died from cancer in 2012 — Two doctors each saw deceased once in 2007 regarding mole — No bar to proposed amendments by plaintiff — Granting leave to Health Authority to file third party proceedings was just and convenient, since limitation date for contribution and indemnity had not yet passed — Supreme Court Civil Rules, Rules 3-5(1)(a), 6-2(7)(b), 6-2(7)(c).**

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| Application by the plaintiff for leave to amend her notice of civil claim to add two doctors as defendants and another head of damage, being loss of life insurance and benefits. Application by the defendant Interior Health Authority for leave to file a third party notice against the same two doctors as third parties. The plaintiff's action was a Family Compensation Act claim by the deceased's wife and children. In 2007, the deceased had a mole removed. The pathology report, which diagnosed cancer, was not followed up. In 2012, the deceased was diagnosed with metastatic malignant melanoma. He died later that year. The plaintiff wished to add Remington, the doctor who initially advised the deceased to have the mole removed, and Screen, who saw the deceased in 2007 because his excision wound was bleeding.  HELD: Applications allowed.  The former and current Limitation Act did not prevent the addition of Remington and Screen as defendants. There was no bar to the proposed amendments by the plaintiff. Granting leave to the Health Authority to file third party proceedings was just and convenient, especially since the limitation date for contribution and indemnity had not yet passed. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, *R.S.B.C. 1996, c. 126*,

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, *S.B.C. 2012, c. 13*,

Supreme Court Civil Rules, *BC Reg. 168/2009, Rule 3-5*(1), Rule 3-5(1)(a), Rule 3-5(4), Rule 6-1(1), Rule 6-2(7), Rule 6-2(7) (b), Rule 6-2(7)(c), Rule 15(5)(ii), Rule 15(5)(iii)

**Counsel**

Counsel for the Plaintiff: R. Josephson.

Counsel for the Defendant Interior Health Authority: R. Irving.

Counsel for the Defendant North Okanagan Medical Clinic Dr. Prokopetz and Dr. Waechter: R. Samtani.

Counsel for the Intended Defendant Dr. David Screen and Dr. Donald Remington: D. Lebans.

**Reasons for Judgment**

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| **MASTER G. TAYLOR** |

**1**   Before the Court are two notices of application: one by the plaintiff and one by the defendant, Interior Health Authority, ("IHA"). The plaintiff seeks leave to amend the amended notice of civil claim by making some "simple clean-up" amendments; to add two defendants; and another head of damage, namely loss of life insurance and benefits. The defendant, IHA, seeks leave to file a third party notice by making the same two named doctors third parties as the same two doctors whom the plaintiff seeks to add as defendants.

**2**  This is a *Family Compensation Act*, *R.S.B.C. 1996, c. 126*, claim by the young wife and children of Eric Shanon Nolting, deceased.

**Factual Matrix**

**3**  On October 2, 2007, Mr. Nolting, who will also be referred to as the deceased, attended at the North Okanagan Medical Clinic ("NOMC") where he saw Dr. Remington for an irregularity and bleeding of a mole in the left axilla or armpit. Dr. Remington advised the deceased to have the mole removed.

**4**  On October 19, 2007, Mr. Nolting returned to NOMC and had the mole removed by Dr. Waechter. The tissue removed was sent to Pathology at Vernon Jubilee Hospital for pathological testing. According to plaintiff's counsel, the deceased was advised he would only be contacted if there were any concerns about the test results.

**5**  On October 22, 2007, the pathology department at Vernon Jubilee Hospital performed the biopsy and found the mole to contain a malignant melanoma. Dr. Prokopetz was the pathologist who apparently forwarded his report to NOMC and Dr. Waechter, however, no follow-up occurred with Mr. Nolting nor was any advice given to him regarding the diagnosis of cancer found in the mole.

**6**  Mr. Nolting reattended NOMC on October 26, 2007 to have the excision wound attended to because it was bleeding. On this occasion, Mr. Nolting saw Dr. Screen at the clinic.

**7**  By June of 2009, Mr. Nolting now had his own family physician named Dr. Dyck. Mr. Nolting attended on Dr. Dyck for a check-up on or about May 16, 2012. Subsequent to this visit and after receipt of the results of a number of tests ordered by Dr. Dyck, a diagnosis was given to the patient of metastatic malignant melanoma on May 24, 2012.

**8**  Due to the receipt of this diagnosis, Mr. Nolting commenced an action for ***negligence*** against Interior Health Authority, Vernon Jubilee Hospital, North Okanagan Medical Clinic, Drs. Waechter and Prokopetz as well as John and Jane Does 1-3. The notice of civil claim was filed on September 12, 2012. Unfortunately, Mr. Nolting died on December 4, 2012 as a result of cancer and without having an opportunity to have his matter heard.

**9**  At paragraph 9 of the original notice of civil claim, Dr. Remington was mentioned in the following words, "He was assessed by Dr. Bryce Remington and advised he should probably have the mole removed". Curiously, Dr. Remington was never named as a defendant in that action, nor was he named in the amended notice of civil claim filed August 27, 2013 following an order permitting the amendment on July 9, 2013. That amendment also converted the action to one under the *Family Compensation Act*. Both documents were prepared and filed by previous plaintiff's counsel.

**10**  The plaintiff now seeks to add both Dr. Remington and Dr. Screen as defendants citing the rationale for same as, and I now quote from paragraph 15 of the plaintiff's notice of application "During the course of the examinations for discovery, [on August 18, 2015] evidence came to light that clarified the particular details of the role of the additional doctors that had an interaction with the deceased relating to the excision of the mole, or the non-disclosure of the diagnosis to the deceased".

**11**  There was a change of plaintiff's counsel on March 24, 2014, where current plaintiff's counsel began to represent the family of the deceased in place of the original plaintiff's counsel.

**Discussion**

**1. The Plaintiff's Applications**

**12**  Counsel for the plaintiff conducted examinations for discovery of the defendants Dr. Waechter and Dr. William Charlton (as representative for the defendant NOMC). During the discovery on August 18, 2015, the following evidence was provided:

1. Dr. Remington likely referred Mr. Nolting back to the NOMC for the mole excision;
2. Dr. Waechter's standard practice was to only remove moles for tissue diagnosis;
3. NOMC did not have any system in place to determine if there was a lab report received in response to a requisition sent;
4. The NOMC would typically receive pathology reports in 10-14 days;
5. Pathology reports received at NOMC were not necessarily reviewed and/or acted upon by the physician who ordered them;
6. It was a rarity to do pathology of this nature at a walk-in clinic; and
7. There were a number of dermatologists practicing in Vernon in 2007.

**13**  Both Doctors Remington and Screen oppose the applications to add them as defendants and as third parties. In regard to the application by the plaintiff to have them added as defendants, they maintain that each of them only saw Mr. Nolting on one occasion and that was approximately eight and one half years ago. As well, both physicians note that since the clinic did not have access to pathology reports through an online medical records system in October, 2007, neither did they, and since pathology reports were typically received at the clinic in paper form and took up to 14 days to deliver, they should not be liable and therefore, should not be added as defendants.

**14**  Dr. Remington maintains he saw Mr. Nolting on one occasion when Mr. Nolting attended the clinic on October 2, 2007 and recommended that the mole "probably should be excised". In a short affidavit sworn in answer to this application to have him added as a defendant, Dr. Remington deposes "...that on October 2, 2007, I was simply too busy to perform the excision of Mr. Nolting's mole myself".

**15**  Dr. Screen also swore an affidavit in answer to the application to have him added as a defendant. In that affidavit, Dr. Screen deposes that the only time he saw Mr. Nolting was on October 26, 2007; that while practicing at the clinic he did biopsies; and that to his recollection that as of October 2007, the Meditech online medical records system was not in use at the clinic. Lastly, he deposes that typically, it takes one to two weeks for receipt of a pathology report after an analysis is requested. As such, when [he] saw Mr. Nolting on October 26, 2007, there was no reason for [him] to expect that any pathology report following on an excision performed on October 19, 2007 should ...have been received by the clinic, nor was it anticipated that ...it required further effort to find a report at that stage.

**16**  Neither affidavit sets out any prejudice either proposed defendant might suffer as a result of being named as a defendant in these proceedings.

**17**  Interior Health Authority operating as Vernon Jubilee Hospital, North Okanagan Medical Clinic, and Dr. Dennis F. Waechter all consent to the application to add Doctors Remington and Screen as defendants in this action. This action has been discontinued as against Dr. Robert Prokopetz.

**18**  The application to add parties is brought pursuant to Rule 6-2(7)(b) & (c) of the *Supreme Court Civil Rules*, *BC Reg. 168/2009*, which provides:

1. At any stage of a proceeding, the court, on application by any person, may, ...

...

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

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

**19**  Thus, the court has discretion to add a party subject to the conditions set out in subparagraphs (b) and (c).

**20**  The respondents, Dr. Remington and Dr. Screen oppose the application on the basis of an expired limitation period or an absence of a reasonable explanation for delay especially where the limitation has expired citing *Brar v*. *Abbotsford (City)*, [*2013 BCSC 1694*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-238G-00000-00&context=) for the latter proposition. As well, the respondents, Dr. Remington and Dr. Screen submit the plaintiff has not tendered any evidence to rebut the presumption of prejudice, and therefore, it is just and convenient that the application to add Drs. Remington and Screen should be denied, citing *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 paragraphs 34-35.

**21**  The plaintiff uses a long line of cases as a foundation for the application commencing with the decision of McLachlin J., as she then was, in *Robson Bulldozing Ltd. v. Royal Bank of Canada,* [*62 B.C.L.R. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21FR-00000-00&context=), [*[1985] B.C.J. No. 2775*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21FR-00000-00&context=), where she set out the considerations to take into account as set out in the former Rule 15(5)(ii) and (iii). That Rule is virtually identical to the current Rule under which this application is brought.

**22**  At paras. 5 & 6 of *Robson Bulldozing*, McLachlin J. said this:

[5] There is no dispute between the parties on the interpretation of the rule. Rule 15(5)(ii) is to be construed disjunctively, so that the applicant need only establish one of the two situations stipulated. "Ought to have been joined as a party" is interpreted as referring to situations where a party might properly have been joined, not as a matter of necessity, but as a matter of convenience. "Necessary to ensure that all matters have been adjudicated upon" in the second situation has been interpreted as applying only if the existing parties cannot be adjudicated between them unless the new party is added: *Cominco Ltd. v. Westinghouse Can. Ltd.* [*(1978), 7 B.C.L.R. 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3GM-00000-00&context=) (C.A.).

[6] For subs, (iii) to apply, two conditions must be met: (1) an issue between the party sought to be joined and another party to the suit relating to the relief, remedy or subject matter of the suit; (2) which it is just and convenient to determine in the same proceedings. If those criteria are satisfied, the court may order joinder under subs, (iii) regardless of whether subs, (ii) is satisfied: *Daco Dev. Ltd. v. Norman Lewis Co.,* [*33 B.C.L.R. 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3F7-00000-00&context=), [*[1982] 2 W.W.R. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3F7-00000-00&context=), 25 C.P.C. 138, [*132 D.L.R. (3d) 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JTNR-M3F7-00000-00&context=) (C.A.).

**23**  The learned justice then went on to say at para. 7 that the power conferred upon the court to join a party is discretionary, to be exercised upon the proper evidence being produced. As well, Madam Justice McLachlin pointed out that the applicant must depose to facts sufficient to persuade the court of the applicability of the portion of the Rule being relied on, and in particular, there must be some evidence indicating a cause of action.

**24**  *Robson Bulldozing* was followed by Edwards J. in *F.W. Hearn/Actes - A Joint Venture Ltd. v. UBC,* [*2000 BCSC 946*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61WX-00000-00&context=), where at paragraph 31 he said:

[31] The authorities seem clear that the test for adding parties under subrule (iii) should be interpreted generously but judiciously. The chambers judge need not determine whether the claim against the proposed defendant will succeed: He or she need only be satisfied that the claim is not entirely frivolous.

**25**  Shannon Nolting swore an affidavit in these proceedings. In that affidavit, she confirms reading the proposed amended notice of civil claim and confirms the contents to be true and correct insofar as they relate to herself and the estate of her deceased husband.

**26**  In the relatively recent decision of *Meade v. Armstrong (City),* [*2011 BCSC 1591*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22J6-00000-00&context=), Mr. Justice Dley set out the factors to be used when applying Rule 6-1(1) to amend pleadings, and Rule 6-2(7) to add parties, as follows at paragraph 16:

1. A party should be added where that party's participation is necessary for the proper determination of the case: *Van de Perre v. Edwards* [*[2001] 2 S.C.R. 1014*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M490-00000-00&context=) at para. 48;
2. The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters: *Northern Construction Co. v. British Columbia Hydro and Power Authority*, [*[1970] B.C.J. No. 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-DXHD-G13M-00000-00&context=) at para. 14;
3. In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined: *MacMillan Bloedel Ltd. v. Binstead*, [*[1981] B.C.J. No. 1611*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2MX-00000-00&context=) at para. 12;
4. Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties: *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.,* [*[1999] B.C.J. No. 2796*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22YF-00000-00&context=) at para. 15;
5. Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action: *Harrington (Guardian ad litem) v. Pappachristos,* [*[1992] B.C.J. No. 2600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2FW-00000-00&context=);
6. Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried: *Langret Investments S.A. v. McDonnell,* [*[1996] B.C.J. No. 550*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2FD-00000-00&context=) at para. 43.

**27**  I have considered both the old *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 the current *Limitation Act*, *S.B.C. 2012, c.13*, and determine that neither statute operates in a situation such as the one at bar to prevent the additions of Dr. Remington and Dr. Screen as defendants.

**28**  The respondents submit that the identification of the John Doe and Jane Doe defendants is not sufficient to allow a reasonable person in the place of either Dr. Remington or Dr. Screen to identify himself as one of the persons intended to be named, and therefore, this is not an instance of simple misnomer, citing *Jackson v. Bubela et al.,* [*28 D.L.R. (3d) 500*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-627B-00000-00&context=), [*[1972] B.C.J. No. 736*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-627B-00000-00&context=) (C.A.) and *Sperling v. Queen of Nanaimo (Ship),* [*2014 BCSC 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61KJ-00000-00&context=). Kent J. in *Sperling* quotes from the BCCA decision in *Jackson* where at paragraph 7, the Court of Appeal quotes from *Davies v. Elsby Brothers, Ltd.,* [1960] 3 All E.R. 672 at page 676 where that court determined that the use of the "misnomer" of John Doe was intended to represent a certain individual whose name was unknown at the time rather than the addition of a party whose identity could not have been known until sometime later as in the case at bar.

**29**  The Court in *Davies, supra,* concluded with these words:

I therefore conclude that the application was one of amendment to correct a misnomer and not for the addition or substitution of a new or different party.

**30**  Accordingly, I find the application before the court is for the addition or substitution of a new party and not the correction of a misnomer as is submitted by the intended defendants.

**31**  Taking all of the above into consideration, I am satisfied that Rule 6-2(7)(c) operates to allow me to exercise my discretion to order that Dr. Remington and Dr. Screen be added as defendants to this action.

**32**  As to the amendments sought by the plaintiff to the notice of civil claim, some are merely administrative such that the pleadings conform with the new action under the *Family Compensation Act*, while others are substantive to coincide with the addition of the two defendants. The third type of amendments are all associated with a claim of loss of Life Insurance Benefits which were denied to the surviving spouse because the deceased did not know of his condition when applying for life insurance. In this case, the deceased and his wife applied for and were accepted for a life insurance policy in the name of the deceased for one million dollars, which was subsequently denied due to his non-disclosure of his condition. The life insurance policy was important to the deceased as he was a commercial airline pilot working for Air Canada, and had a young family.

**33**  A party seeking an amendment need only plead sufficient facts that, if proved at trial, would support a reasonable cause of action or defence: *Victoria Grey Metro Trust Co v. Fort Gary Trust Co.,* [*(1982) 30 B.C.L.R. (2d) 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-JFKM-6132-00000-00&context=), per McLachlin, J. as she then was. In the same case the learned justice said this:

[2] ... Similarly, it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R. 19(1)); material facts (R. 19(1)); particulars (R. 19(11)); and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial: Minnes v. Minnes (1962), 39 W.W.R. 112; B.C. Power Corp. v. A.G.B.C. (1962), 38 W.W.R. 577. If there is any doubt, it should be resolved in favour of permitting the pleadings to stand: Winfield v. Interior Engr. Services Ltd. (1969), 68 W.W.R. 383. While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

**34**  Recently, Ross J. had an opportunity to review the general principles applicable to applications for amendment in *Sommer v. Coast Capital Savings Credit Union,* [*2013 BCSC 881*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20KS-00000-00&context=) at paragraph 20:

The factors to be considered with respect to an application to amend pleadings were discussed in *Chouinard v. O'Connor*, [*2011 BCCA 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1PT-00000-00&context=), citing with approval the trial judge's statement of factors at para. 11:

The factors to be considered in all amendment applications are applicable in this case as well. General principles are these:

1. amendments should be permitted as necessary to determine the real question and issues between the parties;
2. the party is not required to [adduce] evidence in support of a pleading before trial;
3. on an application to amend, the facts alleged are taken as established; and
4. the discretion is to be exercised judicially in accordance with the evidence adduced and the guidelines of the authorities.

**35**  Following the above cited principles, I see no reason why the proposed amendments by the plaintiff in the case at bar should not be allowed.

**2. The Application by IHA for Leave to File a Third Party Notice**

**36**  The application by Interior Health Authority for leave to be granted to file a Third Party Notice against Doctors Remington and Screen is made pursuant to Rule 3-5(1) which provides:

1. A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
2. the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
3. the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
4. a question or issue between the party and the person
5. is substantially the same as a question or issue that relates to or is connected with
6. relief claimed in the action, or
7. the subject matter of the action, and
8. should properly be determined in the action.

**37**  Specifically, the application is pursuant to Rule 3-5(1)(a).

**38**  As well, Rule 3-5(4) allows that a party may file a third party notice "(a) at any time with leave of the court...".

**39**  The starting point for the determination of this application is *McNaughton v. Baker,* [*[1988] 4 W.W.R. 742*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=), [*[1988] B.C.J. No. 515*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-6050-00000-00&context=) (B.C.C.A.) where Madam Justice McLachlin, as she then was, outlined the purpose of third party proceedings at paragraph 14:

Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure. This has been the case since the reforms effected by the Judicature Acts in the nineteenth century.

**40**  Both the applicant for leave to commence third party proceedings and the intended third parties, cite many of the same cases, one of which is that of Goepel J., as he then was, in *Tyson Creek Hydro Corporation. v. Kerr Wood Leidal Associates Limited,* [*2013 BCSC 1741*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23BX-00000-00&context=), [*Tyson Creek*]in which he discusses earlier decisions which dealt with applications for leave to file Third Party Notices.

**41**  In *Tyson Creek,* Mr. Justice Goepel dealt with the exercise of discretion by citing *Lui v. West Granville Manor Ltd.* [*(1985), 61 B.C.L.R. 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=), [*18 D.L.R. (4th) 391*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61WY-00000-00&context=) (C.A.), *Clayton Systems, and The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.,* [*2010 BCCA 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62SX-00000-00&context=), [*3 B.C.L.R. (5th) 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62SX-00000-00&context=) [*Scott Management*] in the following paragraphs:

[41] In *Lui*, Lambert J.A. noted that the court is given a wide discretion under Rule 22(4), to strike out third party proceedings. He indicated at 328 that there were a number of factors that should be considered including:

...What is the fair thing to do? Who suffers prejudice if the discretion is exercised? How much prejudice? Who suffers prejudice if the discretion is not exercised? How much prejudice? Have the parties acted properly and reasonably in their own interests? If a party has not acted properly and reasonably, should he be relieved from the consequences of his own behaviour? Is there another course available to one or other of the parties? Where does the balance of convenience lie? This list is illustrative, but not exhaustive, of the questions that should be asked with respect to the parties before the court. But part of the purpose of the Rule is to avoid multiplicity of proceedings for the benefit of other litigants, so that congestion in the courts is avoided. So it is proper to ask questions in that area as well.

[42] In *Clayton Systems 2001 Ltd. v. Quizno's Canada Corp.*, [*2003 BCSC 1573*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B08X-00000-00&context=) at para. 9, [*27 B.C.L.R. (4th) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B08X-00000-00&context=) [*Clayton Systems*], which was decided under the Amended Rule, Allan J. held that in determining the application the court should consider the following factors in determining whether or not to exercise its discretion to grant leave:

1. prejudice to the parties;
2. expiration of limitation period;
3. the merits of the proposed claim;
4. any delay in proceedings; and
5. the timeliness of the application.

[43] In *Scott Management* at para. 90, the court framed the question on an application for leave to file a third notice in this fashion:

[90] The fundamental question on the applications should have been whether greater injustice and inconvenience would arise from allowing the contribution claim to continue as a third party proceeding, or from striking it and leaving it to be pursued in a separate future action. The chambers judge erred in failing to address that question. Had he done so, in my view he would have been compelled to exercise his discretion in favour of the former course, as the better of two unpalatable options.

**Prejudice**

**42**  The applicant maintains no prejudice will be suffered by the plaintiff if leave is granted as the plaintiff is supportive of the application. As well, there is no evidence before the court that the proposed Third Parties' ability to defend the claim has been adversely affected by the passage of time, rather, the applicant submits that it will suffer substantial prejudice if leave were denied as it would be forced to commence a separate proceeding against the proposed Third Parties. The applicant further submits this would lead to inefficiency and possible inconsistent findings of fact.

**43**  The respondents suggest that a claim for contribution and indemnity would only arise if IHA is found liable and since IHA denies its own liability in this matter and is actively defending the claim against it, it would seem practical to await the outcome of that matter before determining if IHA would even need to pursue a claim for contribution and indemnity.

**Expiration of the Limitation Period**

**44**  The respondents admit that the limitation period applying to a claim for contribution and indemnity has not yet expired but submit that is not determinative of whether or not leave should be granted and relies on *Shvalian v. Seafresh Proucts Distributors, Inc.*, [*2014 BCSC 964*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2S6-00000-00&context=), for that proposition.

**Merits of the Claim**

**45**  The respondents agree the obligation on the applicant is simply to plead a cause of action with sufficient material facts to support it, but again say, relying on *Shvalian* that the applicant's ability to meet this low threshold is not determinative of whether or not leave should be granted.

**46**  The applicant submits the allegations set out in paragraphs 7 - 9 of part 1 of the proposed third party notices, if proven, would be sufficient to establish a claim for contribution and indemnity against the proposed third parties. Those paragraphs allege the negligent acts of the doctors such as recommending to Mr. Nolting that he have the mole removed at the NOMC when there were alternatives available including, among others, a referral to a general surgeon or dermatologist, or failing to take steps to determine the results of the pathology of the specimen when he knew, or ought to have known that NOMC did not have an adequate system in place to follow up on laboratory results.

**Delay in the Proceedings**

**47**  The applicant says it did not become aware of the existence of a possible claim against the proposed third parties until after the discoveries of Doctors Waechter and Charlton in August of 2015 and the retaining of an expert to advise them in November 2015. As well, says the applicant, it acted reasonably prior to bringing this application by attempting to interview Dr. Screen to gather further information, however, when it became apparent that Dr. Screen was not interested in cooperating, counsel for the applicant moved with some haste to bring this application.

**48**  The respondents submit the issue of delay involves the question of whether or not the applicant has delayed in bringing the application for leave, and if so, why? They suggest that this application came some three years and 10 months after the notice of civil claim was filed and maintain that an expert could have been retained earlier to review the involvement of Dr. Remington and Dr. Screen. They also suggest that the claims against them are not dependent on any facts arising from the discoveries of Dr. Waechter or Dr. Charlton.

**Timeliness of the Application**

**49**  This issue addresses whether or not granting leave to file a third party claim will affect other aspects of the case, including the trial date. An application such as this could lead to the adjournment of the trial date, however, this matter is no longer in issue as the parties have already agreed to adjourn the trial date prior to these reasons being issued.

**50**  I have considered the submissions of the parties under each of the factors set out above. In my view, granting leave to the applicant to file third party proceedings is just and convenient in the circumstances, especially since the limitation date for contribution and indemnity has not yet passed. As well, the plaintiff will not be prejudiced by granting the relief sought since the plaintiff is supporting the application and arrangements have already been made to adjourn the trial date for October 2016. Currently it appears that the claim for contribution and indemnity have merit, but that will be determined at the trial of this matter at the same time as whether or not IHA is liable to the plaintiff for negligent acts alleged against it in the notice of civil claim.

**51**  I also find that there has not been the inordinate delay as existed in *Shvalian* of some 40 months as in that case numerous steps in the litigation process had already taken place such as the taking of default judgment, the setting aside of the default judgment, and the numerous changes of counsel within the same firm. As well, the argument that the employees of the intended third party, the Strata where the accidental opening of a door by an employee of the defendant into the pathway of the plaintiff, would be necessary for the litigation, did not take into account that the Rules provide for the examination of a non-party witness. Nor were the issues as serious as they are in the case at bar.

**Summary and Conclusion**

**52**  Accordingly, I conclude it is just and convenient to issue the third party notice in the case at bar. I also allow the sought-after amendments by the plaintiff together with the addition of Dr. Remington and Dr. Screen as defendants.

**53**  Since the applicants have both been successful in their applications, they are entitled to their costs of the applications.

**Some Observations**

**54**  The plaintiff's notice of application is frustratingly brief in that it seeks leave to amend the notice of civil claim in the form attached as Schedule 1. There is then a short three and a half page explanation of the basis for some housekeeping amendments and the basis for seeking to add two physicians as parties. Lastly, the legal basis sets out three Rules from the *Supreme Court Civil Rules* with no case law or other legal rationale for the sought-after amendments. For future reference, this is inadequate as per *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=), commencing at para. 44. This is raised as well since the notice of application contains no factual background on which the application is based. Rather, a three page chronology was given to the Court to support counsel's submissions as to the facts. Accordingly, it took some time to review the factual matrix of this case before dealing with any of the applications.

MASTER G. TAYLOR

**End of Document**

[***Ontario (Pension Board) v. Ball, [2010] B.C.J. No. 1792***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2KX-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.J. Adair J.

Heard: August 9, 2010.

Judgment: September 10, 2010.

Docket: S085420

Registry: Vancouver

**[2010] B.C.J. No. 1792** | 2010 BCSC 1267 | 13 B.C.L.R. (5th) 115 | 2010 CarswellBC 2401 | 192 A.C.W.S. (3d) 1378

Between Ontario Pension Board, Plaintiff, and Terrance Ball, also known as Terrence Ball, also known as Terrence Fredrick Ball and Margaret Sheila Ball, Defendants

(60 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Judgments and orders — Summary judgments — Procedure — To dismiss action — Estoppel — Estoppel by record (res judicata) — Issue estoppel — Application by defendants to claims of conspiracy, unjust enrichment for dismissal of Pension Board's action dismissed — Board had default judgment against one defendant for defrauding Board — Present action related to defendant's transfer of property to wife by defaulting on mortgage, allowing lender to foreclose and transferring money to wife for purchase of property — Claims not bound to fail — Evidence not admissible, so it was not clear claims statute-barred — Conspiracy claim survived, but unjust enrichment claim against judgment debtor dismissed as it could have been raised in prior action.**

**Pensions and benefits law — Public pension plans — Offences and enforcement — Offences — Obtaining benefits by false pretences — Application by defendants to claims of conspiracy, unjust enrichment for dismissal of Pension Board's action dismissed — Board had default judgment against one defendant for defrauding Board — Present action related to defendant's transfer of property to wife by defaulting on mortgage, allowing lender to foreclose and transferring money to wife for purchase of property — Claims not bound to fail — Evidence not admissible, so it was not clear claims statute-barred — Conspiracy claim survived, but unjust enrichment claim against judgment debtor dismissed as it could have been raised in prior action.**

**Tort law — Fraud and misrepresentation — Fraudulent conveyances and preferences — Application by defendants to claims of conspiracy, unjust enrichment for dismissal of Pension Board's action dismissed — Board had default judgment against one defendant for defrauding Board — Present action related to defendant's transfer of property to wife by defaulting on mortgage, allowing lender to foreclose and transferring money to wife for purchase of property — Claims not bound to fail — Evidence not admissible, so it was not clear claims statute-barred — Conspiracy claim survived, but unjust enrichment claim against judgment debtor dismissed as it could have been raised in prior action.**

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| Application by Ball and his wife for an order dismissing the Pension Board's claims against them. The Board claimed Ball defrauded it of $62,000 when he collected pension monies in respect of his aunt's pension after she died. It demanded the return of the monies in February 2006, and obtained default judgment against Ball for $61,964 in December 2006. The Board claimed Ball fraudulently conveyed his interest in real property to his wife by defaulting on his mortgage, allowing the mortgage lender to foreclose in June 2006, and secretly transferring funds he had defrauded from the Board to his wife to enable her to purchase the property from the lender in November 2006. The Board commenced the present action in July 2008. It amended its claim in January 2010 to allege Ball and his wife engaged in a conspiracy to cause loss and damage to the Board and were unjustly enriched at the Board's expense. It sought a declaration setting aside the transfer of property to Ball's wife and of a constructive trust over the property, interest, costs and damages for conspiracy and unjust enrichment. Ball and his wife pointed to evidence showing that Ball's wife paid market value for the property. They also pointed out that a solicitor for the Board had deposed the Board became aware of Bell's fraud in July 2002, in support of their position the Board's claims were statute-barred.  HELD: Application allowed in part.  The unjust enrichment claim against Ball was struck; otherwise the Board's action was sustained. It was not plain and obvious that the Board's fraudulent conveyance claim was bound to fail. There was some authority that the provisions of the Fraudulent Conveyance Act could catch a disposition through a third party. No evidence was admissible on the motion to summarily dismiss the Board's action, so the price Ball's wife paid the lender for the property and the date the Board discovered Ball's fraud were irrelevant. The conspiracy and unjust enrichment claims did not constitute a collateral attack on the order absolute granting the mortgage lender ownership of the subject property. The conspiracy claim was not barred by issue estoppel because the parties to the 2006 judgment were not the same, but the unjust enrichment claim was barred. The Board had the opportunity to raise the issue of Ball's unjust enrichment in the prior action and its failure to do so barred it from raising it in the present action. |

**Statutes, Regulations and Rules Cited:**

British Columbia Rules of Court, Rule 9-5(1), Rule 9-5(2), Rule 7-7(6)

British Columbia Supreme Court Rules, Rule 19(24), Rule 19(24) (a), Rule 19(24)(c), Rule 19(24)(d), Rule 19(27), Rule 31(6), Rule 31(6)(a)(i)

Fraudulent Conveyance Act, [*RSBC 1996, CHAPTER 163, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-JJK6-S01K-00000-00&context=), s. 2

**Counsel**

Counsel for the Plaintiff: David Dahlgren.

Counsel for the Defendants: John Douglas Shields.

**Reasons for Judgment**

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| --- |
| **E.J. ADAIR J.** |

**Introduction**

**1**  The plaintiff, the Ontario Pension Board, says that the defendant Terrance Ball defrauded it of about $62,000 when he collected pension monies from the Board in respect of his aunt's pension after the death of his aunt. In August 2006, the Board filed a lawsuit in Ontario against Mr. Ball and obtained default judgment against him in December 2006.

**2**  In this action, the Board claims that Mr. Ball fraudulently conveyed his interest in property on Gilpin Street in Burnaby (the "Gilpin Property") to his wife, the defendant Margaret Sheila Ball, with the intention of delaying, hindering and defrauding the Board of its lawful remedies against him. The method of conveyance is unusual. The Board alleges that Mr. Ball, with Ms. Ball's knowledge and consent, intentionally defaulted on a mortgage of his interest in the Gilpin Property, and allowed the mortgagee, Ryan Mortgage Corporation, to take an order absolute of foreclosure. The Board alleges that Mr. Ball then diverted money he had defrauded from the Board to Ms. Ball, to enable Ms. Ball to purchase the interest in the Gilpin Property from Ryan Mortgage.

**3**  In amendments to its claim made in January 2010, the Board alleges further that Mr. Ball and Ms. Ball engaged in a conspiracy to cause loss and damage to the Board, and were unjustly enriched at the Board's expense. The Board claims a constructive trust in the Gilpin Property, declarations under the ***Fraudulent Conveyance Act***, *R.S.B.C. 1996, c. 163*, and damages.

**4**  By their application dated January 11, 2010, the defendants seek to have the action dismissed, relying on Rule 19(24)(a) to (d) and Rule 31(6) of the former Supreme Court Rules. (See now Rule 9-5(1) and Rule 7-7(6), respectively.) Neither defendant swore an affidavit in respect of their application.

**5**  For the reasons that follow, I conclude that the Board's unjust enrichment claim against Mr. Ball should be struck out on the grounds of cause of action estoppel, but that otherwise, the defendants' application should be dismissed.

**6**  I will deal first with the request for dismissal relying on Rule 31(6), on the basis that the Board has made admissions. I will then address the issues arising under Rule 19(24).

**Has the Board made admissions?**

**7**  Former Rule 31(6) provided in relevant part:

An application for judgment or any other application may be made to the court using as evidence

1. admissions of the truth of a fact or the authenticity of a document made
2. in an affidavit or pleading filed by a party.

**8**  The defendants seek to rely on statements in the affidavit of Karai Madill no. 1, sworn July 15, 2009, as "admissions" under this rule. The defendants say the Board's so-called admissions in this affidavit make it plain and obvious that there is no merit to the claims, and they therefore seek to have the action dismissed.

**9**  Ms. Madill is a legal secretary working in the firm acting as solicitors for the Board. Her affidavit consists almost entirely of paragraphs in which she identifies a document attached to her affidavit as a "true copy." For example, she says in para. 5:

Attached and marked as **Exhibit "D"** to this my Affidavit is a true copy of a Form A Freehold Transfer, dated November 21, 2006.

**10**  On its face, the copy of the freehold transfer attached as Exhibit "D" shows Ryan Mortgage as the transferor, Ms. Ball as the transferee, the property being transferred as a one-half interest in the Gilpin Property and the "consideration" as $410,000. The defendants say that, by attaching this document to Ms. Madill's affidavit and having her identify it as a "true copy," the Board has admitted the truth of the contents of the document, including in particular that Ms. Ball paid market value (and good and valuable consideration) for the transfer of the one-half interest from Ryan Mortgage.

**11**  The defendants also rely on the contents of a letter and attachments, marked as Exhibit "A" to Ms. Madill's affidavit, as constituting an admission by the Board that the last payment to Mr. Ball was made on July 26, 2002. Relying on those contents, the defendants say that any claim the Board had against Mr. Ball had been extinguished by the time the writ was filed on July 30, 2008, which was more than six years after the last payment. Therefore, the defendants say, based on the contents of the attachments, they both have a complete limitation defence.

**12**  However, the Board does not make any admission of the truth of the facts contained in a document, merely by filing an affidavit in which the deponent attaches a copy of the document and identifies the copy as a "true copy."

**13**  In ***Melgarejo-Gomez v. Sidhu***, [*2004 BCSC 327*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T5-00000-00&context=), [*25 B.C.L.R. (4th) 330*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3T5-00000-00&context=), Bauman J. (as he then was) considered this point in the context of the effect of a notice to admit submitted on a summary trial application, where a new trial had been ordered following an appeal. The defendant applied for a summary trial, and relied almost exclusively on copies of excerpts from the transcript of the first trial that were attached to a notice to admit.

**14**  Bauman J. rejected the position advanced by the defendants here, namely, that by deposing (or admitting) a document is a "true copy," the deponent is also admitting the truth of the contents of the document. Bauman J. said, at paras. 9-10 (underlining added):

[9] That transcript evidence is before me pursuant to a Notice to Admit filed by the defendant. The admissions deemed to be made as a result of that notice include:

1. that the various attached transcripts are true copies; and
2. that they are true and accurate transcriptions of the tapes made in court at the time the statements were made.

[10] These admissions do not of course go to the truth of the evidence contained in the transcripts.

At para. 17, Bauman J. confirms that "the Rule 31 admissions here do not go to the truth of the transcript evidence given at the first trial."

**15**  Further, an admission must be a clear and deliberate concession made by a party, as a concession to its opponent: see ***Adams v. Fairmont Hotels & Resorts Inc.***, [*2008 BCSC 1403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RF-00000-00&context=), at para. 7, aff'd [*2008 BCCA 444*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0PS-00000-00&context=). Ms. Madill's affidavit does not contain any admissions concerning the truth of the contents of the documents attached as exhibits to her affidavit.

**16**  There are, therefore, no "admissions" by the Board of any facts based on which the defendants would be entitled to a dismissal of the claims against them.

**Should the action be dismissed under Rule 19(24)?**

**17**  Before turning to deal with the issues as they arise under Rule 19(24), and to provide the context for that discussion, I will set out the allegations in the amended statement of claim:

1. [Identification of Board.]
2. [Identification of the defendants and the Gilpin Property.]
3. On or about December 3, 2003, the Bank of Montreal notified [Mr. Ball] in writing that he was obligated to repay $64,881.28 of pension monies that he wrongfully collected and defrauded from the Plaintiff after the death of his Aunt . . . .
4. On or about February 15, 2006, [counsel for the Plaintiff] demanded in writing that [Mr. Ball] repay $61,963.78 (the "Debt") of the pension monies that he wrongfully and fraudulently collected from the Plaintiff after the death of his Aunt.
5. On or about June 15, 2006, Ryan Mortgage Corporation obtained an Order Absolute of Foreclosure with respect to [Mr. Ball]'s ownership of an undivided one half interest in the [Gilpin Property] (the "Foreclosure").
6. On or about August 28, 2006, the Plaintiff commenced an action against [Mr. Ball] in the Province of Ontario to recover the Debt.
7. On or about November 21, 2006, [Ryan] transferred, sold and conveyed [Mr. Ball]'s former undivided one half-interest in the [Gilpin Property] to [Ms. Ball].
8. On or about December 21, 2006, the Plaintiff obtained default judgment against [Mr. Ball] for the Debt (the "Default Judgment").

**Fraudulent Conveyance**

1. [Ms. Ball] at all material times, including the time of the Foreclosure and transfer of the one half interest in the [Gilpin Property] to [Ryan] and to herself, had direct notice and knowledge of the First Notice, Debt, Default Judgment, and the collusion or fraud committed by [Mr. Ball].
2. [Mr. Ball], with the knowledge and consent of [Ms. Ball], intentionally defaulted on his mortgage and allowed his interest in the [Gilpin Property] to be foreclosed upon with the direct intent of delaying, hindering and defrauding the Plaintiff of its just and lawful remedies to collect the Debt and enforce the Default Judgment.
3. [Mr. Ball] used or diverted the pension monies that he defrauded from the Plaintiff, and other of his personal monies or assets, with the direct knowledge and consent of [Ms. Ball], in order to assist and enable [Ms. Ball] to purchase his undivided one half interest in the [Gilpin Property] from [Ryan], and this was done with the direct intent of delaying, hindering and defrauding the Plaintiff of its just and lawful remedies to collect the Debt and enforce the Default Judgment.
4. [Mr. Ball] also took other steps and actions, with the direct knowledge and consent of [Ms. Ball], to assist and help [Ms. Ball] acquire or purchase the [Gilpin Property], and this was done with the direct intent of delaying, hindering and defrauding the Plaintiff of its just and lawful remedies to collect the Debt and enforce the Default Judgment.
5. [Ms. Ball] did not acquire the [Gilpin Property] for good or sufficient consideration or in good faith.
6. The Plaintiff pleads and relies upon the *Fraudulent Conveyance Act* . . . .
7. The disposition, transfer or conveyance of the [Gilpin Property] to [Ms. Ball] is void and of no effect as against the Plaintiff, and should be set aside, as it was a fraudulent conveyance in contravention of the *Act*.
8. By reason of the fraudulent conveyance, the Plaintiff is entitled to a constructive trust in the [Gilpin Property] for the full amount of the Debt, plus interest and legal costs, and a certificate of pending litigation against the [Gilpin Property].

**Conspiracy**

1. Beginning in or around 2003 and continuing until the present, the Defendants combined or conspired with each other to cause [Mr. Ball] to intentionally default on his mortgage so that his interest in the [Gilpin Property] would be foreclosed upon and [Ms. Ball] could then purchase or acquire [Mr. Ball]'s undivided half interest in the [Gilpin Property] (the "Disposition").
2. The Defendants caused or completed the Disposition with the direct intent of delaying, hindering and defrauding the Plaintiff of its just and lawful remedies to collect the Debt and enforce the Default Judgment (the "Conspiracy").
3. The sole or predominant purpose of the Conspiracy was to ensure that the Plaintiff would be unable to collect the Debt and enforce the Default Judgment . . . .
4. The Defendants were at all material times aware that their conduct would cause significant and irrevocable loss, damage and expense to the Plaintiff.
5. [Ms. Ball] did not acquire the [Gilpin Property] for good or sufficient consideration or in good faith in that [Mr. Ball] provided her with the funds to purchase and pay for his interest in the [Gilpin Property].
6. As a result of the Conspiracy, the Plaintiff was deprived of assets upon which to collect the Debt and enforce the Default Judgment.
7. As a further result of the Conspiracy, the Defendants have wrongfully retained, misappropriated, [and] diverted assets and monies that rightfully belong to the Plaintiff.

**Unjust Enrichment**

1. From 2002 to the present, the Defendants were unjustly enriched by reason of the fact that they wrongfully and without legal justification received, misappropriated, and diverted monies, and other benefits from the Plaintiff (the "Unjust Enrichment"). As a result:
2. the Defendants have been enriched by the Plaintiff;
3. the Plaintiff has suffered a corresponding deprivation;
4. there is no juristic reason for their enrichment.
5. In particular, the Defendants diverted and misappropriated monies of the Plaintiff in order to purchase, improve, maintain or preserve the [Gilpin Property].

**18**  In the prayer for relief, the Board seeks (among other things): a declaration or order that the "disposition, transfer or conveyance" of the Gilpin Property to Ms. Ball is void and of no effect as against the Board; an order setting aside that "disposition, transfer or conveyance . . . on the grounds that the transaction was a fraudulent conveyance"; an order that the Board is entitled to a constructive trust in the Gilpin Property for the full amount of the Debt, interest and costs; and damages for "Conspiracy" and for "Unjust Enrichment."

**19**  Former Rule 19(24) provided:

At any stage of a 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,
2. it is unnecessary, scandalous, frivolous or vexatious,
3. it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
4. it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**20**  Mr. Shields, counsel for the defendants, indicated that he is relying on all of the subsections of Rule 19(24), except for (c). No evidence is admissible on an application under Rule 19(24)(a): see Rule 19(27) (and see now Rule 9-5(2)).

**21**  The test under Rule 19(24)(a) is well-known. Assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? 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 should the relevant portions of a plaintiff's statement of claim be struck out. The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See ***Hunt v. Carey Canada Inc.***, *[1990] 2 S.C.R. 959*, at p. 980; and ***Odhavji Estate v. Woodhouse***, [*2003 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), [*[2003] 3 S.C.R. 263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=), at paras. 14-15.

**(a) Is the claim under the *Fraudulent Conveyance Act* bound to fail?**

**22**  The defendants say that the Board cannot rely on the ***Fraudulent Conveyance Act*** at all, since Mr. Ball did not dispose of the Gilpin Property to Ms. Ball. Rather, his interest in the Gilpin Property was foreclosed by Ryan Mortgage, who, after taking order absolute, then sold the interest to Ms. Ball. In short, the defendants say this claim is bound to fail.

**23**  The ***Fraudulent Conveyance Act*** provides:

**Fraudulent conveyance to avoid debt or duty of others**

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

1. a disposition of property, by writing or otherwise,
2. a bond,
3. a proceeding, or
4. an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

**Application of Act**

2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

**24**  The defendants say that the Board was never a creditor of Ryan Mortgage, and has no rights against it, whereas such rights are necessary to trigger a claim under the ***Act***. They argue that the ***Act*** does not allow a claim by a party who is not a creditor of the transferor, whom they identify as Ryan Mortgage. The defendants point out that Ryan Mortgage is not a defendant, and the Board does not seek to set aside the order absolute. They say that, once Ryan Mortgage owned the interest in the Gilpin Property by virtue of the order absolute, the Board could never have any rights claims or rights against it. They say that Ryan Mortgage had an absolute right to sell the half interest to Ms. Ball, and that Ms. Ball was allowed to purchase that interest, which she did for consideration in the sum of $410,000.

**25**  However, there is some authority that a disposition through a third party can, nevertheless, be caught by the provisions of the ***Fraudulent Conveyance Act***. In ***Chow v. Pearson*** [*(1992), 69 B.C.L.R. (2d) 117*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B145-00000-00&context=) (S.C.), the court rejected the argument that a transfer of real property through a third party municipality in a tax sale to the debtor's common law spouse was not caught under the provisions of the ***Act***. The court explained (at p. 122) that the term "conveyance" as used in the ***Act*** should be liberally interpreted, and concluded that the means (the tax sale) used to transfer the property from the debtor to his common law spouse was nevertheless a conveyance within the meaning of the ***Act***.

**26**  In that light, I am unable to say that it is plain and obvious that the Board's claim based on the ***Fraudulent Conveyance Act*** is bound to fail.

**27**  The defendants also point to the contents of Exhibit "D" (the freehold transfer form) attached to Ms. Madill's affidavit no. 1 as proof that Ms. Ball paid "ample consideration" to purchase an interest in the Gilpin Property from Ryan Mortgage. They then argue that, since the property was transferred for good consideration, the Board has no claim under the ***Fraudulent Conveyance Act***.

**28**  However, no evidence is admissible on an application under Rule 19(24)(a), and I have rejected the defendants' arguments relying on Rule 31(6). Even if evidence was admissible, the statements in the document are hearsay. They are not admissible for their truth. There is no admissible evidence on this application about whether Ms. Ball paid any consideration for the transfer of the Gilpin Property, and no evidence she in fact paid $410,000.

**(b) Are the conspiracy and unjust enrichment claims statute-barred?**

**29**  The defendants next say that the Board's conspiracy and unjust enrichment claims are statute-barred under the ***Limitation Act***, [*R.S.B.C. 1996, c. 226*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JJYN-B0DY-00000-00&context=), and should be struck under Rule 19(24)(a).

**30**  The defendants say that the Board can only sue with respect to a loss suffered by it, and that any loss (and any claims that could be advanced in respect of it) crystallized as of July 26, 2002. They say further that any alleged debt which would found a claim for unjust enrichment arose prior to July 26, 2002. They point out that the action was not filed until July 30, 2008, and the conspiracy and unjust enrichment claims were not added until the statement of claim was amended in January 2010. The defendants say that the applicable limitation period is six years, and, therefore, the claims are statute-barred.

**31**  However, to support these assertions, the defendants rely on information contained in part of Exhibit "A" to Ms. Madill's affidavit no. 1.

**32**  In support of their position that, under Rule 19(24)(a), the court can dismiss claims as statute-barred, the defendants cite ***Chisamore v. Cumis Life Insurance Company***, [*2006 BCSC 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1Y4-00000-00&context=). There, Madam Justice Gropper dismissed an action under Rule 19(24)(a) on the grounds that the claims pleaded in the statement of claim were statute-barred. However, I note the caution raised in ***Veness v. H.M.T.Q.***, [*2001 BCCA 325*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-639Y-00000-00&context=), at para. 15, concerning using Rule 19(24)(a) to dispose of limitation issues:

[15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a), standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitations is a defence pleading. It is an issue that does not arise until it is pleaded in defence. It has to be remembered that although the events which gave rise to this action had their genesis in 1974, and although it is pleaded that the agreement expired in 1975, it is also pleaded that there has been a continuous breach and trespass since 1975. I do not wish to state categorically that a limitation argument cannot properly arise under Rule 19(24)(a). But in the circumstances that exist here, in particular the allegation of an ongoing breach of contract, I am of the opinion that the limitation issue cannot properly be dealt with under Rule 19(24)(a).

**33**  In argument, counsel for the defendants suggested that, in the light of ***Chisamore***, and despite ***Veness***, I should consider dismissal of the action under Rule 19(24)(a) on the basis of expired limitation periods, and he urged me to dismiss it on that basis. However, the only conclusion that can be drawn from ***Chisamore*** is that the court was satisfied, based on the allegations in the statement of claim in that case and accepting those allegations as true, that it was plain and obvious the claims were statute-barred.

**34**  Here, the Board has not pleaded facts that, if true, would make it plain and obvious that a claim or claims were statute-barred. In addition, like the plaintiff in ***Veness***, the Board has alleged ongoing conduct. It is also possible any applicable limitation period has been postponed.

**35**  Moreover, the defendants' argument that claims are statute-barred requires the court to look beyond the allegations in the statement of claim. They rely on the truth of the contents of the attachments to Exhibit "A" (the list of payments to Mr. Ball) to Ms. Madill's affidavit no. 1 as proof that any cause of action the Board might have had against the defendants for conspiracy or unjust enrichment was complete on July 26, 2002. Based on those contents, the defendants then say that, since the Board did not sue until July 30, 2008 and did not advance the conspiracy and unjust enrichment claims until January 2010, and since the applicable limitation period is six years, the claims are statute-barred.

**36**  However, and as I noted above, evidence is not admissible under Rule 19(24)(a), and I have rejected the defendants' argument that the exhibits attached to Ms. Madill's affidavit constitute admissions. The contents of the documents are hearsay and not admissible for their truth. There is no admissible evidence on this application that the last payment Mr. Ball received from the Board was on July 26, 2002, even assuming the causes of action were complete as of that date and that no limitation period would be postponed.

**(c) Should the conspiracy and unjust enrichment claims be struck under Rule 19(24)(b) and (d)?**

**37**  The defendants then say that the Board's conspiracy and unjust enrichment claims are barred on grounds of issue estoppel, cause of action estoppel and collateral attack, and should therefore be struck under Rule 19(24)(b) and (d).

**38**  Pleadings may be struck out and claims dismissed on the grounds that they are vexatious and an abuse of process. The concepts of *res judicata* (of which issue estoppel and cause of action estoppel are branches) and collateral attack on a court order are both encompassed by the doctrine of abuse of process. 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. See ***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=), at paras. 23, 37.

**39**  The rule against collateral attack 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. 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. See ***Toronto (City)***, at para. 33 (citing ***Wilson v. The Queen***, [*[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 p. 599).

**40**  The defendants argue that the conspiracy claim is a collateral attack on the order absolute pronounced in favour of Ryan Mortgage. They say further that the Board has not pleaded that it suffered damages as a result of the alleged conspiracy, and thus the defendants attack the legal sufficiency of the claim as pleaded.

**41**  I do not think the conspiracy claim is in the nature of a collateral attack on the order absolute. Indeed, the Board pleads the fact of the making of the order absolute in the statement of claim, thereby taking the formal position that it is a material fact which (unless admitted) it must plead and prove as part of its case. Moreover, the Board submitted in argument that it is not attacking the order absolute.

**42**  However, other allegations create some uncertainty concerning the precise transaction the Board is complaining about and wishes to have declared void and set aside. Uncertainty is not desirable in a pleading: see, e.g., ***Wyman v. Vancouver Real Estate Board*** [*(1957), 8 D.L.R. (2d) 724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B24S-00000-00&context=) (B.C.C.A.). Para. 15 of the statement of claim simply speaks of "The disposition, transfer or conveyance" to Ms. Ball. While para. 17 creates a defined term - the "Disposition" - the definition is not very illuminating. Paras. (a) and (b) in the prayer for relief again talk about "the disposition, transfer or conveyance" to Ms. Ball.

**43**  The defendants' submissions concerning collateral attack assume that "the disposition, transfer or conveyance" is the transfer of the half-interest by Ryan Mortgage to Ms. Ball. However, in the light of the Board's reliance on ***Chow v. Pearson***, the most logical conclusion is that the Board is complaining about Mr. Ball's disposition of his interest in the Gilpin Property to Ms. Ball. The Board has alleged Mr. Ball accomplished this by means of the order absolute and then by providing Ms. Ball with money (including money he misappropriated from the Board) so that his disposition to her could be completed.

**44**  The Board would gain nothing from setting aside the transfer from Ryan Mortgage to Ms. Ball, and there would, therefore, be no point in asking for it. The fact that Ryan Mortgage has not been named as a party is consistent with the conclusion that the Board is not asking to have that transfer set aside, and with the conclusion that the Board is not purporting to make a collateral attack on the order absolute.

**45**  When I interpret the pleadings in the context of ***Chow v. Pearson***, "the transaction" referred to in para. (b) of the prayer for relief, and the "disposition, transfer or conveyance" referred to elsewhere, must be the disposition or conveyance between Mr. Ball and Ms. Ball.

**46**  In my view, the result is that there is no collateral attack on the order absolute.

**47**  With respect to the legal sufficiency of the conspiracy claim, the essential elements that must be proved are conveniently summarized in ***Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*** [*(1993), 96 B.C.L.R. (2d) 156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-637P-00000-00&context=) (C.A.) at para. 5, as follows:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
4. if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
5. actual damage suffered by the plaintiff.

**48**  I would not describe the conspiracy claim here as a model of good pleading. However, it is probably sufficient to avoid having the claim struck under Rule 19(24)(a) on the grounds raised by the defendants, namely that one of the essential elements (damages) is missing. The agreement is alleged in para. 17 of the amended statement of claim; para. 18 describes the concerted action taken pursuant to the agreement, and also appears to allege that the action is unlawful; the first sentence in para. 19 sets out the "predominant purpose" required if the action is lawful; para. 20 alleges the constructive intent required if the action is unlawful; and paras. 22 and 23 allege the harm or damage suffered as a result of the defendants' actions (even though the word "damages" is not used).

**49**  The defendants then argue that the conspiracy claim and the unjust enrichment claim against Mr. Ball are barred by issue estoppel and cause of action estoppel. They point to the proceedings taken against Mr. Ball in Ontario, the default judgment taken against him there, and the registration in B.C. of the Ontario judgment.

**50**  For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies: ***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=), [*2001 SCC 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M48G-00000-00&context=), at para. 25.

**51**  A helpful summary of the leading cases on cause of action estoppel is found in ***Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.***, [*2008 BCSC 756*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G2TK-00000-00&context=), [*83 B.C.L.R. (4th) 383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G2TK-00000-00&context=), at paras. 8-13. Josephson J. quotes from the well-known case of ***Henderson v. Henderson*** (1843), 3 Hare 100, at pp. 114-115:

In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from ***negligence***, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

**52**  However, there is some flexibility to the rule in ***Henderson v. Henderson***, as Cromwell J.A. (as he then was) noted in ***Hoque v. Montreal Trust Co.***, [*[1997] N.S.J. No. 430*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F65M-62S2-00000-00&context=), [*162 N.S.R. (2d) 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F65M-62S2-00000-00&context=) (C.A.), leave to appeal refused [*[1997] S.C.C.A. No. 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SD1-FC1F-M34Y-00000-00&context=). He said at para. 37 (underlining in original):

Although many of these authorities cite with approval the broad language of **Henderson v. Henderson**, **supra**, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. . . .

**53**  Whether the second proceeding simply asserts a new legal conception of facts previously litigated, whether two proceedings relate to separate and distinct causes of action and whether, in all of the circumstances, the second proceeding constitutes an abuse of process are among the factors to be considered on the question whether the matter should have been raised in the first proceeding. At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. See ***Hoque***, at paras. 37 and 68.

**54**  As Mr. Justice Josephson noted in ***Grant McLeod*** (at para. 12), Cromwell J.A.'s statements have found favour with the B.C. courts: see, e.g., see ***Lim v. Lim***, [*1999 BCCA 596*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1PV-00000-00&context=); ***Zaidenberg v. Hamouth***, [*2005 BCCA 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JXG3-X11B-00000-00&context=); ***Thandi v. Burnaby (City)***, [*2005 BCSC 1479*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B28H-00000-00&context=); and ***Ali v. Evans***, [*2007 BCSC 1318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X457-00000-00&context=).

**55**  Based on the principles set out above, the conspiracy claim is not barred by either issue estoppel or cause of action estoppel, in my view. The first time a conspiracy claim has been made against Mr. Ball and Ms. Ball is in this action. Ms. Ball is a necessary party to that claim, and she was not named as a defendant in the Ontario proceedings. As framed, the cause of action was not complete until the final step of the alleged agreement, when Ms. Ball became the owner of Mr. Ball's half-interest in the Gilpin Property. Based on the allegations in the statement of claim, this event took place after the Ontario action had been filed. The conspiracy claim against Mr. Ball and Ms. Ball was not one that, in all of the circumstances, should have been raised when the Board sued Mr. Ball in Ontario.

**56**  However, I have come to a different conclusion concerning the unjust enrichment claim against Mr. Ball.

**57**  The object of the Ontario claim was to determine Mr. Ball's liability to the Board for his misappropriation of pension funds after the death of his aunt. His liability in that regard has been reduced to judgment. In my view, the material facts on which his liability was based would have provided the Board with grounds to advance a claim against Mr. Ball in the Ontario action for unjust enrichment. The Board had the opportunity to raise that claim, and in the circumstances should have done so. The claim is now barred on the basis of cause of action estoppel and abuse of process.

**58**  Other than the limitation argument, which I have rejected, no submissions were made concerning the unjust enrichment claim against Ms. Ball. In that light, I will say no more about that claim.

**Conclusion**

**59**  In summary:

1. the allegations against Mr. Ball in paras. 24 and 25 of the amended statement of claim are struck out; and
2. the defendants' application for dismissal of the Board's action is otherwise dismissed.

**60**  As the Board has been substantially successful, I award it costs of the application.

E.J. ADAIR J.

**End of Document**

[***Royal Pacific Real Estate Group Ltd. v. Dong, [2018] B.C.J. No. 2881***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SY2-T191-FK0M-S313-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.J. Sewell J.

Heard: April 18-19, 24-28, May 1-2, July

11, August 24-25, December 18-19

and 22, 2017.

Judgment: July 30, 2018.

Docket: S139554

Registry: Vancouver

**[2018] B.C.J. No. 2881** | 2018 BCSC 1272 | 157 C.P.R. (4th) 119 | 295 A.C.W.S. (3d) 534 | 2018 CarswellBC 2051

Between Royal Pacific Real Estate Group Ltd., Royal Pacific Realty (Kingsway) Ltd., Plaintiffs/Defendants by Counterclaim, and Vinh Phat Steven Dong (a/k/a Steven Dong), Steven Real Estate, Maijan Holdings Inc. and Bliip Box Inc., Defendants/Plaintiffs by Counterclaim

(173 paras.)

**Case Summary**

**Contracts — Breach of contract — General principles — Action by plaintiff Kingsway Pacific Realty Ltd. for damages for breach of contract dismissed — Defendant Dong worked for Kingsway under sales representative agreement — Kingsway terminated agreement by relying on clause allowing for termination without cause on 21 days' notice — Dong subsequently used trade-mark associated with Kingsway — There was no breach of contract as agreement was terminated without cause — Kingsway failed to show damages from breach above and beyond damages awarded for trade-mark infringement and passing off.**

**Intellectual Property Law (Trade-marks) — Trade-marks — Infringement — Confusion and deception — Passing off and unfair competition — Business trade name — Remedies — Damages — Injunctions — Action by plaintiff Royal Pacific Real Estate Group Ltd. (Group) for damages against defendants for infringement of trade-mark, unfair competition and passing off allowed — Defendant Dong worked for Kingsway Pacific Realty Ltd. which was part of Group — Kingsway terminated Dong's sales representative agreement — Dong and other defendants set up email, website and Facebook page using trade-mark belonging to Royal Pacific Ltd. — Use of trade-mark by defendants was infringement of trade-mark and constituted passing off — Group was entitled to injunctive relief — Defendants ordered to transfer domain name to Group and pay nominal damages — Trade-marks Act, ss. 6, 7, 53.2(1).**

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| --- |
| Action by the plaintiff Royal Pacific Real Estate Group Ltd. (Royal Pacific Group) for damages against the defendants for infringement of trade-mark, unfair competition and passing off. Action by the plaintiff Kingsway Pacific Realty (Kingsway) Ltd. (Kingsway) for damages against the defendant Vinh Phat Steven Dong for breach of contract. Royal Pacific Ltd. and Kingsway were part of Royal Pacific Group. Royal Pacific Ltd. was the proprietor of a registered trade-mark in Canada for the mark "ROYAL PACIFIC" and accompanying logo. From June 2012 to December 2013, Dong was a sales representative of Kingsway under a sales representative agreement (SRA). In October 2013, Dong began to use the trade-mark in a manner that the plaintiffs said infringed the trade-mark and constituted the tort of passing off. In November 2013 Kingsway gave notice of termination of the SRA to Dong. Royal Pacific Group and Kingsway submitted that any right that Dong or any company affiliated with him had to use the trade-mark, Royal Pacific name or logo terminated when he ceased to be a Kingsway representative. They argued that Dong's continued use of the trade-mark infringed the trade-mark and constituted the statutory and common law torts of passing off. Kingsway's position was that Dong's actions also constituted a breach of the SRA. Royal Pacific Group sought damages, a permanent injunction and other relief against the defendants. Dong's position was that the name Royal Pacific was not distinctive and that in any event he had the consent of the Royal Pacific Group to use that name in connection with his businesses.  HELD: Action by Royal Pacific allowed.  Action by Kingsway dismissed. Kingsway acted lawfully and in accordance with its rights when it terminated the SRA. The SRA permitted either party to terminate the SRA without cause by giving 21 days' notice. The question of whether Dong breached the SRA was irrelevant because Kingsway did not rely on any such breach in terminating it, choosing instead to terminated the SRA on 21 days' notice. Kingsway failed to show that it suffered any damages from any breach on Dong's part over and above the damages that Royal Pacific Group could recover for trade-mark infringement and passing off. The defendants infringed the trade-mark by using it in emails, on a website and on Facebook. The trade-mark was inherently distinctive. Once the SRA was terminated, Dong no longer had the right to use the trade-mark. The use of the domain name royalpacific.co for the website together with numerous references to aspects of the plaintiffs' business and the fact that the webpage was offering real estate related products would have caused confusion in the mind of an ordinary hurried consumer, who could have confused the owner of the website with the Royal Pacific Group. Royal Pacific Group established the elements necessary to establish the tort of passing off. Royal Pacific Group was entitled to an injunction prohibiting the defendants from using the trade-mark and passing off the services of the defendants as those of Royal Pacific Group. The defendants were ordered to transfer the royalpacific.co website to Royal Pacific Group. Royal Pacific Ltd. was entitled to nominal damages of $6,000. Dong was prohibited from commencing any action against the plaintiffs' counsel without leave of the court. |

**Statutes, Regulations and Rules Cited:**

Trade-marks Act, [*R.S.C. 1985, c. T-13, s. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5WBF-HSM1-F57G-S15F-00000-00&context=), s. 7, s. 53.2(1)

**Counsel**

Counsel for the Plaintiffs/Defendants by Counterclaim: Scott E. Foster, Gregory Hoff.

Appearing on his own behalf and on behalf of the Defendants/Plaintiffs by Counterclaim, Steven Real Estate, Maijan Holdings Inc. and Bliip Box Inc.: Vinh Phat Steven Dong.

**Reasons for Judgment**

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| **R.J. SEWELL J.** |

**Introduction**

**1**  In this action the plaintiff Royal Pacific Real Estate Group Ltd. (Royal Pacific Ltd.) seeks damages against the defendants for infringement of trade-mark, the statutory tort of unfair competition set out in s. 7 of the *Trade-marks Act*, [*R.S.C. 1985, c. T-13*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9Y1-F2F4-G3VM-00000-00&context=) and the tort of passing off. The plaintiff Royal Pacific Realty (Kingsway) Ltd., (Kingsway) seeks damages against the defendant Vinh Phat Steven Dong for breach of contract.

**2**  Royal Pacific Ltd. is the proprietor of a registered trade-mark in Canada for the mark:



**3**  From June 2012 to December 2013 Mr. Dong was a sales representative of Kingsway. The terms of the legal relationship between Kingsway and Mr. Dong were set out in a written Sales Representative Agreement dated June 26, 2012 (the "SRA").

**4**  In October 2013 Mr. Dong began to use the Registered Trade-mark in a manner that the plaintiffs say infringed the Trade-mark and constituted the tort of passing off.

**5**  In November 2013 Kingsway gave notice of termination of the SRA to Mr. Dong effective December 13, 2013. Pursuant to that notice Mr Dong ceased to be a sales representative of Kingsway on that date.

**6**  On December 20, 2013 the plaintiffs commenced this action.

**The Parties**

**7**  The plaintiff, Royal Pacific Ltd. is a British Columbia company. It is the proprietor of the Registered Trade-mark which is being asserted against the defendants in this proceeding.

**8**  Kingsway is a real estate brokerage.

**9**  Royal Pacific Ltd. and Kingsway are part of a group of companies (the Royal Pacific Group) focused upon real estate sales. Five members of the Royal Pacific Group are real estate corporations: Royal Pacific Riverside Realty Ltd., Royal Pacific Lion's Gate Realty, 0928539 BC Ltd., Royal Pacific Realty Corp. and Kingsway.

**10**  The defendant, Steven Dong is an individual who resides in British Columbia. Mr. Dong was an independent sales representative for Kingsway from June 2012 until December 2013.

**11**  The defendant, Steven Real Estate is not a legal entity. No relief is sought against it.

**12**  The defendant, Maijan Holdings Inc. ("Maijan") is a British Columbia corporation. Mr. Dong is the sole shareholder, director and officer of Maijan.

**13**  Bliip Box Inc. ("Bliip Box") is a British Columbia corporation which was incorporated on March 29, 2013. Mr. Dong is also the sole director of Bliip Box. In his evidence Mr. Dong, described himself as the controlling mind of Bliip Box.

**Position of Parties**

**14**  The plaintiffs' position is that pursuant to the SRA, Mr. Dong was an independent contractor who was authorized to use the Registered Trade-mark, Royal Pacific name and logo in connection with carrying on the business of acting as a sales representative of Kingsway in the real estate field. They submit that any right that Mr. Dong or any company affiliated with him had to use the Registered Trade-mark, Royal Pacific name or logo terminated when he ceased to be a Kingsway representative.

**15**  The plaintiffs say that Mr. Dong wrongfully used the Royal Pacific name to promote businesses that had nothing to do with Royal Pacific while he was a sales representative, and continued to use that name in a confusing manner after the SRA was lawfully terminated by Kingsway.

**16**  They say that by so doing, Mr. Dong and the companies he controlled infringed the Registered Trade-mark and committed the statutory and common law torts of passing off. Kingsway's position is that Mr. Dong's actions also constituted a breach of the SRA. The plaintiffs seek damages, a permanent injunction and other relief against the defendants.

**17**  Mr. Dong's position is that the name Royal Pacific is not distinctive and that in any event he had the consent of the Royal Pacific Group to use that name in connection with his businesses. He also submits that the plaintiffs breached the SRA by wrongfully denying him the ability to use the name Royal Pacific, and by terminating the SRA for an improper purpose.

**18**  For the reasons that follow I find that the plaintiffs have established that the defendants have infringed the Registered Trade-mark and committed the tort of passing off, and are entitled to substantially all of the relief sought for those causes of action. However, I also find that Kingsway has not proven the essential elements of its claim of breach of contract against Mr. Dong.

**The Witnesses**

**19**  The plaintiffs called the following witnesses: Andrew Peck, David Choi, Ed Fung, Bill Bi, Sing Yeo, Tracie McTavish, Richard Laurendeau, and Dave Peerless.

**20**  Mr. Peck is the General Manager of the five Royal Pacific brokerages and a Managing Broker at Royal Pacific Realty Corp., which is the Oakridge office of the Royal Pacific Group. In his role as the General Manager, he is primarily responsible for addressing issues that realtors have in respect of licensing and transactional issues.

**21**  Mr. Choi is the Chief Executive Officer and President of both Royal Pacific Realty Corp. and Kingsway.

**22**  Mr. Fung is the Managing Broker of Kingsway.

**23**  Mr. Bi is the IT Manager for the Royal Pacific Group. He reports to Mr. Peck, and is employed by Royal Pacific Realty Corp. He has been the IT manager for approximately ten years.

**24**  Mr. Yeo is the Senior Vice-President of each of the Royal Pacific Group of Companies.

**25**  Messrs. Peck, Choi, Yeo and Fung are all direct or indirect shareholders in Royal Pacific Realty Holdings Ltd. which is the shareholder of the Royal Pacific Group. Mr. Choi is a shareholder of Royal Pacific Ltd. which is a shareholder of Royal Pacific Realty Holdings Ltd.

**26**  Mr. McTavish is the executive director at Rennie Marketing. He has been with Rennie Marketing for 12 years. Prior to that he was with Concord Pacific, a company that has developed major real estate projects in Vancouver. Mr. McTavish has been in the real estate business in Vancouver for over 36 years.

**27**  Mr. Laurendeau is the Managing Broker of the ReMax office in Richmond. He has been a licensed realtor since 1983 and has been the Managing Broker of the ReMax office since 2005. From about 2000 to 2005, Mr. Laurendeau was the manager of Royal Pacific's office in Richmond.

**28**  Mr. Peerless is the President and majority owner of Dexter Associates. Dexter Associates is an independent realty business that has three offices and approximately 180 sales agents. Mr. Peerless is also the Managing Broker of the Kerrisdale office of Dexter Associates, a well-known real estate brokerage in Vancouver.

**29**  Mr. Dong testified on behalf of the defendants, and called Mr. Cheema as a witness.

**30**  Mr. Cheema has been a Chartered Professional Accountant since 2010. He has acted as the accountant for Maijan and Bliip Box since 2013.

**Background**

**31**  The Registered Trade-mark was registered in 1996 in association with the following services:

1. Residential and commercial real estate services, namely the purchase and sale of residential, investment and commercial properties and businesses; appraisal services; residential and commercial leasing services; real estate consultation and local and overseas marketing services of real estate developments for others; property management services.
2. Building services, namely real estate construction and development services.
3. Commercial real estate brokerage and consultation services in the field of mergers and acquisitions of commercial properties and businesses.

**32**  The Registered Trade-mark was first used in 1994 and has been used constantly since then.

**33**  Royal Pacific Ltd. provides an oral or unwritten licence to the other members of the Royal Pacific Group to use the Registered Trade-mark. The licence arrangement has been in place since the initiation of the Royal Pacific Group. As new brokerages were joined to the Group, the licence was extended to them.

**34**  In addition to the Registered Trade-mark, prior to the events leading to this litigation the Royal Pacific Group also exclusively utilized the trading names ROYAL PACIFIC and ROYAL PACIFIC REALTY in the Greater Vancouver real estate industry. These names are used to describe their Vancouver real estate business.

**35**  Mr. Dong is a well-educated person with some considerable ability in the information technology field. At some time around 2010, he obtained a licence which permitted him to act as a real estate sales representative. In 2011, he began working for the Sutton Group as a sales representative. In 2012, he became involved in a dispute with another Sutton salesperson over entitlement to a commission. This dispute led to his leaving Sutton.

**36**  On June 26, 2012, Mr. Dong and Kingsway entered into the SRA. The proper construction of the SRA is disputed by the parties. The plaintiffs' position is that pursuant to the SRA, Mr. Dong was an independent contractor whose rights and obligations were governed by it. Mr. Dong's position is that he was an employee of Kingsway.

**37**  The events that have given rise to this action began in the summer of 2012. By that time, Mr. Dong had created a website with the domain name of stevenrealestate.co. The website combined information about Mr. Dong in his capacity as a sales representative of Kingsway with information about other real estate-related activities in which he was engaged.

**38**  By that time, Mr. Dong had a business plan to combine his real estate sales activities with the promotion of a social media referral application called Bliip Box. Mr. Dong hoped to be able to market Bliip Box to the real estate industry as a preferred supplier of websites. The pursuit of this venture would soon bring him into conflict with the Royal Pacific Group.

**39**  On August 1, 2012, the Real Estate Council of British Columbia informed Mr. Dong that certain aspects of his website did not comply with its regulations. Andrew Peck was copied with this complaint. He accordingly reviewed the stevenrealestate.co website.

**40**  On August 12, 2012, Mr. Peck sent an email to Mr. Dong outlining what he considered to be the deficiencies in the website. Among the concerns he expressed were references on the website to Steven Real Estate Developments, which stated that that entity could be contacted through the phone numbers and contact information of the Royal Pacific Brokerages at Kingsway and Oakridge.

**41**  Mr. Dong replied the same day by email, agreeing to address Mr. Peck's concerns. Subsequently Mr. Dong did make changes to the website which appeared to have made it compliant with the requirements of the Real Estate Council.

**42**  In 2013, a further issue arose over the stevenrealestate.co website. On August 26, 2013, the Real Estate Council again objected to the website, informing Mr. Dong that it did not consider that it complied with Council Rules. Apparently Mr. Dong was able to address that objection, but the website was again reviewed by Mr. Peck, who concluded that the content of the website was not acceptable to Royal Pacific.

**43**  On September 4, 2013, Mr. Peck sent an email to Mr. Dong outlining Royal Pacific's concerns about the website. The general tenor of this email was that Royal Pacific was concerned that the website might confuse members of the public who could conclude that the website was a corporate site of Royal Pacific rather than Mr. Dong's personal site.

**44**  Mr. Dong continued to pursue the promotion of his Bliip Box technology. He had some discussions with Royal Pacific personnel about marketing it to them. On September 17, 2013, he sent an email to Mr. Peck asking if Royal Pacific would be interested in his technology. Mr. Peck replied saying that Royal Pacific was satisfied with its current suppliers. He also directed Mr. Dong to direct any further communications about his technology to Mr. Bi, the IT manager for the Royal Pacific Group.

**45**  On October 6, 2013, Mr. Dong emailed Mr. Bi offering to commence discussions about providing the Bliip Box platform to Sales Representatives of the Royal Pacific Group.

**46**  On October 9, 2013, Sonya Jakovickas, a compliance officer of the Real Estate Council, forwarded Mr. Peck an email that Mr. Dong had sent to a number of realtors. The email displayed the Royal Pacific Realty Logo and the words "Get endorsed at RoyalPacific.co."

**47**  Under those words the following sentences appeared:

Royal Pacific Realty is one of BC's largest brokerages and now we are looking to endorse local businesses on Our Bliip Box. Below are some key benefits to advertising with us.

**48**  The plaintiffs object to the following contents of the email. They say the email:

1. displayed the Registered Trade-mark, including the (R) symbol, giving it an air of legitimate use;
2. used the trading names ROYAL PACIFIC and ROYAL PACIFIC REALTY;
3. used the address and contact information of Kingsway as the mailing address for Bliip Box;
4. referred to the domain name <*royalpacific.co*> in the following manner "Get Endorsed at ROYALPACIFIC.CO";
5. stated "Royal Pacific Realty is one of BC largest brokerages and now we are looking to endorse local business on our Bliip box"
6. stated that "ROYALPACIFIC.CO provides updates in the Real Estate Industry"; and
7. stated "Contact me today at: StevenDong@RoyalPacific.com" (this was the email address approved for Mr. Dong to use in connection with his activities as a sales representative of Kingsway).

**49**  Mr. Peck testified that he was concerned that persons reading this email or viewing the website would conclude that the Royal Pacific Group was offering or endorsing the services being offered on the website.

**50**  Ed Fung, the Managing Broker of Kingsway, informed Mr. Dong that Royal Pacific had seen the website and that Mr. Peck was waiting for an explanation for the use of the royalpacific.co website address.

**51**  On October 10, Mr. Dong acknowledged that he had obtained the domain name royalpacific.co and intended to use that domain on a site endorsing local businesses to start a real estate referral network.

**52**  Mr. Peck communicated the plaintiffs' position that Mr. Dong was not permitted to use a domain name with Royal Pacific in it in connection with any business other than that of the plaintiffs and demanded that he immediately take the site down.

**53**  The Royal Pacific Group also consulted its solicitors, who sent a cease and desist letter to Mr. Dong and Steven Real Estate on October 14, 2013.

**54**  The cease and desist letter asserted that the Royal Pacific Ltd. had a registered trade-mark to use the name Royal Pacific and Lion Design over a Maple Leaf and had used that trademark in connection with their real estate business since 1994. It also asserted that the use of the Trade-mark and the name Royal Pacific on the website constituted an infringement of the Royal Pacific Ltd.'s Trade-mark, as well as the tort of passing off.

**55**  This letter demanded that Mr. Dong take down the website and cease using the domain name royalpacific.co.

**56**  On October 14, 2013, the royalpacific.co website gave a description of the Royal Pacific Realty Group under the heading "About Royal Pacific Realty Group", followed immediately by a heading, "Get endorsed on our Bliip Box", which was followed in turn with a heading "Contact" under which all of the Royal Pacific Group brokerage offices' contact information was listed.

**57**  Shortly after October 9, 2013 Mr. Peck also decided to terminate the SRA with Mr. Dong but did not give immediate notice of termination for cause. Instead, on November 27, 2013, he gave Mr. Dong the 21 days' notice of termination required under the SRA. In accordance with that notice Mr Dong ceased to be an sales representative of Kingsway on December 18, 2013.

**58**  On December 2, 2013, Mr. Dong emailed Mr. Peck. In that email he took the position that he was entitled to use the Royal Pacific name on his website, reiterating his refusal to transfer the royalpacific.co domain name.

**59**  The Royal Pacific Group continued to demand that Mr. Dong transfer the royalpacific.co domain name to Royal Pacific Ltd. In response, Mr. Dong took the position that he did not own that domain name.

**60**  On January 13, 2014, the royalpacific.co website was substantially similar to the format it was in on October 14, 2013. Thereafter the website continued to promote real estate investments.

**61**  In addition to this website, Mr. Dong is the owner of a Facebook page called royalreferrals that displays the plaintiffs' Registered Trade-mark. While Mr. Dong initially denied he owned this page, in his cross-examination he admitted that he owned the page but said that someone else managed the page and that he had lost all contact information for that person. He also said that he could not remember the name of the person who manages the page. As of the date of trial this page continued to display the Registered Trade-mark.

**62**  There was a good deal of conflicting evidence about which of the defendants owned the royalpacific.co domain name. I do not find it necessary to make findings on this issue. I am satisfied that at all times Mr. Dong was in complete control of Maijan and Bliip Box. I am also satisfied that he used these corporations in the course of his business and that they are equally liable for any wrongful actions I find to have occurred in this case.

**63**  The documentary evidence shows that Maijan was billed for the original purchase of the royalpacific.co domain name. There is also evidence that the domain name was transferred from Maijan to Bliip Box. In addition, Mr. Dong made representations in this court to Master Taylor that Maijan had transferred the domain name to Bliip Box.

**64**  I am aware of Mr. Dong's evidence that this transfer was later reversed on the advice of his accountant. However, I am of the view that this evidence does not assist Bliip Box. It is clear that Mr. Dong considered that he was at liberty to use either Maijan or Bliip Box to own the domain name. The documentary evidence shows that since at least August 13, 2015, Bliip Box has been paying Godaddy for the renewal fees for that domain name.

**65**  Accordingly, I am satisfied that all three defendants participated in any wrongful act related to that domain name.

**Issues**

**66**  The parties have characterized the issues before me in different ways. This makes it somewhat difficult to succinctly set out their respective positions.

**67**  The plaintiffs identify seven issues in this case:

1. Did Mr. Dong breach the Sales Representative Agreement while he was an independent contractor with Royal Pacific Realty (Kingsway) Ltd?
2. Did Royal Pacific Realty (Kingsway) Ltd. breach the Sales Representative Agreement by giving Mr. Dong 21 days' notice?
3. Did Mr. Dong breach the Sales Representative Agreement after the Sales Representative Agreement was cancelled?
4. Did the defendants infringe the Registered Trade-mark?
5. Did the defendants pass off their services as those of the plaintiffs?
6. Is Mr. Dong personally liable for the actions of Maijan and Bliip Box?
7. If the defendants are liable, what remedies are the plaintiffs entitled to?

**68**  Mr. Dong identifies 16 issues:

1. Did Kingsway breach Section 9 of their Sales Representative Agreement with Steven Dong by disallowing him to use the Royal Pacific name and Logo?
2. Did Kingsway breach their contract when they wrongfully terminated Mr. Dong so they could obtain the royalpacific.co domain without compensating Mr. Dong and to harm Bliip Box?
3. Is Kingsway's acquiescence to the use of their name and logo a full defense to this action by reason of the doctrine of estoppel by acquiescence?
4. Should the plaintiffs' action be estopped by the doctrine of *ex turpi causa*?
5. Did Mr. Dong breach the Sales Representative Agreement after the Sales Representative Agreement was cancelled?
6. Did the defendants infringe the Registered Trade-mark contrary to section 19 and 20 of the *Trade-marks Act*?
7. Did Mr. Dong depreciate the value of the plaintiffs' goodwill contrary to Section 22 of the *Trade-marks Act*?
8. Did the defendants pass off their Services as those of Royal Pacific?
9. Should Mr. Dong be personally liable for the actions of Maijan and Bliip Box?
10. Should the defendants transfer the domain royalpacific.co over to the plaintiffs?
11. Have the plaintiffs been unjustly enriched?
12. Are the plaintiffs entitled to an injunction?
13. Are the plaintiffs entitled to nominal damages for trade-mark infringement, passing off and breach of contract?
14. Are the plaintiffs entitled to special costs?
15. Should the vexatious litigation order be extended?
16. Have the plaintiffs abused the court's process?

**Breach of the SRA**

**69**  The plaintiffs and defendants allege breaches of the SRA against each other.

**70**  The plaintiffs submit that Mr. Dong breached the SRA by using the Royal Pacific name and logo for purposes other than seeking real estate listings and real estate sales in connection with the business of Kingsway.

**71**  The plaintiffs also say that Mr. Dong used the name and logo to pursue other businesses and in particular, the business of promoting the Bliip Box platform in such a way as to mislead members of the public into believing that the Royal Pacific Group endorsed the platform.

**72**  Mr. Dong says that Kingsway breached the SRA by terminating the SRA because he was trying to promote Bliip Box by selling websites. His position is that in terminating the SRA the Royal Pacific Group acted in bad faith and for the improper purpose of forcing him to transfer the royalpacific.co domain name to them without proper compensation.

**73**  In my view the dispositive question on this issue is whether Kingsway lawfully terminated the SRA.

**74**  I find that Kingsway acted lawfully and in accordance with its rights when it terminated the SRA.

**75**  Paragraph 14 of the SRA permits either party to terminate the SRA without cause by giving 21 days' notice.

**76**  I find that there was nothing that prevented Kingsway from exercising this right when it gave notice of termination on November 27, 2013. Kingsway was no doubt motivated by the dispute the Royal Pacific Group was having with Mr. Dong over the use of its Trade-mark, and trading name. However, I find that it did not terminate for the SRA for any improper or dishonest purpose.

**77**  Mr. Dong submits that it was unconscionable for Kingsway to terminate the SRA because it was done for improper purposes. His position is that he was terminated so that the Royal Pacific Group could obtain the royalpacific.co domain without compensation and to harm his software business. He says that he was terminated to send a message to other Royal Pacific sales representatives that if they used the Bliip Box platform they would also be terminated. He also asserts that it was wrong for Mr. Peck to consult counsel to achieve the purposes he alleges.

**78**  I see no merit in these submissions. There is no evidence that Kingsway terminated the SRA with Mr. Dong to interfere in any improper way in his pursuit of developing the Bliip Box platform. The evidence is clear that the Royal Pacific Group had no interest in that platform. There is no evidence that they did anything for the purpose of harming Bliip Box's business.

**79**  I find that Kingsway terminated Mr. Dong because of concerns arising out of the October 9 email and website. In particular, I find that Mr. Peck had an honest belief that the contents of the website would lead members of the public to associate the web-based platform Mr. Dong was promoting with the Royal Pacific Group.

**80**  It is also apparent from the communications between Mr. Dong and Mr. Peck in early October 2013 that the relationship between Mr. Dong and the Royal Pacific Group had hopelessly broken down, and that it would be impracticable for Mr. Dong to continue to be a sales representative of Kingsway.

**81**  I can find no evidence that Kingsway or anyone in the Royal Pacific Group acted in bad faith or for any improper purpose in terminating the SRA. I therefore find that Mr. Dong has no cause of action against Kingsway for such termination.

**82**  The question of whether Mr. Dong breached the SRA is irrelevant because Kingsway did not rely on any such breach in terminating it, choosing instead to rely on the provision of the SRA that permits cancellation upon three weeks' notice. Kingsway has also not shown that it suffered any damages from any breach on Mr. Dong's part over and above the damages that Royal Pacific Ltd. can recover for Trademark infringement and the tort of passing off.

**Infringement of Trade-mark, and Passing Off**

**83**  These are the critical issues in this litigation.

**Infringement of Trade-mark**

**84**  The plaintiff Royal Pacific Ltd. is the proprietor of the Registered Trade-mark.

**85**  The evidence establishes that Royal Pacific Ltd. licenses the other members of the Royal Pacific family to use the Registered Trade-mark. The licence arrangement has been in place since the initiation of the Royal Pacific Real Estate Group. As new brokerages were joined to the Group, the licence was extended to them.

**86**  Royal Pacific Ltd. and representatives of the Royal Pacific Group, including Mr. Peck and Mr. Choi, regularly monitor the use of the Registered Trade-mark by doing Google internet searches, enforcing the policy manual, and ensuring the Registered Trade-mark is used by the sales representatives in a suitable manner.

**87**  The SRA provides:

1. Property of the Company

Royal Pacific Real Estate Group Ltd. is the owner of the "Royal Pacific" name and the "Royal Pacific" logo (featuring a rampant lion against a maple leaf background), and has authorized the use of the name and logo to the Company, which in turn Is authorizing their use to the Sales Representative, subject to the terms set out in this agreement. The Sales Representative agrees to refrain from modification to the Company's logo or other artwork in marketing material without the expressed approval of the Company.



All listings, multiple, exclusive or otherwise, and related documents, including contracts of purchase and sales are the property of the Company and will remain so upon cancellation of this agreement. Any property belonging to the Company including photos of the Sales Representative that the Sales Representative has in his/ her possession upon cancellation of this Agreement shall be immediately returned to the Company.

The Sales Representative agrees to allow the Company to use any promotional items, and media promotions which include but are not limited to photos, news paraphernalia, listings, voice recording for the purposes of advertising in any form of media and without limit.

**88**  The plaintiffs allege that the defendants infringed the Trade-mark by using a mark identical or similar to it on:

1. the email sent out on October 9, 2013;
2. the website at <*royalpacific.co*>; and
3. the Facebook page "royalreferrals" between at least March 2014 and March 2017.

**89**  Sections 19 and 20 of the *Trade-Marks Act* create a cause of action for trade-mark infringement:

19 Subject to sections 21, 32 and 67, the registration of a trade-mark in respect of any goods or services, unless shown to be invalid, gives to the owner of the trade-mark the exclusive right to the use throughout Canada of the trade-mark in respect of those goods or services.

20 (1) The right of the owner of a registered trade-mark to its exclusive use is deemed to be infringed by any person who is not entitled to its use under this Act and who

1. sells, distributes or advertises any goods or services in association with a confusing trade-mark or trade-name...

**90**  The relevant portions of s. 6 of the *Trade-marks Act* state:

6 (1) For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

...

1. In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including
2. the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
3. the length of time the trade-marks or trade-names have been in use;
4. the nature of the goods, services or business;
5. the nature of the trade; and
6. the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

**91**  The issue I must address is whether the use of the Registered Trade-mark by the defendants was likely to have caused confusion. The applicable principles are summarized *in Masterpiece Inc. v. Alavida Lifestyles Inc.*, [*2011 SCC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1X2-00000-00&context=):

[40] At the outset of this confusion analysis, it is useful to bear in mind the test for confusion under the *Trade-marks Act*. In *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [*2006 SCC 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16X-00000-00&context=), [*[2006] 1 S.C.R. 824*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16X-00000-00&context=), Binnie J. restated the traditional approach, at para. 20, in the following words:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [mark], at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

Binnie J. referred with approval to the words of Pigeon J. in *Benson & Hedges (Canada) Ltd. v. St. Regis Tobacco Corp.*, [*[1969] S.C.R. 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22WF-00000-00&context=), at p. 202, to contrast with what is not to be done -- a careful examination of competing marks or a side by side comparison.

[41] In this case, the question is whether, as a matter of first impression, the "casual consumer somewhat in a hurry" who sees the Alavida trade-mark, when that consumer has no more than an imperfect recollection of any one of the Masterpiece Inc. trade-marks or trade-name, would be likely to be confused; that is, that this consumer would be likely to think that Alavida was the same source of retirement residence services as Masterpiece Inc.

**92**  The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class: *Trans-High Corp. v*. *Conscious Consumption Inc.*, [*2016 FC 949*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KP4-WFD1-JN14-G3RY-00000-00&context=) at para. 26.

**93**  The degree of resemblance, although the last factor listed in s. 6(5) of the *Trade-mark Act*, is the statutory factor that is often likely to have the greatest effect on the confusion analysis; *Masterpiece Inc*. at para. 49.

**94**  In K. Gill, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed., (Toronto: Carswell, 2002), Chapter 8 - Likelihood of Confusion - 8.6. - Degree of Resemblance, the degree of resemblance is explained as follows:

1. - Taking Essential Features

To constitute confusion it is not necessary that every part of a trade-mark is copied; it is sufficient if enough is copied to have a tendency to confuse the public. A trade-mark is infringed if a person other than the registered proprietor or authorized user sells, distributes, or advertises wares or services in association with one or more of the trade-mark's essential features, provided that this is likely to cause confusion. The right of proprietors is to their trade-marks as a whole; but where the essential feature or, as it is sometimes called, a single characteristic and distinctive particular of the plaintiff's marks has been taken, a case of infringement may be established. ...

"[D]egree of resemblance" recognizes that marks with some differences may still result in likely confusion.

**95**  I adopt as accurate the table set out in the plaintiffs' written argument comparing the Registered Trade-mark to the marks used by the defendants in each of the complained about publications.



**96**  I find that the website as it existed on October 9, 2013 infringed the Registered Trademark.

**97**  I find that the Registered Trade-mark is inherently distinctive; the Trade-mark and trade-names have been in continuous use since the early 1990s; there is a similarity between the business of the Royal Pacific Group and some of the services offered on the website and the marks are very similar.

**98**  I do not understand Mr. Dong to be taking the position that the marks he has used in his email on his website and the royalreferrals Facebook page are not similar. They clearly are.

**99**  However, Mr. Dong's position is that he has the consent of the Royal Pacific Group to use the mark, or at least that it acquiesced in his usage of it. Mr. Dong also asserts that he was required to use the Royal Pacific name on his website.

**100**  However, Mr. Dong has failed to appreciate the difference between his using the Trade-mark in connection with his duties as a sales representative of Kingsway and using it in a manner that represents that there is an association between the Royal Pacific Group and the Bliip Box technology or other businesses that Mr. Dong was pursuing.

**101**  Mr. Dong had no right to use the Royal Pacific logo or name and goodwill in connection with his own separate businesses, including Bliip Box. The terms under which he was entitled to use the Royal Pacific name and logo are set out in the SRA.

**102**  At paragraph 108 of his argument on the issue of whether Kingsway breached s. 9 of the SRA by preventing him from using the Royal Pacific name and logo, Mr. Dong asserts that Kingsway never objected to his October 9 marketing piece. If Mr. Dong is seeking to make a distinction between Kingsway and the rest of the Royal Pacific Group, I find this argument to be disingenuous. If he is suggesting that Royal Pacific never objected he is wrong.

**103**  Both Mr. Peck and Mr. Fung objected to the October 9 email and the website attached to it. Mr. Peck demanded that he take the website down immediately.

**104**  I find that no reasonable person in Mr. Dong's position could have formed the opinion that the Royal Pacific Group was consenting or acquiescing in the use of the Royal Pacific name or logo in connection with the promotion of his Bliip Box business or any other business of his apart from his duties under the SRA.

**105**  I am also satisfied that Mr. Dong was well aware of the advantages of being able to use the royalpacific.co domain name. His evidence was that his original intent in acquiring it was to make it a gift to Mr. Fung.

**106**  Mr. Dong operated his website for many years under the name stevenrealtor.com. There can be no reasonable explanation for his changing the name of his website to royalpacific.co other than to trade on the goodwill of the Royal Pacific brand.

**107**  I therefore see no merit in Mr. Dong's argument on this issue.

**Passing Off**

**108**  Section 7 of the *Trade-marks Act* contains a statutory enactment of the common law tort of passing off;

7 No person shall

1. make a false or misleading statement tending to discredit the business, goods or services of a competitor;
2. direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;
3. pass off other goods or services as and for those ordered or requested...

**109**  The three necessary components of passing-off are:

1. The existence of reputation or goodwill at the relevant time. This includes consideration of whether the plaintiff was recognized by the trade name and whether the trade name was distinctive within the relevant field of activity.
2. A misrepresentation leading the relevant public to believe there is a business association or connection between the parties. This includes consideration of whether the defendants' use of the trade name is likely to deceive the relevant public. Any misrepresentation need not be deliberate and proof of intent is not necessary. Evidence of likelihood of confusion, leading to the possibility of lost business opportunity is relevant. However, the establishment of actual confusion is not required.
3. Damage or potential damage flowing to the plaintiff as a result of any misrepresentation due to loss of control over its reputation is presumed.

*Vancouver Community College v. Vancouver Career College (Burnaby) Inc.*, [*2017 BCCA 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MS1-JVC1-F7VM-S3TT-00000-00&context=) at paras. 27-30.

**110**  In this proceeding, there are four allegations of passing off:

1. the email sent on October 9, 2013, directed at real estate-related services;
2. the website at <*royalpacific.co*>, which was directed at real estate services from at least October 9, 2013 to March 25, 2014;
3. the domain name <*royalpacific.co*>; and
4. the Facebook page "royalreferrals" which was also directed at referrals in the real estate community from 2014 to 2017.

**111**  I have already found that the plaintiffs have established goodwill in the name and Trade-mark. The plaintiffs called a good deal of uncontradicted evidence establishing their reputation in the real estate field in Greater Vancouver.

**112**  Tracie McTavish, Richard Laurendeau and David McTavish were witnesses called by the plaintiffs to testify as to the goodwill and reputation of the Royal Pacific Group in the Greater Vancouver Real Estate industry. All three were able to describe the Royal Pacific Trade-mark from memory and testified that Royal Pacific was well known and respected in this market.

**113**  The evidence also established that Royal Pacific has been in business since 1994. It is one of the largest independent brokerages in Vancouver and arranged sales of real estate valued at over $15 billion in 2016. In addition, I find that the Royal Pacific Group utilizes the trading names ROYAL PACIFIC and ROYAL PACIFIC REALTY in its business.

**114**  Mr. Dong put into evidence numerous entities that have used the name Royal Pacific in support of his position that the name Royal Pacific was not distinctive of the plaintiffs' business.

**115**  I do not find this evidence persuasive. There is no doubt that other companies have used the name Royal Pacific in connection with their businesses. However, none of them has used the Royal Pacific logo or anything similar. In addition, most of those businesses operated in other countries or jurisdictions and none was a real estate company. In my view the critical question is whether the plaintiffs have established goodwill in the Vancouver area real estate industry. The evidence in this case establishes that they have done so.

**116**  The second element of the tort is a misrepresentation leading relevant members of the public to believe that there is a business connection between the parties. This involves a consideration of whether confusion in the minds of the public is a likely consequence of the actions complained off.

**117**  The tort of passing off can occur not only when a competitor leads the public to believe that its products or services are that of the plaintiff but also when the defendant has promoted its own products in such a way to create the impression that its product or services are in some way approved or endorsed by the plaintiff or that there is some business connection between the plaintiff and the defendant; *National Hockey League v. Pepsi-Cola Canada Ltd*. [*(1992), 42 C.P.R.(3d) 390*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNS1-M127-00000-00&context=) (B.C.S.C.), aff'd [*(1995), 59 C.P.R. (3d) 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M230-00000-00&context=) (B.C.C.A.).

**118**  In my view, this is the manner in which the actions of the defendants constitute passing off in this case.

**119**  The issue of what constitutes confusion in the minds of the public was addressed in *Vancouver Community College*:

[57] Referring to the jurisprudence the judge recognized, correctly, that whether there is likely to be confusion must be answered in the context of the circumstances of the case. He referred to these observations by Justice Binnie in *Mattel Inc. v. 3894207 Canada Inc.*, [*2006 SCC 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16W-00000-00&context=):

56 What, then, is the perspective from which the likelihood of a "mistaken inference" is to be measured? It is not that of the careful and diligent purchaser. Nor, on the other hand, is it the "moron in a hurry" so beloved by elements of the passing-off bar: *Morning Star Co-Operative Society Ltd. v. Express Newspapers Ltd.*, [1979] F.S.R. 113 (Ch. D.), at p. 117. It is rather a mythical consumer who stands somewhere in between, dubbed in a 1927 Ontario decision of Meredith C.J. as the "ordinary hurried purchasers": *Klotz v. Corson* [*(1927), 33 O.W.N. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2Y9-00000-00&context=) (Sup. Ct.), at p. 13. See also *Barsalou v. Darling* [*(1882), 9 S.C.R. 677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3N1-FCYK-238X-00000-00&context=), at p. 693. ...

[Emphasis in original]

**120**  In this case, the context is that the relevant market is the lower mainland or greater Vancouver real estate industry. Royal Pacific has a well-recognized name and reputation in that market. That industry and geographic area was the very market in which Mr. Dong was soliciting business.

**121**  I conclude that the use of the domain name royalpacific.co for the website together with numerous references to aspects of the plaintiffs' business and the fact that the webpage was offering real estate related products would have caused confusion in the mind of an "ordinary hurried consumer", who could have confused the owner of the website with the Royal Pacific Group.

**122**  The law is well settled that interference with the goodwill of the plaintiff is sufficient to establish damage, the third element of the tort. At paras. 75-76 of *Vancouver Community College*, Justice Saunders approved the statement of the principle set out by Justice Shaw in *Edward Chapman Ladies' Shop Limited v. Edward Chapman Limited*, [*2006 BCSC 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S30K-00000-00&context=):

[75] In the trial decision of *Edward Chapman Ladies' Shop Limited*, [*2006 BCSC 14*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S30K-00000-00&context=), Mr. Justice Shaw admirably described the jurisprudence on damage, including:

[53] The defendant argues that no financial loss has been proven by the plaintiff. In terms of demonstrable loss of business to date, I agree with the defendant. As I read the case law, however, proof of actual financial loss is not required; rather, damage may be inferred from the unauthorized use of another's goodwill. Damage may also be inferred from the loss of control over one's goodwill.

[54] In *Sir Robert McAlpine Ltd. v. Alfred McAlpine Plc.*, 2004 EWHC 630 at para. 20 (Ch.), Mann J. said:

When it comes to considering damage, the law is not so naïve as to confine the damage to directly provable losses of sales, or "direct sale for sale substitution". The law recognises that damage from wrongful association can be wider than that.

[55] In *Irvine v. Talksport Ltd.*, [2002] 1 W.L.R. 2355, at 2366 (Ch.), Laddie J. said:

But goodwill will be protected even if there is no immediate damage....[A]lthough the defendant may not damage the goodwill as such, what he does is damage the value of the goodwill to the claimant because, instead of benefiting from exclusive rights to his property, the latter now finds that someone else is squatting on it.

[56] In *Visa International Service Association v. Visa Motel Corporation* (1984), 1 C.P.R. (3d) 109 at 119 (B.C.S.C.), Proudfoot J. (as she then was) said:

[T]he lack of power to control the use of the marks to which goodwill attached by unauthorized users was recognized as an apprehended form of damage to goodwill.

[76] In this case the interference with the appellant's goodwill is sufficient to establish damage.

[Emphasis of Saunders J.A.]

**123**  I am therefore satisfied that the plaintiffs have established the three elements necessary to establish the tort of passing off. In this regard I note that after the termination of the SRA, the defendants continued to operate the royalpacific.co website and update it to March, 2014.

**Defences**

**124**  At paragraph 68 of these reasons I set out the issues identified by the defendants. I have already dealt with most of those issues but will address them again briefly.

**125**  I have already found that Kingsway did not breach the SRA. Mr. Dong was permitted, and indeed encouraged to use the Royal Pacific name and logo in connection with his activities as a sales representative. Read in context, any permission given to Mr. Dong to use the name and logo was clearly limited to that purpose. Section 9 of the SRA did not grant Mr. Dong the right to use the Royal Pacific name and logo for any other purpose.

**126**  Mr. Dong relied on what he called the doctrine of estoppel by acquiescence with respect to the use of the name and logo. However I can no evidence of either estoppel or acquiescence in the conduct of the plaintiffs. In my view, in advancing this argument Mr. Dong is again confusing the limited right granted to him to use the name and logo in connections with his duties as a sales representative with use for any other purpose.

**127**  Mr. Dong has not shown any ground on which the doctrine of *ex turpi causa* can be applied to this case. I have already found that the plaintiffs have acted lawfully and in good faith throughout this dispute.

**128**  I will address the question of whether the defendants must transfer the royalpacific.co domain name to Royal Pacific Ltd. in my reasons dealing with remedies.

**129**  There is also no evidence that the plaintiffs have benefitted at all, let alone been unjustly enriched in this case.

**130**  I will also address the issue of damages, special costs and the continuation of the vexatious litigant order later in these reasons.

**131**  Finally I find that the plaintiffs have done nothing to abuse the process of this court.

**Remedies**

**132**  The plaintiffs seek the following remedies:

1. an injunction prohibiting the defendants by themselves and their servants, workmen, agents and employees, from directly or indirectly:
2. using the trade names and trade-marks ROYAL PACIFIC and ROYAL PACIFIC REALTY and the Registered Trade-mark in the future including without limitation use in association with sales of, distribution of or advertising of wares or services in association with the trade names and trade-marks ROYAL PACIFIC and ROYAL PACIFIC REALTY and the Registered Trade-mark;
3. directing public attention to any of the defendants' services in such a way as to cause or to be likely to cause confusion between the services and business of the defendants and the services and business of the plaintiffs, including without limitation by adopting, using or promoting "ROYAL PACIFIC" or "ROYAL PACIFIC REALTY" as, or as part of, any trade-mark, trade-name, trading style, meta tags (or other internet search engines, optimization tools or devices), corporate name, business name, domain name (including any active or merely re-directing domain name); or
4. passing off the defendants' services as and for those of the plaintiffs;
5. an injunction that the defendants or any one of them transfer the <*royalpacific.co*> domain name to the plaintiff Royal Pacific Real Estate Ltd. and provide assistance to the plaintiff Royal Pacific Real Estate Ltd. as may be necessary to transfer the <*royalpacific.co*> domain name;
6. nominal damages for Trade-mark infringement and passing off in the amount of $30,000;
7. nominal damages for breach of contract in the amount of $5,000;
8. special costs;
9. pre-judgment and post-judgment interest; and
10. extension of the vexatious litigation order made on February 5, 2016.

**133**  In most circumstances a successful plaintiff in an action for passing off and infringement of Trade-mark is entitled to an order restraining the defendant from continuing its unlawful activities.

**134**  I am satisfied that the plaintiffs are entitled to the injunctive relief sought in paragraphs a) (i) and (ii) and (iii) above.

**135**  In the circumstances of this case, I am also of the view that an order should be made requiring the defendants to transfer the royalpacific.co domain name to the plaintiff Royal Pacific Ltd.

**136**  I have the authority to make such an order under s. 53.2(1) of the *Trade-marks Act*, which provides:

53.2 (1) If a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits, for punitive damages and for the destruction or other disposition of any offending goods, packaging, labels and advertising material and of any equipment used to produce the goods, packaging, labels or advertising material.

**137**  In *Michaels v Michaels Stores Procurement, Inc.*, [*2016 FCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JDJ-9D11-JT42-S0YW-00000-00&context=), the court held that s. 53.2(1) gives the court the power to order the transfer of a domain name when a breach of the *Act* has been established;

8 Further, the jurisdiction to order delivery up of the domain names in question (e.g. michaels.ca) is firmly rooted in statute. Section 53.2 of the *Trade-marks Act* gives the Court a wide discretion to grant the remedies it considers necessary to give effect to rights that have been infringed, such as those under ss. 20(1.1) of the *Trade-marks Act*. It provides that "if a Court is satisfied... that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances...". A statutory basis for the order requiring delivery up of the domain name can also be found in subsection 20(2) of the *Federal Courts Act* ([*R.S.C. 1985, c. F-7*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB51-JW09-M4VW-00000-00&context=)), which gives the Court jurisdiction to order any appropriate remedy known to common law or equity: *Merck v. Apotex*, [*2006 FCA 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-FD4T-B082-00000-00&context=) at para 123.

9 On the evidence before the judge, the domain name was the mechanism by which the respondent's mark was infringed, and was the instrument of confusion in the marketplace. No palpable and overriding error has been demonstrated in the judge's discretionary decision to require delivery up of the domain name.

**138**  In this case the domain name was integral to the infringement of the Registered Trade-mark, the tort of passing off and to the breach of s. 7 of the *Trade-marks Act*. Mr. Dong at no time acknowledged that the use of the royalpacific.co domain name was in any way wrongful. I am of the view that an order requiring the defendants to transfer the domain name is necessary to protect the rights of the plaintiffs and reduce the risk of further litigation over the use of the domain name.

**139**  I therefore order that all defendants take all necessary steps to transfer the domain name royalpacific.co to the plaintiff Royal Pacific Ltd.

**Mr. Dong's Personal Liability**

**140**  I am satisfied that all three defendants are liable for Trade-mark infringement and passing off.

**141**  In certain circumstances a director or directing mind of a company will not be held personally liable for wrongful acts that they cause that company to take. The classic example of such a situation is found in *Said v. Butt*, [1920] 3 K.B. 497, in which it was held that a managing director of a company could not be found liable for inducing the company to breach a contract with a third party.

**142**  In *Mentmore Manufacturing Co. v. National Merchandise Manufacturing Co*. [*(1978), 89 D.L.R. (3d) 195*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M3Y1-FG68-G2PS-00000-00&context=) (F.C.A.), the court held that a director of a company could only be liable for knowing, deliberate, wilful participation in a wrongdoing. In that case the wrongdoing in question was manufacturing ball point pens in breach of the patent rights of the plaintiff. If that *ratio* applies to this case, the plaintiffs would have to show that Mr. Dong engaged in deliberate, willful and knowing pursuit of wrongful conduct by Maijan or Bliip Box to impose liability on him for any wrongful acts on their part.

**143**  However, in *ADGA Systems International Ltd. v. Valcom Ltd*. [*(1999), 43 O.R. (3d) 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1TV-00000-00&context=) (Ont. C.A.), the Ontario Court of Appeal pointed out that the rule in *Said v. Butt* does not apply to cases in which the director or officer of a company personally commits a tort:

...After detailing the mischief that would flow from permitting such claims to be made McCardie J. concluded at p. 506:

I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. ... Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong...

The consistent line of authority in Canada holds simply that, in all events, officers, directors and employees of corporations are responsible for their tortious conduct even though that conduct was directed in a bona fide manner to the best interests of the company, always subject to the Said v. Butt exception.

**144**  The Court of Appeal considered the issue of directors' liability in *Merit Consultants International Ltd. v. Chandler*, [*2014 BCCA 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61WX-00000-00&context=). As I read that decision the Court expressed general agreement with *ADGA*. At para. 22, Newbury J.A. quoted with approval from *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=);

[22] In *XY v. Zhu* itself, we concluded that:

... it appears to be the law in Canada that as long as tortious conduct on the part of an employee or agent of a corporation (or any other employer) is properly pleaded and proven as an "independent" tort by the employee or agent, the wrongdoer can be held personally liable notwithstanding that he or she may have been acting in the best interests of (and at the behest of) the employer or principal. I see no reason in principle or policy why such liability should be restricted to cases involving physical damage (as Said v. Butt may have suggested in 1920), or to claims in ***negligence*** (as referred to in London Drugs, *[1992] 3 S.C.R. 299*, Hildebrand and Neilson.) Certainly the Ontario Court of Appeal did not so restrict it in ADGA. ... [At para. 73.]

**145**  I conclude that Mr. Dong is liable for his own tortious conduct whether or not he was acting on behalf of a corporation when he carried it out.

**146**  In this case I find that it was Mr. Dong who used the royalpacific.co domain name and advertised on the website distributed on October 9, 2013. I also am satisfied that it was Mr. Dong himself who caused the Facebook page complained of to be created.

**147**  My conclusion that Mr. Dong is personally liable is reinforced by the evidence that shows that Mr. Dong at no time differentiated between his personal interests and those of Maijan and Bliip Box. Apart from the fact that they were incorporated, there is little or no evidence that these companies were anything other than vehicles through which Mr. Dong carried on business.

**Damages**

**148**  The plaintiffs seek nominal damages against Mr. Dong for $1,000 for breach of contract. Of the two plaintiffs, only Kingsway has a contract with Mr. Dong.

**149**  I am not persuaded that Kingsway is entitled to any damages against Mr. Dong. Proof of actual damage is an essential element of a claim for breach of contract. Kingsway did not rely on any breach of contract by Mr. Dong when it terminated the SRA. The principal complaints made against Mr. Dong are trade-mark infringement and passing off. Moreover, Kingsway has not demonstrated any damages as a result of any breach of conduct by Mr. Dong.

**150**  I therefore dismiss the claim against Mr. Dong for breach of contract.

**151**  Royal Pacific Ltd. is entitled to nominal damages. By definition nominal damages are damages that cannot be determined by reference to any loss to the plaintiff or wrongful gain by the defendant.

**152**  In this case I am satisfied that the defendants do not appear to have made any financial gain from their wrongful conduct. They undoubtedly have caused the plaintiffs a good deal of inconvenience but there is no evidence that any financial loss was caused to the business of either plaintiff.

**153**  The relief I have granted by way of injunction and by ordering the defendants to transfer the royalpacific.co domain name to Royal Pacific Ltd. have provided the plaintiffs with an adequate remedy.

**154**  In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc. et al*, [*2004 BCSC 1464*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0D7-00000-00&context=), the court awarded $1,000 in nominal damages for each breach. In this case four instances of infringement or passing off have been made out. I consider that an award of $1,500 for each breach is appropriate in this case and therefore award damages of $6,000.

**Continuation of Prohibition against Pursuing actions against Plaintiff's Counsel**

**155**  Finally, I have concluded that the order prohibiting Mr. Dong from commencing any action against the plaintiffs' counsel without leave of the court should be made permanent.

**156**  In the course of these proceedings, including at trial, Mr. Dong made a number of unsubstantiated allegations against the law firm representing the plaintiffs. There was no evidence lead capable of supporting any such allegations. These included allegations of dishonesty and unprofessional conduct.

**157**  I am satisfied that the plaintiffs' counsel should not be put to the expense of defending a proceeding against them without Mr. Dong satisfying this court that it is in the interests of justice that it should proceed.

**158**  I therefore make an order permanently prohibiting Mr. Dong from commencing any action against the firm WLG (Canada) LLP or any partner, associate, employee or agent of that firm with respect to the conduct of the firm in acting for the plaintiffs in this action without obtaining leave of the court.

**Application to amend Counterclaim**

**159**  It follows from the conclusions I have reached in these reasons that the issues the defendants wish to raise by way of an application to amend their counterclaim have been resolved against them and no further application can be brought to advance a counterclaim.

**Costs**

**160**  The plaintiffs have been substantially successful in this action and are entitled to their costs.

**Special Costs**

**161**  The plaintiffs seek an award of special costs.

**162**  The law is well settled that the court can award special costs when it is satisfied that a party has engaged in reprehensible conduct in the course of the litigation. However, a decision to award special costs is discretionary.

**163**  In this case there is much to criticize about Mr. Dong's conduct. However, I have concluded that much of his conduct can be explained by his unfounded but genuine conviction that the plaintiffs have sought to persecute him in this action.

**164**  While there was no medical evidence to this effect before me it was clear that Mr Dong has a compulsive personality. While this does not excuse his conduct, it is a factor that I take into account in determining whether he should be punished by an award of special costs.

**165**  I am aware that Mr Dong advanced many unmeritorious arguments. However, as pointed out in *Merit Consultants International Ltd*, there is a fine line between advancing unmeritorious claims that have little chance of success that a party genuinely believes in and the assertion of hopeless arguments recklessly or spuriously.

**166**  I am satisfied that Mr Dong had a genuine but misplaced belief that his arguments were meritorious.

**167**  I am also concerned that an award of special costs will further delay the conclusion of this already lengthy proceedings. One consequence of an award of special costs would be a waiver of privilege which would permit Mr. Dong to review all of the files of the plaintiffs' counsel. Such an exercise is not in the interest of the parties.

**168**  Accordingly, I decline to order special costs against Mr. Dong.

**Scale of Costs**

**169**  I have concluded that costs should be assessed on scale C as a matter of more than ordinary difficulty.

**170**  In *Mort v. Saanich School District No 1*, [*2001 BCSC 1473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2V2-00000-00&context=), Justice R. D. Wilson set out some factors that should be considered in determining the appropriate scale of costs under the tariff of costs as it then existed:

5 The starting point is to determine whether this matter was of little difficulty; less than ordinary difficulty; ordinary difficulty or importance; more than ordinary difficulty or importance; or, of unusual difficulty or importance. Difficulty or importance must be established, not both.

6 Relevant factors to consider in answering that question include:

1. The length of the trial;
2. the complexity of the issues involved;
3. the number and complexity of pre-trial applications;
4. whether or not the action was hard fought with little or nothing being conceded along the way;
5. the number and length of Examinations for Discovery;
6. the number and complexity of Experts' Reports; and
7. the extent of the effort required in the collection and proof of facts.

**171**  In *Meghji v. Lee*, [*2014 BCCA 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61V8-00000-00&context=), the Court of Appeal referred to *Mort* with approval, and found that all matters that were formerly covered in scales 4 and 5 of the repealed *Supreme Court Rules* should be treated as matters of more than ordinary difficulty:

[136] We say this for two reasons. First, given the existing case law defining matters of ordinary difficulty, the drafters of the *Rules*, by using the same phrasing, appear to have intended to continue the existing cost regime in relation to cases of ordinary difficulty, as that phrase has been defined and judicially considered. Further, the *Rules* reflect an intention to collapse, into one category, all cases of less than ordinary difficulty. The language of the current *Rules* combines matters of little difficulty (which formerly fell into Scale 1) and matters of less than ordinary difficulty (formerly Scale 2) into what is now Scale A. There was not an equal and proportionate expansion of the range of cases falling within each scale in the new tariff. Having consolidated all matters of less than ordinary difficulty into one scale, it is our view that the drafters also consolidated all matters of more than ordinary difficulty, including matters of unusual difficulty or importance, into Scale C.

**172**  In this case, the trial was lengthy, occupying 15 days over an 8-month period. The legal issues were not unduly complex but were complicated by the many unmeritorious issues raised by the defendants. There were a number of pre-trial applications made necessary by the difficulties faced by the plaintiffs in obtaining proper disclosure of documents and responsive answers on examination for discovery. The action was hard fought, with the defendants conceding nothing and making allegations of impropriety against the plaintiffs, its officers and counsel for the plaintiff. The examinations for discovery were lengthy. There were no expert reports but the plaintiffs were put to a great deal of time and effort to determine the ownership of the critical domain name royalpacific.co.

**173**  For these reason I order costs to be assessed on Scale C.

R.J. SEWELL J.

**End of Document**

[***Rutter v. Adams, [2016] B.C.J. No. 629***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JH9-BW81-F22N-X483-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.E. Watchuk J.

Heard: October 14-17, 20-24, 27, November

26, 2014; February 16-17, 2015;

written submissions, June 12, August 25, 2015.

Judgment: March 31, 2016.

Dockets: M114802, M139131

Registry: New Westminster

**[2016] B.C.J. No. 629** | 2016 BCSC 554

Between Danica Violette Rutter, Plaintiff, and Russell George Adams and Jacqueline Lois Adams, Defendants And between Danica Fletcher, Plaintiff, and Kevin M. Simpson and Hollie M. Schuurman, Defendants

(320 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Head injuries — Headaches — Psychological injuries — Depression — Considerations impacting on award — Degree of impairment — Age of claimant — Determination of damages arising from motor vehicle accidents — Plaintiff was awarded $115,000 in non-pecuniary damages — 37-year-old plaintiff was involved in motor vehicle accidents — She had experienced neck and back pain, headaches and psychiatric problems since first accident, but issues had significantly diminished — She was totally disabled by physical injuries for four months — Physical injuries were 50 to 60 per cent resolved after two years, but she then began serious spiral into depression and suicidal ideation — Plaintiff's ability to function was significantly affected.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Extent of incapacity — Non-pecuniary loss — Determination of damages arising from motor vehicle accidents — Plaintiff was awarded $115,000 in non-pecuniary damages — 37-year-old plaintiff was involved in motor vehicle accidents — She had experienced neck and back pain, headaches and psychiatric problems since first accident, but issues had significantly diminished — She was totally disabled by physical injuries for four months — Physical injuries were 50 to 60 per cent resolved after two years, but she then began serious spiral into depression and suicidal ideation — Plaintiff's ability to function was significantly affected.**

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| --- |
| Determination of damages arising from motor vehicle accidents. The 37-year-old plaintiff was involved in two motor vehicle accidents four years apart, the first of which happened seven years before the trial. She had experienced neck and back pain, headaches and psychiatric problems since the first accident, but the issues had significantly diminished. She was totally disabled by the physical injuries for four months after the first accident, during which time her mother and fiancÚ stayed with her and assisted her with day-to-day needs. The physical injuries were 50 to 60 per cent resolved after two years, but she then began a serious spiral into depression and suicidal ideation when she realized that her dream of a career in stagecraft was over and missed 11 months of work. When she could not meet the physical demands of her pre-accident work, she obtained a series of jobs that were better suited to her post-accident abilities but less rewarding. She was very active before the first accident.  HELD: The plaintiff was awarded $115,000 in non-pecuniary damages, $11,328 for past income loss, $30,000 for loss of opportunity, $0 for loss of future earning capacity, $4000 for loss of housekeeping capacity, $102,764 for cost of future care, $22,639 in special damages and $14,000 in trust.  The plaintiff's ability to function physically, recreationally, socially and vocationally was significantly affected. The physical effects were the most acute for the first four months and improved after two years, but the emotional and psychiatric effects then worsened. The physical and emotional effects continued. The physical effects on the plaintiff's neck and back were likely chronic. Her emotional stability continued to improve. The physical injuries resulted in the loss of a dream. The award for loss of opportunity was for the 11 months that the plaintiff was unable to work due to the psychiatric issues. The plaintiff did not prove a real and substantial possibility of an income loss. She had a stable job and the capacity to continue to earn her current income. The assistance that the plaintiff's mother and fiancÚ provided during the first four months was more than what would reasonably be expected from family members. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 11-6(9), Scale B

**Counsel**

Counsel for the Plaintiff: D.W. Framingham, M. Monroy.

Counsel for the Defendants: S.G. Herman, S.M. Bluekens, S. Wittman (Articled Student).

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**Reasons for Judgment**

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| **J.E. WATCHUK J.** |

**I. INTRODUCTION**

**1**  The plaintiff, Danica Rutter, now Danica Fletcher, claims for damages resulting from two motor vehicle accidents: July 21, 2007 and September 9, 2011. The trials of the actions arising from both accidents were heard together by consent.

**2**  On July 21, 2007, the plaintiff was the driver of her own vehicle when it was struck on the driver's door by a vehicle owned by the defendant, Russell George Adams, and operated by the defendant, Jaqueline Lois Adams (the "first accident"). Liability for the first accident has been admitted by the defendants.

**3**  On September 9, 2011, the plaintiff was again driving her own vehicle when it collided with a vehicle that was owned by the defendant, Hollie M. Schuurman, and driven by the defendant, Kevin M. Simpson (the "second accident"). Liability for the second accident is not contested by the defendants.

**4**  Ms. Fletcher claims damages for the physical, psychological and emotional injuries she sustained and the losses suffered as a result of the first accident and the second accident. In particular, she claims non-pecuniary damages, past and prospective loss of earnings and lost opportunity, diminished earning and housekeeping capacity, the cost of future care, damages in trust for others, special damages, and accelerated depreciation in the value of her vehicle following the first accident.

**II. ISSUES**

**5**  As liability for the first accident was admitted, and liability for the second accident is no longer contested, liability is not in issue.

**6**  The issues for determination are the nature and extent of the injuries and losses suffered by Ms. Fletcher, the degree of recovery from those injuries, and the damages to which she is entitled. In this case, there were both physical and psychological injuries sustained. Six physicians, including two neurologists, a psychiatrist, a psychologist, a physiatrist and a family physician provided expert evidence.

**7**  It is the submission of the plaintiff that the ***negligence*** of the defendants fundamentally changed Ms. Fletcher's life and permanently altered its course. She says that she is not, nor will she ever be, the woman she was on July 20, 2007.

**8**  The defendants in both actions, collectively "the defendants", submit that although it is not disputed that the plaintiff sustained neck and back soft tissue injuries and headaches as well as psychological injuries from the first accident with a minor aggravation from the second accident, it is contested that she continues to suffer a great degree of impairment from her injuries. They say that there has been a significant recovery since 2011 in the areas of neck and back pain and suffering from headaches as well as the psychological and psychiatric effects from the accident.

**III. EVIDENCE AT TRIAL**

**9**  Many of the facts including the chronology of the plaintiff's pre-accident life, work-related history and the treatments following the accidents are not in issue. The defendants challenge the plaintiff's credibility and reliability with regard to her evidence of injuries and recovery, and submit that that evidence is rife with inaccuracies and inconsistencies. I will resolve those issues in the Discussion section below.

**A. Danica Fletcher**

1. Prior to the First Accident

**10**  Ms. Fletcher is 37 years old and has spent most of her life in British Columbia. She grew up in Coquitlam, the only child of Robert and Marion Rutter, and other than 18 months in Sechelt and attending the Banff Centre for the Arts in Alberta, she has resided in the Lower Mainland. She described her early years as idyllic. When she was eight her parents separated then reconciled three years later.

**11**  Ms. Fletcher was born with dislocated hips and she was first taken to a chiropractor as a toddler. She has remained a patient of the same chiropractor since then. In junior high school, she also struggled with suicidal ideation and self-harm as a result of bullying and teasing. During this period Ms. Fletcher moved to Sechelt to live with her aunt. Upon returning to Coquitlam, she made new friends and finished high school in 1996.

**12**  Ms. Fletcher has maintained a close and loving relationship with both of her parents. In a family active in the arts, including her mother who worked as a fine arts educator, she enjoyed various fine art subjects, including ballet, modern dance and painting. These interests developed into a passion for stagecraft. In high school she was responsible for making masks for a production of Madame Butterfly. She developed skills in this area, learning carpentry, rigging and stage lighting.

**13**  Ms. Fletcher began working in high school part-time and upon graduation found a job at H&R Block. She was accepted to an interior design program at Kwantlen College but opted instead to attend Douglas College from 1998-2000 in their stagecraft program. She received a full scholarship to the Banff Centre for the Arts and attended there for two summers. At the Banff Centre for the Arts, Ms. Fletcher met various professionals in the industry and was inspired to pursue a career in stagecraft and someday work for Cirque du Soleil.

**14**  In this industry her first position was working as a lighting supplier in a warehouse for what was then Showtime Lighting but was later known as Q1 Production Technologies and Epic Production Technologies ("Showtime"). This position involved designing, moving, loading, unloading, setting-up and taking down lighting and other heavy equipment. She often had to climb ladders carrying equipment and frequently drove a one tonne truck to venues, sometimes out of town. Work days were long and she sometimes worked seven days a week. She excelled in this industry and became a crew chief.

**15**  It was in this role that Ms. Fletcher met her future husband, Kevin Fletcher. They began dating in July 2004.

**16**  Ms. Fletcher was involved in two motor vehicle accidents during this period on October 17, 2000 and December 9, 2003. In both accidents she was hit from behind. As a result of the 2000 accident she injured her back and missed about three weeks of work. The 2003 accident resulted in further injury to her neck and back. In 2003, she was cautious for several weeks but did not miss work. After these accidents, Ms. Fletcher was able to return to full duties at her work and all of the physical demands that went with it. She underwent chiropractic treatment after each accident.

**17**  Later in 2004, Ms. Fletcher was offered a position at Art of the Party Design ("Art of the Party") as a full-time shop manager. This position involved all aspects of event staging and design and, like her position at Showtime, had long hours and involved designing and constructing sets which involved everything from construction with lumber and power tools to the finishing aspects of painting and lighting.

**18**  In late 2005, Ms. Fletcher resigned from Art of the Party as she felt burned out and taken advantage of due to the working conditions. In January 2006 she commenced work in a new position at Cinequip White ("Cinequip") as a shipper/receiver of movie and theatrical equipment. This job involved heavy work loading and unloading trucks of film equipment. Ms. Fletcher saw this position as a short-term, 18 to 24 months, solution and a less stressful position.

**19**  In this position Ms. Fletcher occasionally had lower back pain if she exerted herself or lifted beyond her capacity. She found that chiropractic treatments were effective when needed and does not recall missing any work due to back symptoms. She also continued freelance work striking shows and lights at Showtime.

**20**  In September 2005, Ms. Fletcher and Kevin moved in together and began planning life as a couple. They enjoyed going on 4x4 "wheeling" trips together where she would clear the path for the truck by moving obstacles and operating the winch. During these trips Ms. Fletcher was an enthusiastic and active participant who greatly enjoyed what amounted to deliberately rough and challenging rides off-road. She was able to participate fully without hesitation or restriction. She also enjoyed camping, hiking and scaling rocks.

**21**  At home they gardened, painted and otherwise improved the unit they had rented. Household duties were shared but Ms. Fletcher performed roughly 70% of those tasks. They were financially independent and rarely needed to rely on others for assistance. Their long-term plan included Kevin going to school for electrical engineering at BCIT with the assistance of Ms. Fletcher's father. During 2006 and 2007, Ms. Fletcher and Kevin were talking about marriage and children.

**22**  Before the first accident, Ms. Fletcher was able to work extremely long hours performing physically demanding work. While she would sometimes have to take care with heavy lifting and occasionally experienced some back symptoms, she was not functionally restricted or limited in her ability to work or participate in social, recreational or any other activities of daily life.

**23**  Ms. Fletcher described herself at this time as bubbly and extremely social. She was motivated, positive, optimistic and able to offer support to family and friends when the need arose. In her words, she was "rarely in one spot for very long." She was physically active and emotionally healthy and happy.

1. The First Accident

**24**  On July 21, 2007, Ms. Fletcher was turning left from Woolridge onto King Edward in Coquitlam when a vehicle driven by the defendant, Ms. Adams, struck her vehicle on the driver's side. The impact caused Ms. Fletcher's head to strike the driver's side window, knocking raindrops from the window where it had been struck by her head.

**25**  Ms. Fletcher then observed what she thought was an attempt by the defendant to leave the scene. The defendant's vehicle struck her vehicle a second time and drove away. Ms. Fletcher panicked thinking the other driver was going to get away. Two people at the scene called 911 and located the defendant's vehicle a short distance away where it had stalled. The vehicle damage estimates and photographs in evidence depict significant damage to both vehicles.

**26**  Ms. Fletcher was petrified and shaking severely at the scene. She felt faint and nauseous. Her physical symptoms included a burning sensation and pounding in her head that caused her to ask someone if she was bleeding. When no blood was reported she began to worry that she might be bleeding inside her head. Firefighters and paramedics attended and one supported her head and neck until she was given a neck brace, removed from the vehicle, placed on a spine board and transported by ambulance to Royal Columbian Hospital.

**27**  At the hospital she had an x-ray of her neck. Ms. Fletcher was told that the x-ray had revealed a possible neck fracture and a CT scan was ordered. She was told not to move while she waited several hours for the CT scan. Ms. Fletcher was extremely scared that she had a broken neck. Ms. Fletcher remained in a neck brace, confined to the spine board and was not permitted pain medication or even water until the results of the CT scan became known. Ms. Fletcher was advised that there was no fracture, reassured, sent home with pain medication and instructed to return if she experienced any numbness in her extremities. Ms. Fletcher left the hospital at approximately 5:00 a.m., over nine hours after she had arrived, and was driven home by her mother.

1. After the First Accident

**28**  Given that Kevin was working in the United States at the time of the first accident, Ms. Fletcher's mother stayed with her for the following day, during which she remained in bed. During the days that followed she experienced cognitive disruption, extreme nausea, dizziness and fainting. She described herself as feeling vulnerable and easily overstimulated by lights and sound. She was unable to read or watch TV. It was uncomfortable to ride as a passenger in a car. She was suffering from headaches. Her neck and back were really stiff and her body was sore.

**29**  Ms. Fletcher was also very concerned about being left alone and felt her safety had been compromised. She felt a constant flight or fight impulse. When her regular family physician, Dr. Heather McLeod, was not available she saw a locum at her office and was prescribed painkillers, muscle relaxants and anti-inflammatory medication. Her mother drove her to that doctor's appointment and stayed with her until Kevin returned a few days later.

**30**  Ms. Fletcher was homebound except for medical appointments. Over the next three or four weeks Ms. Fletcher's mother and Kevin continued to assist her and drove her to various appointments. She would sometimes take a taxi if necessary. Eventually she was able to begin walking to appointments for massage therapy at Legacies Massage Therapy ("Legacies") and physiotherapy at Sungod, both of which were within walking distance. She was sometimes able to remain out of the house for as long as four hours before increasing nausea, headaches and dizziness would cause her to return home. She had a large "goose egg" on the side of her head for a number of weeks and fainted a number of times in the months that followed the first accident.

**31**  For two or three months following the first accident, Ms. Fletcher convalesced at home, relying heavily upon the assistance of Kevin and her mother. Kevin took over most of the household chores, including shopping, cleaning, vacuuming and taking care of their three cats. He also drove her to appointments, in addition to keeping her company because she did not want to be left alone. When Kevin was at work, her mother would keep her company, do the housework and shopping and provide transportation. After the first months, she was able to do 30% of the household work, with Kevin doing 70%.

**32**  Other symptoms following the first accident included left knee pain, stiffness in her neck, numbness/tingling extending down her arms and into her fingers, and tension and migraine headaches. Her back symptoms spanned an eight inch band across her lower back and she sometimes experienced associated symptoms of shooting pain extending into her left buttock and left leg. She had milder tension headaches that seemed focused behind her eyes and more severe migraine headaches that included sensitivity to light and sound. Her migraines typically began with stiffness in her neck that would extend over her head "like a hood" and prove debilitating such that she would lock herself in a dark room.

**33**  Ms. Fletcher did not return to driving until November 2007. When she did begin to drive again, an activity she previously enjoyed, she was anxious and nervous on the roadway and worried about other drivers. She returned to the repair shop on a number of occasions to ensure that all damage done to her vehicle by the accident was adequately repaired. When she and Kevin became frustrated with the quality of the repairs to their vehicle, they traded it in for two Hyundais. They believed the larger vehicles would be safer with features such as side and front airbags and Kevin did not want to maintain and drive his 4x4 jeep in the city any longer.

**34**  Ms. Fletcher remained under the care of her family physician, Dr. McLeod, who prescribed time off work, physiotherapy and massage therapy. Ms. Fletcher attended physiotherapy approximately once a week for several months but did not find that treatment particularly helpful. She gained more relief from massage therapy, which she received at Legacies as often as twice a week for some time and less thereafter. She also found aquatic or pool therapy and home exercises helpful for both her physical and her cognitive symptoms. Due to persistent symptoms of dizziness and nausea, Dr. McLeod referred Ms. Fletcher for assessment by neurologist Dr. Javidan, whom she saw on October 17, 2007 and February 29, 2008. Although she felt that improvement was slow, there were some improvements between the two visits to Dr. Javidan.

**35**  Ms. Fletcher also returned to see her chiropractor of many years, Dr. Shepherd. Although Dr. Shepherd had helped her with various issues in the past, she experienced little relief with traditional chiropractic treatment following the first accident and eventually stopped seeing Dr. Shepherd.

**36**  On December 3, 2007, after consultation with Dr. McLeod and feeling some pressure from her employer, Ms. Fletcher returned to work at Cinequip on modified duties. She was not to perform any heavy lifting or other activities that would aggravate her injuries. She tested the boundaries but she was restricted primarily by neck and back pain to administrative tasks. After ten months, in October 2008, she resigned because it had become obvious to her that she could not resume her full duties, and the initial plan was for this position to be temporary because, as a warehouse job, it was not her career path.

**37**  All aspects of Ms. Fletcher's life were adversely affected by the first accident. She was unable to participate in the 4x4 trucking and other physically demanding recreational activities with her friends. Intimacy and her physical relationship with her husband were significantly impacted. She felt that she and Kevin had become hermits who were cut off from social activities and connections, frequently declining invitations to engage in activities and attend events. Before the first accident she loved going on the most challenging of carnival rides, but now goes only infrequently and cannot risk any of the more challenging rides.

**38**  Ms. Fletcher and Kevin became engaged in 2008 and were married on September 26, 2009. Ms. Fletcher testified that her enjoyment of her bachelorette party in Las Vegas and wedding were negatively affected by the injuries from the first accident.

**39**  In October 2008, Ms. Fletcher obtained a position as project coordinator with Panther Constructors Ltd. ("Panther"). The position offered better pay and the opportunity to work with designers and architects designing and constructing for various events. It was a job that involved significant stress and very long hours. Ms. Fletcher did well at Panther for some time. During late 2009 and early 2010 she worked on Live City sites for the 2010 Winter Olympics. She worked extremely long hours, for up to 70 hours per week for almost six months.

**40**  After the Olympic projects were completed, the work and hours at Panther became more normal between April and September 2010. Ms. Fletcher testified that it was an amazing place to work. However, at the same time, Ms. Fletcher was also breaking down as she came to the realization that she could not return to the hands-on work about which she was so passionate. She felt that her chosen career was over.

**41**  As a result, she started to suffer panic attacks and was having difficulty with basic functions and thought processes. While still working at Panther, she contemplated suicide scenarios, but she never took any active steps in that direction because of the effect her death would have upon her parents and Kevin. She did not speak with family or healthcare practitioners about her suicidal ideation in 2010 as she attempted to hold on to what remained of the woman she had been. She felt telling people she was suicidal would mean she had officially lost the person she was prior to the accident in 2007.

**42**  She struggled to accept that she might be mentally ill and what that could mean for her life, her friends and her family. As she began to feel she was losing control, she developed dysfunctional and obsessive behaviours. She began to pick at her skin. She shopped compulsively for silly things to bring her some instant gratification, which strained her relationship and led to arguments with Kevin.

**43**  Ms. Fletcher's desire to control everything made her job that much harder. Inside she felt she was spiraling and there were a few episodes of disassociation. She gave an example of one such dissociative event when she went grocery shopping and found herself in the middle of the cereal aisle, but did not remember leaving her house, driving to the store or putting the loonie in the cart. She thought she might be dreaming.

**44**  In September 2010, Ms. Fletcher was laid off by Panther due to a shortage of work after the Olympics. When she received notice of the lay-off by registered mail she went through the shock of realizing she had no job, followed almost immediately by feelings of relief that there would be no more stress of working. She remained off work for 11 months. She collected Employment Insurance benefits during the interval but did not apply for medical E.I. benefits.

**45**  Ms. Fletcher knew she needed to do something about her poor emotional and mental health so she went to see Dr. McLeod who recommended counselling and medication. She began taking the antidepressant drug Paxil, which she continued until early 2012. It helped to control her intrusive thoughts and her anxiety, but did not diminish her obsessive or compulsive behaviours. The medication also had the side-effect of interfering with her regular emotions and caused her to become distant and emotionally unavailable. She felt drained and avoided interaction with people closest to her. She lost interest in socializing with friends and saw much less of them.

**46**  Her relationship with Kevin also suffered. She stopped sleeping in the same bed as her husband and spent months on the living room couch. Dr. McLeod recommended that Ms. Fletcher find a therapist close to her home. She chose Charlene Kostecki, whose counselling sessions were helpful in working through depression and dealing with anxiety and intrusive thoughts. Ms. Fletcher learned how to talk herself through anxiety and panic attacks by training her brain to stop what it is doing. She also felt guilty about her relationship with Kevin, whom she described as a saint. They attended a few counselling sessions with Ms. Kostecki together to address their relationship and the fact that Ms. Fletcher was no longer the person Kevin had met, fallen in love with and married. She said that she was a shell of her former self and not the vibrant, bubbly wife and partner that he remembered.

**47**  Ms. Fletcher's relationships with her parents were also impacted as she became increasingly frustrated with her difficulties and ongoing disability. She lashed out at loved ones, particularly her mother, to whom she described herself as being really mean. Ms. Fletcher and Kevin withdrew approximately $11,000 from their RRSPs to support themselves, which had never been necessary in the past.

**48**  Before the first accident she and Kevin had only rarely received financial assistance from others, but thereafter they became increasingly reliant upon her parents who were not wealthy. Her father borrowed money, cashed in stocks or had to go without to provide financial assistance to his daughter. Such financial support came in the form of loans, some of which Ms. Fletcher repaid when she received an advance payment from the Insurance Corporation of British Columbia in relation to her claim. She still owed her mother between $20,000 and $25,000 at the time of the trial, whereas her father had forgiven a similar amount before his death, which was to be considered her inheritance.

**49**  Ms. Fletcher also continued to struggle with her physical symptoms, primarily headaches and neck and back pain, which fluctuated with activity. She had not had a day without pain from the time of the first accident to 2011. Her left knee still bothered her, and some numbness and tingling in her fingertips continued.

**50**  While Ms. Fletcher was off work during early 2011, she sought a creative outlet. In order to turn her craft skills into something profitable, she started a small business called Morningstar Creative. She made greeting cards, jewelry and small décor items, which she sold through her website and at farmers' markets and craft shows. More recently, she began teaching card-making classes to between 12 and 16 students for $25 a class. The main reason she created the business was for the satisfaction it gave her as she was going through a particularly difficult time.

**51**  Due to the ongoing effects of the first accident, Ms. Fletcher had to rely upon her friend, Leanne Robb, Kevin and her mother to assist with the heavier tasks required in getting to the events and setting up and taking down the displays. Those were tasks she could have easily done on her own prior to the first accident.

**52**  After 11 months off work, Ms. Fletcher had some improvement in her psychological state on Paxil and with counselling and she told friends and former colleagues that she was again looking for work. During the summer of 2011 she learned of an opportunity to work for Comedy Central -- Destination Funny ("Comedy Central"). She was scheduled to start work in mid-to-late September. She said that part of her was excited to be semi-involved in the event industry in a position she believed was within her physical capacities.

1. The Second Accident

**53**  Ms. Fletcher described traveling northbound on Schoolhouse Avenue in Coquitlam on September 9, 2011, when the defendant, Mr. Simpson, drove the white Chevrolet Cavalier, which was also heading north on Schoolhouse, into a left turn across the path of the vehicle that she was driving. Her mother was the passenger. Mrs. Rutter attempted to warn her daughter but only had time to say "watch this guy" as the defendant's vehicle moved from the right lane into and across the left lane, leaving Ms. Fletcher no opportunity to avoid a collision.

**54**  The front of Ms. Fletcher's vehicle collided with the front left fender and driver's door of the defendant's vehicle. Ms. Fletcher's vehicle sustained almost $3,000 in damage to the front end.

**55**  The plaintiff and her mother testified that Mr. Simpson apologized at the scene of the accident saying words to the effect of "Sorry, I didn't even see you".

1. After the Second Accident

**56**  As a result of the second accident, Ms. Fletcher's ongoing neck and lower back symptoms were aggravated and she felt some new symptoms on the right side of her body. The physical effects of the second accident persisted for only a few months and Ms. Fletcher believed she had returned to her "baseline" by approximately Christmas of 2011. However, her anxiety about driving was exacerbated and she continues to have what she described as a permanent feeling of vulnerability or lack of safety. She no longer enjoys driving or travelling as a passenger, although she does feel somewhat better when she is the driver and in control of the vehicle.

**57**  Ms. Fletcher was still able to commence employment with Comedy Central nine days later, as scheduled on September 18, 2011. While working at Comedy Central, Ms. Fletcher was in direct contact with 18 hotel managers and with Ticketmaster to coordinate accommodation and ticketing packages. She worked full-time earning $20 per hour until the job ended in early December 2011 due to a lack of funding for the project.

**58**  On November 17, 2011, the trial of Ms. Fletcher's claim arising from the first accident, which had been scheduled to commence on December 5, 2011, was adjourned and an advance payment was made on behalf of the defendants in the amount of $50,000. Ms. Fletcher used the funds advanced to pay off credit card debt and pay back money that she had borrowed from her parents. She used funds to pay for hypnotherapy and other treatments, in addition to covering basic living expenses as she had been off work for 11 of the preceding 14 months. She had a veterinarian bill of a few thousand dollars, and she bought an orthopaedic mattress in an attempt to ease her discomfort. She also spent approximately $1,500 on her craft business.

**59**  Four months after the Comedy Central job ended, Ms. Fletcher learned from her friend, Erin Salo, of an opportunity to work again as a project coordinator, this time for Golder Construction ("Golder"). She was hired to commence a full-time contract position from April to December of 2012. Based on-site at the Ruskin Dam in the Maple Ridge/Mission area, her starting wage was $20 per hour with no benefits.

**60**  Golder is a subsidiary of Golder Associates, which is a global company with roughly 9,000 employees. Golder Associates is an employee-owned company of consultants with environmental, mining and geotechnical divisions. Golder operates as a separate entity. Ms. Fletcher's job with Golder was and remains an office job--100% clerical--at which she has had considerable success. She is responsible for high level reports and works in the area of finances.

**61**  Ms. Fletcher had trouble remaining either seated or standing for extended periods due to pain and discomfort. While on contract with Golder and without benefits, Ms. Fletcher missed between 10 and 15 days of work that she was not entitled to pay and had to cash banked overtime, which would have been paid out or used as extra vacation time.

**62**  During mid-2012 when she was commuting to work in the Maple Ridge/Mission area, Ms. Fletcher experienced increased pain in the region of her coccyx. While she had experienced some discomfort in that region before the first accident and felt that the symptoms were aggravated by that accident, it was not to the same extent.

**63**  During the process of learning of and getting her position at Golder, in February 2012, Ms. Fletcher received news that her father was diagnosed with stage 4 liver cancer. Immediate surgery was performed but he was given only a matter of weeks or months to live. Ms. Fletcher became directly involved in his treatment and care. However, taking Paxil to control depression left her feeling disconnected and unable to access or regulate normal human emotions. Ms. Fletcher said that her inability to feel anything made her feel like a horrible person and she decided to wean herself off Paxil over several months. She then felt better able to connect with family and friends, but her anxiety and panic attacks returned.

**64**  When the Ruskin Dam project was complete and her contract ended, Ms. Fletcher moved to the Golder offices in Burnaby. In May 2013, she was hired full-time as a project controls administrator. This position came with benefits and a salary of $45,000 per year, which has since increased to $50,000 per year or about $25 per hour. The extended health benefits available to Ms. Fletcher through her employer require pre-payment by employees who must then seek partial reimbursement of such expenses. The insurer has a subrogation policy, pursuant to which it reserves the right to seek reimbursement of the funds paid out under the Golder employee plan.

**65**  In 2013, Ms. Fletcher was given the Collaborating for Success Award at Golder, which came with a $2,000 taxable benefit. She received her most recent raise six months prior to the trial.

**66**  In late 2013, Ms. Fletcher saw Dr. McLeod who recommended an MRI of her coccyx and lumbar spine, but because of the delay she had a private MRI. After reviewing the results of the MRI, Dr. McLeod referred Ms. Fletcher to a neurosurgeon. She saw Dr. Gittens on May 12, 2014.

**67**  When she saw Dr. Stewart in July 2014, she told her that her coccyx pain worsened in 2012 and is now 100 times worse than it was earlier. Ms. Fletcher had an ergonomic assessment at Golder and she received a sit/stand workstation and other accommodations. In her testimony, she said that it was only painful on sitting, and the sit/stand desk has made a significant improvement. Her coccyx symptoms decreased and administrative work was made more tolerable physically as she could do everything standing. She has not missed any work due to the coccyx symptoms.

**68**  However, she continued to suffer from headaches, neck pain and back pain, and any sustained position causes her to become uncomfortable over time. Over the course of a five-day work week, chronic pain wears on her nerves and reduces her energy levels and her tolerance. By the end of the week, she is physically exhausted and does her best to keep it together. Some of her co-workers are aware of her physical problems but few know about her ongoing emotional and psychological issues. There are weekends that she stays in bed.

**69**  Ms. Fletcher does not have any plans to leave Golder. However, she is concerned about how long she will be able to continue in her present position. Recently, there was a large lay-off of Golder employees, reducing the number from 80 to 30. Seven of Ms. Fletcher's friends and colleagues at Golder were let go on a single day. Her immediate supervisor, with whom she had worked most closely and to whom she reported directly, and his boss, have also since left the company. Ms. Fletcher observes that Golder is facing increasing competition and was due to be absorbed into the parent corporation, Golder Associates, in January 2015. In her current position, Ms. Fletcher receives information about new projects and at the time of the trial she had seen only smaller jobs on the horizon when compared to the larger scale projects in which she had been involved previously at Golder.

**70**  With the departure of Ms. Fletcher's immediate superiors, along with three of four members of the cost control team, she feels without support in a position for which she has only limited on-the-job training, little experience and no formal education. She feels that she is in over her head in many respects and the pressure, combined with her existing physical and emotional problems is taking a toll. She has a great deal of difficulty getting to work each day and sometimes finds herself in tears en route.

**71**  There are days when she calls in sick due to her anxiety, stress and depression which leave her feeling unable to interact with people and the demands of her job. Ms. Fletcher used all of her allowed 12 sick days during 2013 and drew upon banked overtime to maintain her income. While she missed some time due to her father's illness, much time was lost due to her emotional and anxiety issues. An additional cause of her missed work was migraine headaches which cause sharp pain, extreme sensitivity to light and sound, nausea and vomiting.

**72**  In cross-examination, Ms. Fletcher gave evidence that the parent company, Golder Associates is rated among the top ten companies for which to work. They will accommodate employees who work part-time.

**73**  If she did not continue at Golder, Ms. Fletcher would consider going back to school. She would attend Kwantlen College to take the interior design program as the work would be creative and more sedentary.

**74**  Over the years since the first accident, Ms. Fletcher has undergone many treatments and been assessed by various treating health care practitioners. In addition to initial courses of physiotherapy and massage therapy, in early 2008 Ms. Fletcher attended Karp Rehabilitation, where she worked on core stability and strengthening, which helped her feel better, especially improving her left knee.

**75**  She also attended Canadian Medi-Pain Centre for spinal decompression treatments for her back, which she thought might be helpful. She still receives a "bit of relief" from those treatments. She underwent hypnotherapy with Ms. Cam Oxendale, which she found extremely helpful in addressing her anxiety, depression, obsessive compulsive behaviours and her panic attacks.

**76**  She also tried acupuncture, Bowen Therapy, prolotherapy and neurolinguistic programming as she considered and investigated numerous possibilities to deal with the physical, mental and emotional issues arising from the accidents, but she did not find such treatments helpful.

**77**  Ms. Fletcher described a typical weekday for her starting about 6:45 a.m. She usually drives in the morning because she is a better driver than passenger, but she is shaky and can get teary on the way to work, usually after she drops Kevin off at BCIT. She is able to fulfill duties during the work day but finds she is easily distracted and that anxiety can develop into intrusive thoughts. She is troubled by physical symptoms during the day but can alleviate some discomfort by changing position. Her coccyx is still problematic when she remains seated.

**78**  Since early 2014, Ms. Fletcher and her friend Erin Salo, who also works for Golder, frequently go for walks as long as 5.5 kilometres during their lunch breaks. After work she picks up Kevin, drives home and makes dinner. On Wednesdays once per month she teaches a crafts class, and spends about 20 to 24 hours per month preparing classes and doing crafts. Some nights she goes to group fitness class. Other nights after dinner she is exhausted and just watches television or goes straight to bed.

**79**  In 2014, she also embarked on more rigorous fitness programs with friends, including Tuesday night video workouts at the homes of various participants and walking or hiking on the weekends. Although it makes the neck and back pain worse than in 2013, she has continued as she realised that exercise would help her. The hikes include one called the Coquitlam Crunch, about four kilometres uphill and mostly stairs, which she did about four times, and other 4 to 12 kilometre hikes. She also continues to perform exercises on her own at home with various pilates or strengthening DVDs in addition to working on core strengthening. She uses a treadmill, free weights and therabands to exercise at home a couple of days per week. With the additional exercise she lost 25 pounds but had more pain in her neck and back.

**80**  Since 2009 Ms. Fletcher has continued to do Bikram and other yoga up to five days per week. She can do most postures but some cause too much stress on her neck and back. She described Bikram yoga as an extremely intense and enjoyable workout.

**81**  With regard to housework, she testified in cross-examination that she now does 75%. Ms. Fletcher also said that she does almost 100% of the shopping and cooking and most of the laundry. She is able to do all areas of housework although some are more difficult and all are done in pain. If she does cleaning, vacuuming and laundry all day it brings on pain, stiffness and discomfort, especially in her lower back and left knee and it takes a day to recover.

**82**  In 2014 she went back to the PNE and tried two less challenging rides which she found manageable.

**83**  Ms. Fletcher would like to have children. She loves them and it brings her joy to see the world through their eyes. She is concerned about difficulties in physically caring for children, especially because any lifting causes an exacerbation of her neck and back pain.

**B. Kevin Fletcher**

**84**  Kevin, the plaintiff's husband, is 32 years old, has worked as a lighting technician since he was 15 years old and has always made a good living in the lighting industry. He continues to do part-time free-lance work at present while studying electrical engineering at BCIT.

**85**  Kevin met Ms. Fletcher, then Ms. Rutter, in July 2002 when she was his supervisor at Showtime. He observed her to work just as hard as anyone else. He also found her to be warm, lovely and fun to be around. She kept the atmosphere friendly on-site. She was considered one of the top technicians who never shied away from difficult tasks and was a good leader. She was always enthusiastic, happy to be there and fun to be around. Mr. Fletcher described the long work hours and physical nature of the job.

**86**  Kevin and Ms. Fletcher began dating in July 2004 and moved in together in September 2005. They went camping, hiking, walking around the neighbourhood and spent a great deal of time in his 4x4 jeep out in the back country. Despite long hours and days at work and rough rides on extreme terrain, Kevin was not aware of Ms. Fletcher having any physical limitations or restrictions of any kind. Nor was he aware of any psychological issues prior to the first accident. She was always happy, easygoing, able to deal with change quite easily and fun to be with. She always had a good attitude towards work and life in general.

**87**  With respect to household chores, Kevin described a fairly even distribution of work before the first accident, but conceded that Ms. Fletcher may have done a little bit more than he did. When they worked in the garden, Ms. Fletcher helped with the digging and planting and mowed the lawn.

**88**  Before the first accident, Ms. Fletcher was always able to find work when she needed it. She worked very hard and had built a good name for herself in the industry. She was on top of the list to be called for a show. She liked to build sets, do artistic design and figure out how to set things up in the most efficient way. She was always using her creative abilities and made events special for clients who were always happy to have her on their shows. She was also creative at home and was always scrapbooking and making cards for people.

**89**  In 2005 and 2006, Kevin saw Ms. Fletcher as being in "perfect health" and able to do whatever she needed to do without any trouble. She was very calm and able to deal with things and happy.

**90**  Before the first accident, Kevin and Ms. Fletcher were planning for him to go to school. They had started to save money and planned for him to attend classes in math and physics toward a return to school in September 2008.

**91**  However, the car accident changed all of their plans. Kevin was working in the United States at the time of the first accident. When he first saw Ms. Fletcher following the first accident, he saw that she was extremely stiff and immobile. She was very upset, in pain and angry over what happened. She was not able to do anything around the house and spent most of her time lying in bed with hot and cold compresses.

**92**  As a result, Kevin did all of the chores around the house for several months. Ms. Fletcher felt badly that she was not helping around the house and eventually started doing some light work, but Kevin testified he continued doing most of the chores. Generally after Ms. Fletcher would try to do something, she would spend the next day on the couch or in bed because of the pain. Kevin says he is still doing a greater percentage of the household work, and estimated a ratio of roughly 70:30 over the past five to six years. Ms. Fletcher is unable to take out the garbage and still calls as she nears the house so Kevin can carry in the groceries.

**93**  He would also drive Ms. Fletcher to and from appointments when he was available. He remembers Ms. Fletcher beginning to drive again in late 2007 but said she was afraid of other drivers being out to get her, a condition which remains. Before the first accident Kevin found she was a competent driver who was generally calm and would not react much to other people. Since the first accident, Kevin finds it hard to be in a car with Ms. Fletcher because she gets angry with other drivers, often loses her temper and yells. Even as a passenger she is on edge. If a vehicle beside her starts to move she will make him aware.

**94**  After Ms. Fletcher returned to work in December 2007, she seemed to develop a short fuse. She was not as tolerant as she had been and was frustrated she was not able to do all her usual work. Even when small things would happen outside of the norm she would not be able to react in a normal and calm way. She had temper tantrums and sometimes threw things, behaviours Kevin had never observed in Ms. Fletcher before.

**95**  Between 2008 and 2010, Ms. Fletcher began to exhibit signs of depression. She was upset that she was not able to do her normal things and that they were not able to go on trips with friends. She began to seclude herself and turn down invitations to parties. By the end of the work week, she was exhausted and wanted to stay at home, which was also not typical before the first accident.

**96**  In addition, they had very few parties after the first accident because Ms. Fletcher was not able to get the house ready the way she wanted it. She was very upset by this as it is in her nature to plan parties. Nor was she able to participate in 4x4ing with him, though she did attend to see the people on a few occasions but did not travel in the rough terrain anymore.

**97**  When he began attending BCIT in 2010, he did so with a lot of help from his father-in-law who had always wanted him to go to school.

**98**  For a time following the first accident, the intimate relationship between Kevin and Ms. Fletcher basically did not exist. Still, to this day, Kevin cannot really give her a big hug as it ends up hurting her back. When intimate relations did return, it was not the same because of Ms. Fletcher's back pain. Those issues caused a lot of stress and strain on the relationship.

**99**  Kevin and Ms. Fletcher had planned to have children after Kevin finished school and established his new career. However, they are now concerned about possible complications with injuries and pregnancy and have thought of adoption to eliminate such problems. Kevin also expressed concern with Ms. Fletcher's short fuse and how she will react to children.

**100**  Kevin also noticed Ms. Fletcher beginning to shop a lot more after the first accident as an outlet for her frustration or to fill a void by buying things. She had been reasonably frugal before the first accident but began to buy frivolous things and spend money without speaking or consulting with him about purchases. Such expense added to the financial burden which they could not really afford but it helped her be happier.

**101**  After the first accident, when Kevin and Ms. Fletcher became frustrated with the quality of the repairs to their vehicle they cleaned it up and prepared it for sale as best they could. It was a fully loaded 2006 Matrix which appeared to be in reasonably good condition. As they did not believe they would be able to sell it privately with its history, they concluded the best option was to trade it in at a dealership, which they did.

**102**  When Ms. Fletcher ceased employment with Cinequip and began to work for Panther, Kevin testified that she saw the new job as being in the same realm of industry with the possibility of design work. However, as the job progressed, she realized she was not going to be involved in design, which caused her more stress. Ms. Fletcher was unhappy that she was stuck in the office doing paperwork. When she was eventually laid off she was initially quite happy but in the weeks and months that followed she entered a deep depression. She was not able to cope and ended up creating a futon fort in the living room where she remained at all times. She just stayed in the living room rather than coming to bed.

**103**  After about six months, a prescription for Paxil and seeking some therapy, Ms. Fletcher started to emerge from that dark time. She began to work toward starting her own crafts business making custom cards and other items. She made items to take to farmers' markets with her friend, Leanne Robb, during the summer of 2011. However, as a result of her injuries, Leanne or Kevin had to help her move the heavy objects and supplies at the beginning and end of the day. Before the first accident, Ms. Fletcher was capable of carrying such items and performing such tasks on her own.

**104**  During the summer and fall of 2011, Ms. Fletcher was still experiencing neck pain and back pain which often led to migraine headaches and made it difficult for her to get up and go out. She was also taking Paxil, which Kevin observed made her very flat. While the drug seemed to eliminate the highs and lows, Kevin found she was not responsive to anything.

**105**  After the second accident on September 9, 2011, he noticed reports of a slight increase in pain but from Kevin's perspective the physical effects of the second accident appeared to have been relatively short-lived. He did not notice any significant change in her physical condition or abilities. She was able to start her job with Comedy Central as scheduled, which was her indirect way of getting back into the entertainment industry, but that proved to be short-lived.

**106**  When Ms. Fletcher's father was diagnosed with cancer in February 2012, she did not respond well. She began to develop some obsessive symptoms as she tried to control her environment, and with her father's illness she decided to go off Paxil so she could feel more of what was going on and not be a robot.

**107**  Kevin testified that when Ms. Fletcher started working with Golder she seemed happy at first. She was in the field where she thought she would be more involved and the work would be more interesting. However, the position soon turned to more paperwork in which she does not have much interest. She also continued to struggle with neck pain, back pain and headaches and also started to complain that her tailbone was starting to hurt as a result of sitting. Kevin observed that she is not happy going to work in the morning.

**108**  During her father's illness, Ms. Fletcher put on a brave face for everyone else and then collapsed at home. She would spend days in bed, unable to cope, which was a pattern Kevin had observed when Ms. Fletcher was having trouble coping before her father's illness. Since her father died on October 14, 2013, Ms. Fletcher still spends a lot of time in bed, sometimes days at a time. She still cannot interact with others on a regular basis and continues to experience back and next pain.

**109**  Lately the Fletchers have been revisiting the possibility of Ms. Fletcher returning to school to pursue interior design. Because she is not happy with her current position and is not able to do the physical jobs, she is looking at interior design as an alternative by which she could use her creative skills. According to Mr. Fletcher's inquiries, such a program would require another three to four years in school at a cost of $4,000 or $5,000 per year.

**110**  At the conclusion of examination in chief, Kevin emotionally described his wife: "She is a drastically different person than the one I originally met and I really wish I could have her back."

**C. Robert Rutter**

**111**  Robert Rutter, Ms. Fletcher's father, died on October 14, 2013. Mr. Rutter was diagnosed with stage 4 liver cancer in February 2012. His evidence was recorded at a video deposition on March 27, 2012. He and his wife lived only a five minute walk from their daughter's home and saw her every couple of days.

**112**  Mr. Rutter described his daughter's childhood as normal and happy with a very close family life and close relationships with her parents. She was an average student who was very physically involved in swimming and trampoline. He recalled she was bullied in junior high school and his account of that and other events on his daughter's early life, her academic and vocational pursuits were consistent with the evidence given by Ms. Fletcher.

**113**  Mr. Rutter described his daughter completing a program in stagecraft, which he described as her desired career path. She wanted to work in the entertainment industry and thought of doing stage work for Cirque du Soleil. She loved physical work with props and painting and did heavier jobs with wiring and equipment. He was not aware of any physical or psychological issues for his daughter before the first accident. She liked camping and hiking and was quite a physical person.

**114**  Mr. Rutter remembered his daughter being fully employed before the first accident. She sometimes worked two jobs and as many as 12-14 hours per day performing jobs "almost like a roadie for large events." She did not have to rely upon him for financial support beyond a few gifts of cash from father to daughter of perhaps $500 per year.

**115**  Following the first accident, Mr. Rutter noticed that his daughter's ability to get around was severely impaired. She was frequently bed-ridden because her back was tender and sore. She improved over time to some extent and was able to get back to work but at a desk job which was not her preferred work. He also noticed she cannot lift anything of any weight.

**116**  Before the first accident she was very outgoing and friendly. However, Mr. Rutter noticed changes in his daughter's emotional state after the first accident. He found her to be more aggressive and argumentative, which was not at all typical for her. She would fly off the handle and was more emotional than she had been in the past. She was also a little bit more withdrawn. While he had noticed some improvement with psychotherapy, she was nowhere near what she was prior to the accident.

**117**  Following the first accident, Mr. Rutter loaned his daughter and Kevin approximately $40,000, some of which was repaid.

**118**  Mr. Rutter did not notice any change in his daughter's condition following the second accident. At the time of his testimony, she had recent improvement in her condition with psychotherapy, but physically she was still impaired. An example was Ms. Fletcher bowling and being in bed the next day with neck and back pain and spasms. Prior to the first accident he had known her to bowl with ease.

**119**  When asked whether his daughter was back to her old self, he answered "definitely not." She is unable to deal with stressful situations the way she could before. He indicated that she becomes overwhelmed and sometimes explodes with emotion and does not deal with such situations on a rational basis. This was definitely not typical of his daughter before the first accident.

**120**  Mr. Rutter stated that he was aware of his daughter's wish to have children and that she was concerned it could be difficult for her.

**121**  In cross-examination, Mr. Rutter described his daughter as very frugal prior to the first accident, whereas after that accident she was not. He said that she had been paid an advance on her claim, but it is pretty much gone. He described her trying to start a business and spending money on other things he did not believe were appropriate. When she then did not have sufficient funds for rent, he felt it was up to him and his wife to assist. He said his daughter had become an impulsive buyer which was also uncharacteristic.

**122**  Under cross-examination Mr. Rutter also described his daughter when driving as nattering on about all other drivers in a non-stop verbal tirade.

**D. Marion Rutter**

**123**  Marion Rutter, Ms. Fletcher's mother, is 68 years old and worked as a public school teacher for seven years but took some time off when she had Ms. Fletcher and became a fine arts educator when she returned to work. She has since retired. Her evidence about her daughter's childhood, her time at school, and her academic and vocational history was consistent with the evidence from Ms. Fletcher and her father. She added that Ms. Fletcher had, as a young child, been enthralled with Cirque du Soleil and she had the goal of attending its school in Montreal. She was bilingual but she found out she needed years in the industry first.

**124**  Mrs. Rutter described her daughter's involvement in numerous family celebrations for which she was in charge of decorations and setting up the backyard and the deck. She was a very creative, active, happy and sociable girl who was also somewhat vulnerable. She had a strong work ethic and always seemed to be seeking some form of employment or creating some sort of employment for herself. She wanted to work in the entertainment industry and directed her education and work experience toward that end.

**125**  Mrs. Rutter remembered her daughter being involved in one motor vehicle accident before the first accident, but did not recall any lasting effects of such a collision. When asked about her daughter's condition in the years leading up to the first accident she said she was in very good health both physically and mentally. She was very strong and wanted to continue doing things that would further her career.

**126**  When Mrs. Rutter learned of the first accident by telephone from her husband, she went to meet her daughter at Royal Columbian Hospital. Before her daughter was discharged from the hospital, Mrs. Rutter was told someone had to stay with her overnight because they were concerned she might have a concussion.

**127**  Mrs. Rutter stayed with her daughter for the first few days following the first accident, during which time she observed that her daughter could barely move. She said Ms. Fletcher was worried about going back to work and her finances. Mrs. Rutter helped prepare meals for her daughter, tried to make her comfortable, observed her, looked after her pets and took her to her family doctor. Even after Kevin returned, Mrs. Rutter continued to assist her with the shopping, meal preparation and driving her to appointments when Kevin was at work.

**128**  Before the first accident, her daughter was financially independent. Since the first accident, she has loaned her daughter roughly $25,000, in addition to the $40,000 she borrowed from her father.

**129**  Previously Ms. Fletcher was always patient and she was able to discuss any topic with her without being judged or criticized. During the interval from 2008 to 2010, Mrs. Rutter found her daughter to be frustrated, impatient, short-tempered and angry with her. Mrs. Rutter noticed that Ms. Fletcher started to attempt to order her parents' lives and tell them what they should be doing. She became more distant. Little things would agitate her. She was not interested in doing any parties anymore. She seemed to lose her direction or decisiveness and was really anxious about her future. Her mobility was limited and she suffered a lot of migraines. She seemed to have less fun and laughter in her life. She was fearful of what she could or could not do with her body and became very anxious about any activity that might aggravate her back or give her a headache. Mrs. Rutter said she heard a lot of: "I can't do it anymore".

**130**  When asked about her daughter's condition in late 2010 and early 2011, Mrs. Rutter recalled her "being a basket case in all parts of her life." She was really anxious and depressed about not being able to manage the pain and headaches. To her, it felt like her daughter's world was shrinking, getting smaller and smaller. She also remembered her daughter being involved in craft fairs.

**131**  Mrs. Rutter was a passenger in her daughter's vehicle when the second accident occurred. Her account of that event is consistent with that of Ms. Fletcher. After the second accident, Mrs. Rutter indicated that her daughter had a stiff neck, back and headaches.

**132**  On February 2, 2012, her husband was diagnosed with cancer and given six to twelve months to live. Mrs. Rutter said her daughter was initially shocked but then became very angry with her father, who had been having symptoms for some time before seeking treatment. Initially, her daughter ended up spending a lot of time with her father at the hospital as he was recovering from surgery. Once he began chemotherapy and had chosen to die at home, she came over less and less but still tried to be supportive of him. She had conversations with him and even cut his hair. Eventually, he was moved to a hospice where she and her daughter visited him every evening.

**133**  Following the death of her husband, Mrs. Rutter thought her daughter would be more of a comfort to her, but that was not the case. Instead, she feels her daughter is angry with her and finds it very difficult to have conversations with her. Mrs. Rutter feels the compassionate person she raised is not there. She feels like she has lost two people in her life; the daughter she used to have and her husband.

**E. Stephen Matthews**

**134**  Stephen Matthews met and hired Ms. Fletcher in the late 1990s when he was rentals manager for Showtime. Ms. Fletcher began working on Showtime's call list of roughly 20-25 people. He hired Ms. Fletcher because she had a very positive attitude and a keen interest in the industry, along with the drive and physical ability required. Mr. Matthews' evidence regarding the heavy physical work required of his employees was consistent with the evidence given by Ms. Fletcher and others in that respect.

**135**  Mr. Matthews also gave evidence of the prospects and fortunes of individuals who work for him at present. Within a year or two of starting out, his employees earn in the range of $20-$22 per hour. Those with between five and ten years of experience earn between $28 and $32 per hour and those with more than ten years can earn more than $32 per hour. He indicated jobs such as those at Showtime could be a stepping stone for people in the industry and he saw Ms. Fletcher as one of those people with drive, a good attitude and good interpersonal skills. He said: "She had what I was looking for."

**136**  When asked whether he was aware of any accident in which Ms. Fletcher was involved, he remembered calling her around only to learn that she was unable to perform the required duties and their communication declined after that.

**F. Leanne Robb**

**137**  Leanne Robb met Ms. Fletcher during the fall of 2004 on a 4X4 "wheeling" trip. She remembered getting up early and spending full days on the mountain riding in the trucks with their boyfriends, later husbands. For the first few years, they would go wheeling as often as twice a month, as well as go camping and out for dinners together. She described Ms. Fletcher as very strong in mind and body. She was feisty, dependable and someone you want to be with if you were in trouble. She loved the outdoors, could chop wood with an axe and had a lot of parties.

**138**  After the first accident, Ms. Robb felt as though she had lost her 4x4, craft and camping buddy. She described wheeling as being hard for anyone, even without injuries. Ms. Robb believed Ms. Fletcher had attempted to 4x4 again following the first accident but found it too difficult. Ms. Robb also said it was the loss of Ms. Fletcher's physical abilities that really shook her. She became apprehensive and fragile and that was not like her. She became almost like a hermit. Ms. Robb said she could see the depression and remembered asking Kevin if Ms. Fletcher would come out only to have him say that she would not. She saw Ms. Fletcher as plagued by the first accident and it was weighing her down. As a friend she thought she was suffering from depression. She was not the vivacious, bubbly, loud Danica.

**139**  In May 2011, Ms. Fletcher and Ms. Robb began doing crafts pretty intensely and attended craft fairs frequently between July and Christmas of that year. Ms. Fletcher participated but it was hard on her body and eventually she stopped coming altogether. Ms. Robb would then take her crafts to the markets to sell and give her the money.

**140**  Ms. Robb gave evidence of assisting Ms. Fletcher, along with Kevin, as she struggled with the transporting and setting up tents, tables, chairs and other items for the craft fairs. Ms. Robb would sometimes pick up Ms. Fletcher and her material in her truck and observed Kevin helping bring things down the stairs. When there was lifting to be done, Ms. Fletcher could not do it.

**G. Erin Salo**

**141**  Ms. Erin Salo met Ms. Fletcher while they were both attending the stagecraft program at Douglas College. Since then, they have studied, socialized and worked together for a number of employers. Ms. Fletcher and Ms. Salo worked together at Showtime, Panther, and Art of the Party before they both ended up in their current positions working for Golder, though Ms. Salo works for the parent company Golder Associates. She testified to Ms. Fletcher's strong work ethic and her enthusiasm.

**142**  Ms. Salo knew Ms. Fletcher very well before the first accident as they were part of the same social circle of couples and had camped in tents, travelled and socialized with her in the past. She described Ms. Fletcher as extremely bubbly, with an effervescent personality and someone who could work, go out later and stay until the end of the party. She had a lot of energy and was extremely happy.

**143**  Ms. Salo's evidence with respect to very physically demanding jobs and long hours at Showtime and Art of the Party prior to the first accident was consistent with Ms. Fletcher's evidence on such issues. She had the opportunity to work with Ms. Fletcher and recalled "new guys" on the job being shocked by her strength and being challenged to lift as much as she could. Ms. Fletcher had no difficulties with the heaviest of tasks and was usually one of strongest on a crew.

**144**  After the first accident, Ms. Salo noticed a slow down with less frequent social activity, lower energy levels and exhaustion. She gave examples of having plans with Ms. Fletcher that just did not happen, with back pain, neck pain, a migraine or a headache or some combination thereof offered as reasons. She still retained her innate cheerfulness but was less outgoing, less energetic and prone to mood swings and lethargy which seemed to be brought on by pain.

**145**  After the first accident, when Ms. Salo worked with Ms. Fletcher at Panther, she noticed she had a high number of absences. It was not unusual for her to call in sick when she would wake up in the morning and be in pain and not be able to come to work. Ms. Salo was aware of the second accident but did not notice any change in Ms. Fletcher's condition thereafter.

**146**  Ms. Salo and Ms. Fletcher remain in close contact through email and during their lunch-time walks at work. She said Ms. Fletcher still has issues and just cannot make it into work in a pattern similar to what she had observed at Panther.

**147**  Ms. Salo was asked about her knowledge of Ms. Fletcher's career plans or goals and her future prospects at Golder. She explained that she and Ms. Fletcher had both studied stagecraft, which is directed at theatre but many graduates end up working in the concert, wedding and film industries in which there is a lot of work. Ms. Fletcher always wanted to be in a creative industry, making things such as set pieces and did not mind the hours expected in the event industry.

**148**  With respect to her understanding of opportunities at Golder, Ms. Salo confirmed Ms. Fletcher's evidence that it is pretty standard for Golder employees to have one or more degrees such as engineering. With Ms. Fletcher holding only a diploma there would be limits on how high she can rise in the company and the kind of salary she can expect.

**H. Expert Evidence**

**149**  The plaintiff adduced expert evidence from various medical experts whose written opinions are in evidence: Dr. Heather McLeod, family physician; Dr. Nairn Stewart, physiatrist; Dr. Gordon Robinson, neurologist; Dr. Winston Gittens, neurosurgeon; Dr. Frederick Shane, psychiatrist; and Dr. Larry Krywaniuk, neuropsychologist. With the exception of Dr. Krywaniuk, all of the experts were cross-examined on their opinions.

**150**  Also in evidence are written expert opinions and testimony from Ms. Giovanna Boniface, occupational therapist and certified life care planner; Mr. Hassan Lakhani, economist; and Mr. Carey Scarrow, vehicle appraiser.

**151**  The defendants did not call any expert opinion evidence in either action. Although they had opinions from medical experts, that evidence had been obtained prior to the first trial date in 2011 and was thought to be out-of-date at this trial date. Further, the defence chose to rely on the evidence of the plaintiff's witnesses with regard to the significant degree of recovery made by the plaintiff.

**152**  Due to the number of expert witnesses and the nature of the information and diagnoses, the following summary of the expert evidence includes some lengthy quotations from the reports. The quotations will be referred to in the Discussion section below.

1. Dr. Heather McLeod, Family Physician

**153**  Dr. McLeod has been Ms. Fletcher's family physician since May 2003. She was accepted as an expert qualified in the areas of family practice with a focus on obstetrics. Dr. McLeod prepared opinions dated June 19, 2009, July 13, 2011 and July 20, 2014.

**154**  In the first report, Dr. McLeod listed the issues reported by Ms. Fletcher: left side of head, and feelings of dizziness and nausea; right side of neck; left side of neck; low back; and left hip, the latter four relating to pain. On the November 27, 2007 visit, Ms. Fletcher reported that most of her concussion symptoms were gone. On the May 12, 2009 visit, she reported that she did hot yoga four to five times per week and aquacise. She could not do any bowling or 4x4ing, and with regard to household chores she could not do any vacuuming. Headaches were once per week. She had a full range of motion of her thoracic spine, shoulders and lumbar spine. Dr. McLeod felt her neck still had another 50% to go for complete recovery, and that, overall, the plaintiff was "50 to 60% recovered with a lot more neck and upper back progress to go."

**155**  In the next report on July 13, 2011, Dr. McLeod notes that she recommended a psychiatrist to assist with the ongoing fear and anxiety. With regard to prognosis, it will be "linked to how she recovers physically as this will directly affect her psychiatric issues."

**156**  Ms. Fletcher did not see Dr. McLeod from October 25, 2011 to January 17, 2013.

**157**  The July 20, 2014 report contains a summary of her opinion and includes the following:

A summary of her injuries as of the July 13, 2011 letter are:

1. mild to moderate concussion -partial remission
2. cervical spine strain and anterior and posterior neck muscle spasm/strain(whip-lash) in partial remission
3. mild thoracic outlet syndrome
4. low back or lumbar strain with periodic sciatic distribution pain
5. moderate tension headaches and migraines
6. post traumatic stress disorder
7. generalized anxiety disorder
8. depression
9. pain disorder

...

1. My diagnosis and prognosis.
2. chronic neck and low back strain. This started with the first mva and continued through to the 2011 mva with little progress. This will be her most difficult issue in the future.
3. Coccodynia. This is new with the second mva of Sept 9 2011. It is possible that this started with her desk job after sitting most of the day with the pre-existing back issues. This may continue for as long as she has this type of job.
4. Left sciatica and the disc bulging at L-5/S-1 and [] less so at the L-4/L-5 level. This is new and could be a chronic issue for the future needing ongoing rehabilitation.
5. Anxiety and depression. She is helped by an exercise program and has weaned herself off medication and stopped seeing the therapists. These issues are not gone but simply doing better at this time.
6. L knee strain. She has embarked on a more vigorous program of work-outs that may have exacerbated her early osteoarthritis.
7. Muscle contraction and periodically vascular headaches.

...

I do believe that her neck and low back pain will leave Danica at least partially disabled regarding what job she can do, loss of recreational activity she once enjoyed. She had some mild pre-existing lumbar changes on x-ray prior to the first mva but not the sciatic symptoms and the mri changes to correlate with her symptoms. She needs to consider starting a family very soon and these injuries will certainly impact her pregnancy and delivery and then caring for a baby as well. Chronic pain will predispose Danica to depression and anxiety and this will come and go in her life, depending on the circumstances.

...

I always wanted Danica to have weekly physio and massage therapy but she could not afford it. They had to modify her work station at work. Housekeeping at home was not easy for her and no vacuuming or floors could be done. She needs a bone scan for her coccyx.

I anticipate she will need weekly or q [sic] 2 week physio and massage and continue the chiropractic for the spinal decompression weekly. This may need to go on for the next year or two.

If she does become pregnant this will likely need to intensify as the pelvis and low back are normally put under alot of strain and this could be very difficult for her to manage without medication. She will likely need a nanny who can help with the baby and housework for the first year. Ongoing weekly housecleaning after the first year might be necessary.

**158**  In cross-examination, Dr. McLeod was responsive to most questions. However, she could not respond to the apparent disconnect between Ms. Fletcher's long work hours in the winter of 2009-2010 and her self-report of pain at 8 out of 10. She did acknowledge the apparent inconsistencies between her understanding of Ms. Fletcher's residual pain from the prior accidents and previous depression.

**159**  Dr. McLeod also clarified in cross-examination the conclusion in the July 20, 2014 report regarding the coccodynia being new with the second accident of September 9, 2011. She testified that it had been there since 2007, as noted by orthopaedic surgeon Dr. Kokan. She also acknowledged that with the delay in reporting symptoms of coccodynia, it was difficult to draw a connection between the accident and the symptom.

**160**  When cross-examined with respect to the evidence regarding the efficacy of spinal decompression therapy, Dr. McLeod stated that she would be more likely to tell her patients to try decompression if they have tried everything else.

1. Dr. Nairn Stewart, Physical Medicine and Rehabilitation Specialist

**161**  Dr. Stewart saw the plaintiff twice and prepared written opinions dated February 25, 2010 and July 18, 2014. Dr. Stewart was accepted as an expert qualified to give opinion evidence in the areas of her specialty in physical medicine and rehabilitation.

**162**  In the report of February 25, 2010, Dr. Stewart recommends that Ms. Fletcher take a yoga class for the stretching and relaxation benefits of yoga. She also recommended a personal trainer for a gym and aquatic program as well as psychological counselling for anxiety and pain management. Dr. Stewart understood that massage therapy assisted Ms. Fletcher and recommended that continue every two weeks.

**163**  In cross-examination, Dr. Stewart agreed that rather than full recovery from the prior motor vehicle accidents, she would opine that Ms. Fletcher had largely recovered.

**164**  Dr. Stewart's July 18, 2014 report contains the substance of her opinion and includes the following:

It continues to be my opinion that Ms. Rutter sustained soft tissue injuries to her neck and back in that accident and that her symptoms of those injuries have been aggravated by increased muscle tension. Her emotional distress resulting from the accident has contributed to her pain. As anticipated, she has continued to experience neck and back pain and headaches resulting from the 2007 motor vehicle accident.

...

Ms. Rutter also complained of worsening pain in her coccyx (tailbone) since the 2007 accident when I saw her in July 2014. However, she had not reported that symptom when I saw her in 2009. Dr. Kokan recorded that the coccygeal pain was present prior to the 2007 accident and was aggravated by that accident. In my opinion it would be reasonable to conclude that that was the case.

...

Ms. Rutter derives significant symptomatic relief from massage therapy and spinal decompression treatments from a chiropractor. In my opinion it would be reasonable for her to continue both types of treatment, each every two weeks, alternating weeks so that she is having one or the other treatment every week.

It would be advisable for her to continue to exercise regularly, but to a degree that does not aggravate her symptoms.

Ms. Rutter reported that her low mood is better controlled than it was earlier after the 2007 accident. However, in accordance with Dr. Shane's recommendation, I would recommend that Ms. Rutter have ongoing access to psychological counselling.

With regard to her work, my recent assessment of Ms. Rutter indicates that she has poor balance in her life in that she spends her evenings resting and feels exhausted by the end of her work week, to the point that she has to spend every second weekend in bed. She also misses work often because of her symptoms. This is not a sustainable situation. In my opinion, because of her chronic pain and low mood resulting from her injuries in the 2007 accident it would be preferable for Ms. Rutter to work three or four days of the week rather than full time and for her to have mid-week breaks (that is, that she work Monday, Wednesday and Friday, or Monday/Tuesday and Thursday/ Friday, to allow her to recover better from her work days rather than becoming progressively sore and tired over her workweek. This would probably also provide her with more energy to pursue activities outside of work in the evenings and on weekends.

It has now been seven years since the 2007 motor vehicle accident and it is likely that Ms. Rutter will continue to experience all of her current symptoms and limitations resulting from her injuries in that accident in the future.

She would be unable to do physically demanding work because of her injuries and is best suited to work at the sedentary to light level of physical activity, with the flexibility to change her work tasks and position periodically throughout her workday. She will continue to require good ergonomics and a sit/stand workstation in any future office work.

Ms. Rutter will continue to be limited with respect to more strenuous household and leisure activities in the future much as at present because of her injuries and 2007 accident.

Ms. Rutter's injuries in the motor vehicle accidents are unlikely to have a significant adverse effect on any future pregnancies. However, it is likely that Ms. Rutter will require assistance with childcare when her children are at the infant and toddler stages of development, because of the physical demands of caring for young children.

**165**  In examination-in-chief, Dr. Stewart clarified the nature of Bowen Therapy as being a type of gentle massage therapy. When cross-examined with respect to her recommendation for spinal decompression and massage therapy, Dr. Stewart admitted that generally passive therapies are not indicated but Ms. Fletcher experienced some relief. She agreed that spinal decompression is somewhat controversial and has not been adequately studied but she recommended such measures only on the basis of symptomatic relief. Dr. Stewart also agreed that spinal decompression may have a placebo effect and that similar relief may be obtained from a hot bath.

**166**  Under cross-examination, Dr. Stewart agreed that if the history provided by the patient is inaccurate, it may lead to inaccurate medical opinions. Ms. Fletcher told her that she spent every other weekend in bed, and Dr. Stewart accepted that statement although it was not contained in any other medical report which she had reviewed. She did not know how it was co-incident with hiking the Coquitlam Crunch and did not ask about the other weekends although she was aware of walking six kilometres three times per week. Dr. Stewart's opinion did not change when she was made aware of the evening and weekend time spent by Ms. Fletcher on her craft business. Her opinion was not affected by learning that Ms. Fletcher did not see her family doctor for a year in 2012. The discrepancy in the reporting of the coccyx pain did not cause particular concern to Dr. Stewart.

**167**  Dr. Stewart did not know or would not acknowledge that Bikram yoga was physically demanding. However, it was her opinion that bending and lifting are the causes of the pain that make it difficult for Ms. Fletcher to do housework or would impede child-rearing.

**168**  Dr. Stewart assumed from Ms. Fletcher's statement that she was a "little bit stiff" at the end of the workday that that meant that there was also increased pain.

**169**  In re-examination, Dr. Stewart stated that patients with chronic pain are sometimes prepared to try almost anything to seek relief from their symptoms, including even less traditional or controversial therapies.

1. Dr. Gordon Robinson, Neurologist

**170**  Dr. Robinson is a neurologist who was accepted as an expert qualified to give opinion evidence in the area of his expertise in neurology, including the assessment and treatment of headaches. Dr. Robinson saw Ms. Fletcher twice and prepared written opinions dated March 9, 2011 and June 9, 2014.

**171**  In the report of March 9, 2011, Dr. Robinson noted that initially Ms. Fletcher had a constant headache that began to improve a year or more following the accident: "Headaches continue to occur 3-4 times a week, lasting hours to days." There were at that date frequent tension headaches and occasional migraines. In testimony, Dr. Robinson stated that it was significant that after one year the more severe headaches were improved.

**172**  He noted her considerable emotional upset following the accident and opined that it was a generalized anxiety disorder followed by feelings of depression, stating "[h]er level of anxiety and feelings of panic are probably important aggravators to her headaches." He believed that "her persisting headaches are a combination of her chronic neck pain and mood disorder."

**173**  With regard to treatment, he stated that treatment of chronic headache is usually difficult and the best advice is to maintain an active lifestyle. Medications are often unhelpful, but botox injections to her head, neck and upper back were recommended. Dr. Robinson believed that "successful management of her psychological distress is critical in her eventual prognosis." Psychotherapy and appropriate medication may reduce the impact of the headaches. He believed that she was capable of working a full-time job with light physical demands.

**174**  In his description of the effects of the first accident, Dr. Robinson also gave the opinion that there was no damage sustained to the nervous system.

**175**  The report of June 9, 2014 includes the following:

**Opinion**

This lady continues to suffer from difficulties arising from the July 21, 2007 motor vehicle accident. She has frequent headaches which are occasionally severe along with constant discomfort in her neck, upper back, shoulders and low back.

...

Her headaches have gradually improved since my previous review in early 2011. Her mild to moderate headaches now occur on average every couple of weeks, and up until recently her more severe migraine-like headaches were relatively infrequent.

During the last 6 months she has become much more physically active, and not surprisingly there has been an increase in her headaches. She has been able to continue working full-time and is committed to her desire to improve her level of physical fitness.

Her symptoms of depression and anxiety have continued but appear to be substantially improved. She is no longer on psychoactive medication and denies feeling depressed. Her anxiety surrounding the fright of the accident continues to be present, particularly while riding as a passenger in a motor vehicle.

...

I do not believe that there is any further investigation which would be helpful in understanding her headaches.

As noted in my previous report the treatment of chronic post-traumatic headache is usually difficult. I doubt that her return to any physical therapy would be of benefit to her. To her credit she has embarked on an active rehabilitation program that is self-directed. It is possible that there will be better tolerance to the increased activity and that her more severe headaches will return to being less frequent.

I believe that she will continue to experience headaches for many years to come. It is possible that her headaches will improve further but probable that she will be subject to mild to moderate headache, usually with physical activity. Her more severe headaches will continue causing occasional periods of incapacitation.

She did try triptan medication but this was unhelpful and had side effects. Although she could be provided with other drugs in the same class it is probable that they will also be ineffective. Other than continuing with her simple analgesics and anti-inflammatory drugs I doubt that there are any other medications that would be helpful for acute therapy of her headaches.

There are daily medications that could be utilized, however many result in appetite stimulation and increased weight. I believe that this would be a contraindication for her, and given the relatively low chance of efficacy I would not suggest these drugs.

I continue to believe that botulinum neurotoxin type A (Botox) could possibly result in improvement in her headaches, neck and shoulder pain. Although she does have extended benefits she believes that she would have to "put the money up front" before collecting from the insurance company. At the present time this is not feasible given the financial constraints on her and her husband.

She has proven to be capable of working a full-time in a job with light physical demands.

By their nature the symptoms of headache and neck pain are subjective. There are no objective measures such as a blood test or image that can document the presence, absence or magnitude of these complaints. However, this is almost universally true in patients with chronic headache disorders. The assessment of the headaches, which includes diagnosis and impact, can only be determined by self-report.

**176**  Dr. Robinson addressed a letter sent to him by Ms. Fletcher on June 17, 2014 regarding his 2014 opinion. Dr. Robinson said that he viewed such issues as reflecting relatively minor inaccuracies which are normal in the context of taking a prolonged history. In short, his opinion did not change.

**177**  When cross-examined with respect to the plaintiff's report to treating neurologist, Dr. Javidan, regarding the frequency of her headaches, he stated that they were not necessarily inconsistent. Patients in his practice do not necessarily mention headaches unless they are serious or impact function. He also pointed out that Dr. Javidan had seen Ms. Fletcher with respect to "blackout spells."

**178**  With regard to inconsistencies in the report of headaches to Dr. McLeod, Dr. Robinson acknowledged that there may be inconsistencies. He testified that although there was almost no mention of headaches to her family doctor for three years, it may be that some people seem to accept headaches. Dr. Robinson was alive to the issue of reliance on self-reporting of headaches and he accepted Ms. Fletcher's reports to him of headaches. I accept his evidence which relied in part on those self-reports.

**179**  Ms. Fletcher reported to him that in 2013 her headaches were much improved. She did not tell him that she spent every other weekend in bed. Dr. Robinson testified that most of the present headaches are relatively mild. There is an impact but it is not substantial.

1. Dr. Larry Krywaniuk, Psychologist

**180**  Dr. Krywaniuk saw Ms. Fletcher on October 22, 2009 and November 5, 2009 for a neuropsychological assessment. He administered a series of psychological and neuropsychological tests and prepared a report dated August 31, 2010, which includes the following:

**Opinion**

Ms. Rutter's physician and a neurologist she saw indicated that Ms. Rutter likely experienced a mild concussion as a result of her accident and she also reported to me symptoms consistent with this diagnosis. Although initial cognitive symptoms were probably associated with this, the results of my assessment indicated that she is probably no longer experiencing residual symptoms associated with the initial concussion. However, these symptoms were initially concerning to her and it seems likely to me that she found the overall experience, including the initial accident, extremely frightening.

In my opinion, the major consequences of Ms. Rutter's accident have been in the emotional domain and are coupled to symptoms of depression and anxiety with the result that there is likely to be a psychological component in her overall symptom pattern. Because of her perceived slow recovery and continuing difficulties, Ms. Rutter has developed a pessimistic attitude towards further recovery and her overall future.

Ms. Rutter likely qualifies for a diagnosis of Mood Disorder although her overall profile also is consistent with a diagnosis of Chronic Pain, to which psychological factors are likely to contribute. It appears to me that Ms. Rutter does not have strong insight into her psychological dynamics and the contribution that this has to her overall symptom pattern. Ms. Rutter probably qualifies for diagnosis of Post Traumatic Stress Disorder although there are indications that her symptoms have diminished to a degree.

The indications I have are that Ms. Rutter is a highly sensitive individual from an emotional perspective and this probably has been a factor in the strong emotional reactions she has had due to her accident and the difficulties she has had in overcoming its effects. The indications I have are that Ms. Rutter has developed a maladaptive psychological adjustment pattern in response to her accident and injury she sustained as a result. When she was younger, she struggled with self-concept issues although she seemed to have overcome them prior to the accident. However, it may be that she was somewhat more vulnerable in this area than others would be as a result. Despite this, she recently has been coping with the basic aspects of the job she subsequently obtained as a project manager for a construction firm.

Overall, Ms. Rutter's accident has had a significant impact over most aspects of her life. This includes aspects of daily living, her employment, her spousal and family relationships, her emotional adjustment, her overall physical condition and her perception of her future.

**Prognosis**

The fact that she has been able to return to work contributes to a favorable prognosis. However, this would be tempered by the medical prognosis regarding residual physical difficulties, including the contribution from psychological factors. At this point, Ms. Rutter continues to experience significant emotional sequelae to her accident. The fact that she is now three years post-accident has allowed her maladaptive psychological adjustment patterns to become relatively deeply entrenched in her psychological makeup. Because she tends to be a ruminative individual, these feelings are continually reinforced. From an emotional perspective, Ms. Rutter's prognosis is somewhat guarded and this will continue until her disturbed emotional adjustment is addressed through treatment. On the other hand, she has strong cognitive abilities, especially in the verbal area, and this does give her potential for further education and training.

**RECOMMENDATIONS**

1. I would recommend that Ms. Rutter be referred for psychological counseling and therapy to address her psychological adjustment issues, self-confidence, self-concept, pessimistic attitude towards her future and residual PTSD symptoms.
2. I would also recommend that Ms. Rutter attend a pain management program to address the continuing pain issues.
3. Ms. Rutter reports diminished sexual functioning. This may be a combination of diminished libido based on psychological factors in correlation with physical factors. I recommend that this be specifically addressed as a topic of her rehabilitation with further referrals, if required.
4. Although Ms. Rutter reported that she has found a job that she is able to manage, I would recommend that she have vocational counseling to determine if she is optimally employed and to help her identify other vocational and career options.
5. Ms. Rutter should work with an occupational therapist to help her identify alternative social, recreational and leisure pursuits.

**181**  Dr. Krywaniuk was not required to attend trial for cross-examination and his opinion was not challenged.

1. Dr. Harold Frederick Shane, Psychiatrist

**182**  Dr. Shane saw Ms. Fletcher twice on March 7, 2011 and November 21, 2013. He prepared a written opinion dated March 20, 2011, and addenda dated June 28, 2011 and November 24, 2013. Dr. Shane was accepted as an expert qualified to give expert opinion evidence in the field of psychiatry. Dr. Shane's March 20, 2011 report includes the following:

**Diagnostic Considerations**

**- Pain Disorder Associated With Both Psychological Factors and a General Medical Condition**

...

This is a significant history which is well documented by specialists in the area of musculoskeletal pain and it[s] causes. Associated with this pain over the years have been anxiety, panic and symptoms of Post Traumatic Stress Disorder as well as issues of a possible period of depersonalization.

**- Depression**

**Major Depression**

It would appear that there is a reasonable case to be made for Ms. Rutter having a major depression subsequent to the accident in terms of loss of pleasure, sleep disturbances, agitation, decreased energy, tiredness and fatigue, a sense of worthlessness, loss of appetite, suicidal preoccupations and difficulties with her cognition. To a great degree this has ameliorated over the last number of years and it is difficult to say when it began to become less prominent but there has been a sustained sense of sadness and underlying depression. It is of note that she has functioned in a reasonable manner. It is also of note that there has been some documentation of neuropsychiatric testing regarding depressive issues.

**Obsessive Compulsive Disorder**

There are some mild symptoms of ritualistic approaches to the time she gets out of bed during the day as mentioned. It has not been accompanied by other symptoms which would qualify her for an Obsessive Compulsive Disorder.

**Post Traumatic Stress Disorder**

Following the accident of 2007, Mr. [sic] Rutter developed significant symptoms related to the development of Post Traumatic Stress Disorder. She went on to experience a great deal of general anxiety, psychic numbing, difficulties enjoying previous activities, reduced stability of her emotions, depressive symptoms, panic attacks, recurrent thoughts and intrusive occasional flashbacks of the accident. These symptoms have muted with time.

**Generalized Anxiety Disorder**

Ms. Rutter continues to worry a great deal about her pain, her future occupational status, her marriage and issues in her daily life more days than not. It is also accompanied by significant somatic tension, subjective anxiety and pervasive worry as indicated.

**Panic Disorder without Agoraphobia**

She continues to experience intermittent panic attacks characterized by physiological symptoms although they have been muted in terms of frequency over the years, they are still present from time to time.

She has discussed with me the issue of her self abuse. This is not a diagnostic disorder but certainly is a psychological symptom that affects her general medical condition and impacts upon her treatment and the course of her problems.

**Impulse -- Control Disorder Not Otherwise Specified**

Ms. Rutter indicated she has had moments where she has deliberately broken items in her home when she has felt stressed.

**Dissociative Disorder**

This is characterized based on the DSM-IV criteria of a disruption of usually integrated functions of consciousness, memory, identity or perception of the environment. This may be transient or protracted by of [sic] behaviour. The subtypes of dissociative amnesia usually are characterized by an inability to recall important personal information usually of a stressful nature.

**Tinnitus**

Ms. Rutter has experienced Tinnitus on a regular basis she indicated since the accident of 2007.

**Personality Disorder Not Otherwise Specified**

This category as reflected in the DSM-IV disorders of personality function is characterized by the presence of features of more than one personality disorder. These features do [sic] meet the full criteria for any one personality disorder but together result in clinically significant distress. Her job difficulties and self abusive behaviour all reflect aspects of this disorder.

**DSM-IV Diagnosis**

This is a compendium of mental disorders used by psychiatrists for the diagnosis of mental disorders.

Axis I - Pain Disorder With Both Psychological Factors and a General Medical Condition -- chronic

1. Post Traumatic Stress Disorder -- in partial remission
2. Panic Attacks Without Agoraphobia -- in partial remission
3. Generalized Anxiety State -- in partial remission, mild, chronic
4. Impulse-Control Disorder not otherwise specified -- in remission

Axis II - There is no distinct personality disorder but she uses maladaptive mechanisms such as masochistic behaviour to deal with psychological conflicts. She has moments when she has destroys [sic] inanimate objects. The diagnosis of Personality Disorder Not Otherwise Specified would be appropriate.

Axis III - History of motor vehicle accident in 2007 predisposing her to Pain Disorder With Both Psychological Factors and a General Medical Condition, Post Traumatic Stress Disorder, Generalized Anxiety State, Panic Disorder Without Agoraphobia and Impulse-Control Disorder Not Otherwise Specified

Axis IV - Economic stress

- Problems related to well being related to motor vehicle accident of 2007 resulting in musculoskeletal pain and other somatic symptoms

Axis V - GAF at this time is in the range of 65

...

**- My detailed diagnosis and prognosis;**

I have discussed the diagnosis in detail. In terms of the prognosis, there is certainly concern from a psychological perspective as there have been ongoing issues of changes in terms of her self esteem, her feelings regarding her inability to work within the community in a gainful manner and her ability to cope in the future with her life. I am somewhat optimistic that she will be able to deal with this but it is critical she receive ongoing therapy to help her with her problems. In terms of her physical symptoms I would refer this to experts in this area.

...

**- Was there or is there any period of total or partial disability as a result of the accident and, if so, what is my estimate of the nature and duration of such disability?**

It is my opinion that for the better part of four months after the accident in 2007 she was disabled to work. Since then she has struggled with her work situation and since the fall of 2010, has not been able to work because of what she claims is her inability to cope psychologically with any occupational setting at this time. She is not actively looking for work she indicated since September 2010. It is my opinion that her ability to adapt to the stresses of her occupational setting within the context of her emotional and physical health has been responsible for her not working at this time.

**- Will there be any permanent disability as a result of the accident (even if that disability is a partial disability) and, if so, what is the nature and extent of such permanent disability?**

It is difficult to state from a psychological perspective how long her symptoms will last. I do think that with the appropriate support there is a reasonable chance this will resolve to a reasonable degree. The issues of pain are best referred to a specialist in that area.

**- What recommendations, if any, would I make with respect to future treatment and what would be the likely duration, frequency and anticipated cost of such treatment?**

I would think that her receiving psychotherapy on an ongoing basis would be appropriate. The length of time involved in this type of therapy would be determined by the therapist in the context of his/her relationship with Ms. Rutter. The type of therapy she would require would be that of a frequent nature, ongoing and lasting up to a few years.

**183**  Dr. Shane's November 24, 2013 report contains his opinion following his re-evaluation of Ms. Fletcher after the second accident, his review of the then newly available medical opinions, including the opinion of the psychiatrist, Dr. Grant Chernick, whose October 5, 2011 report was not adduced as evidence at trial. Dr. Shane's November 24, 2013 report includes the following:

I note that in reviewing my report, I omitted to document in Axis I the diagnosis of Major Depression, single episode, non psychotic in remission. I note in my diagnostic considerations I had documented this issue. It was an oversight that this disorder was not documented on the Axis I considerations.

...

**My diagnosis and prognosis;**

**Somatic Symptom Disorder, predominant pain, persistent and moderate**...

...

It is my opinion she is experiencing significant pain which certainly has an impact upon her psychological and physical well being. This has been documented. Although she tolerates the pain it is a symptom that has predisposed her to depressive symptoms.

**Post Traumatic Stress Disorder (PTSD), chronic**...

...

She has experienced symptoms of this disorder since 2007.

**Panic Disorder in remission**...

**Excoriation (Skin Picking Disorder), chronic**

This is a new disorder added to the DSM-V

**Prognosis**

It is my opinion unless her pain is alleviated the struggle with the quality of her life will continue to persist. I see the symptoms of the Post Traumatic Stress Disorder continuing indefinitely although she is a young woman and certainly it is likely with time unless there is intervening stress of a significant nature, these symptoms will probably become less of a problem. She has continued to drive as indicated.

It is also of note that her skin picking continues to be a problem for her although it does not disrupt her daily functioning. This is a reflection of her anxiety about pain and accompanying limitations.

...

**You have asked me to address the issue of whether there are any permanent disabilities as a result of the accidents and if so, what is the nature and duration of such disabilities;**

Following the initial accident in 2007 it appears Ms. Rutter was off work for some months because of the pain she had experienced and the depression. Other than that period it appears she has been employed, has been laid off from time to time. I do not see her as being occupationally limited within the context of her abilities and work experience. I do not view any psychological symptoms that she is experiencing reaching the magnitude where they are significantly impairing her ability to cope occupationally. Having said this, there has certainly been an impact upon her sense of psychological stability as she has to cope with her pain, skin picking, mood vacillations, and symptoms of the Post Traumatic Stress Disorder.

**You have asked me to address the issue of whether she has any permanent disabilities as a result of the accidents, either wholly or partially?;**

At this time it appears she is able to cope in a highly demanding occupational position. There is no evidence she is disabled in any way whatsoever to work in the type of position in which she is now involved.

**You have asked me to address the issue of future treatment;**

It is important she continue to have psychotherapeutic support. She has a good relationship with her present counsellor but as indicated she has not seen her for some time because of economic considerations. She did indicate she hopes to return soon as her present occupational setting has a plan which will pay for this intervention. I am not sure why she has not returned as she has been working at this present firm for over a year. Perhaps she feels it is not important and she has been able to manage.

...

She would like to return to massage therapy treatments and I support this.

**184**  Dr. Shane explained his use of the diagnostic Axes I-V under the DSM-IV, which were eliminated under the DSM-V, and the global assessment of function or GAF, which is no longer part of an evaluation under the DSM-V. His initial diagnoses included Pain Disorder with Both Psychological Factors and a General Medical Condition, as defined in the DSM-IV, which has been incorporated into a new disorder in the DSM-V, resulting in his final diagnosis of Somatic Symptom Disorder, Predominant Pain, Persistent and Moderate.

**185**  With regard to the diagnosis of Post Traumatic Stress Disorder, Dr. Shane testified that Ms. Fletcher met the criteria for a period of time, and although she still shows some symptoms, it was sub-clinical in 2013.

**186**  In response to a question from the bench, Dr. Shane further explained the nature and effect of a Somatic Symptom Disorder such as he diagnosed in Ms. Fletcher. Dr. Shane indicated such a disorder is a condition where individuals experience pain from organic causes such as a motor vehicle accident or ulcer, but factors such as emotional stress and distress of the illness itself contribute to psychological or psychiatric distress emotionally, physically and occupationally. He responded in the affirmative when asked if it is the experience of pain that leads to the difficulties and depression.

1. Dr. Winston Gittens, Neurosurgeon

**187**  Dr. Gittens was accepted as an expert witness qualified to give opinion evidence in the field of neurosurgery. Dr. Gittens saw Ms. Fletcher on May 12, 2014, conducted a review of the available medical records and reports, and prepared a written opinion dated May 22, 2014. His report includes the following:

... At the time of my assessment, the predominant complaints related to me were:

1. Lower back pain and stiffness related to the motor vehicle accident of 2007;
2. Left lower limb pain extending from the back and coccygeal area to the posterior aspect of the knee, which she related to 2012;
3. Neck pain and stiffness dating back to the 2007 motor vehicle accident;
4. Headaches (migraines) with neck pain dating back to the motor vehicle accident of 2007.

Other symptoms highlighted in the patient questionnaire included fainting spells, muscle weakness, loss of feeling or tingling sensations, nausea, vomiting, neck pain, lower back pain and lack of concentration.

...

Having reviewed the documents provided and interviewed and assessed Ms. Fletcher, to summarize the salient features, it should be noted that prior to the motor vehicle accident of 2007 Ms. Fletcher had been involved in three other motor vehicle accidents. Although the dates may not be accurate, it is believed that the first was minor in 1997 and that she suffered no injuries as a result of that, that she had in the other two accident believed to have occurred either in 2000 for the first one and 2003 or 2004 for the second one, injuries to the back and also a whiplash type injury to the neck, resulting in symptoms which persisted into at least 2004 based on the records of Dr. Shepherd and also required in 2004 an x-ray of the lumbar spine. There is also a suggestion based on the information provided by KARP that she may have had ongoing back symptoms dating back to the motor vehicle accident of 2004. Most of the records, however, make no other reference to back symptoms immediately prior to the 2007 motor vehicle accident.

The motor vehicle accident of July 21, 2007 was an accident that resulted in no loss of consciousness and an impact that resulted in her head striking the window or the window frame area. The records would suggest that the primary result of that incident was soft tissue injury to the paraspinal muscles in the cervical, thoracic and lumbar areas of the spine; but mainly in the neck and lower back as well as contusions to the scalp on the left side, left hip area and thigh along with post-traumatic headache arising from the scalp, neck and possibly vascular structures. This motor vehicle accident also resulted in nausea and dizziness, which has brought up the following diagnoses: Mild concussion or traumatic brain injury or some sort of vestibular injury.

However, everyone is of the agreement in there [sic] findings that the motor vehicle accident on July 21, 2007 did not result in any neurological injury. Dr. Stewart considered the possibility of thoracic outlet syndrome. However, the neurologist who saw her, as well as Dr. Hirsch, did not consider this in their list of possible diagnoses and the clinical information did not indicate the presence of any disc injury to result in the left-sided sciatica.

...

The records, with the exception of the comment and Dr. Kokan's report, would indicate that there was no significant tailbone area pain referred to in the records until 2013.

The second motor vehicle accident of September 9, 2011, based on the clinical data available to me, would suggest that there was an increase in symptoms from the soft tissues and soft tissue injury resulting from the previous motor vehicle accident but again there did not appear to be any neurological injury as a result of this accident and there was nothing in the clinical data to suggest a permanent change secondary to this accident. The subsequent assessment of various studies, including the MRI scan, did not suggest any structural injury to the spinal column, including the coccygeal area.

At the time of my assessment, Ms. Fletcher was still reporting ongoing lower back pain and stiffness, neck pain and intermittent headaches, particularly with the neck pain. One of the predominant complaints, however, was left lower extremity pain extending from the coccyx and pain in the coccygeal area.

**OPINION:**

...

**2. Diagnosis and prognosis.**

Current Diagnoses:

1. Chronic neck and lower back pain;
2. Headaches with the cervicogenic and vascular component;
3. Mild carpal tunnel syndrome (positive Tinel's sign);
4. Coccydynia (pain in the tailbone area); and
5. Possible sacroiliac joint dysfunction.

Motor Vehicle Accident-Related Diagnoses:

1. Soft tissue injury to the neck and back;
2. Possible mild traumatic brain injury with possibly mild concussion symptomology;
3. Contusion to the scalp, left hip, left knee and possibly left thigh;
4. Cervicogenic headaches, post-traumatic in nature with a vascular component; and
5. Possible vestibular injury.

Comment:

In regard to the diagnosis of possible mild traumatic brain injury or concussion, as indicated earlier, there is a difference of opinion in the reports in regard to whether this lady suffered a concussion. The initial presentation does suggest the possibility of some change in sensorium prior to when she was assessed by the paramedics, at which time she was fully conscious, alert and well-oriented, but she had shortly after the incident some dizziness and nausea, which could be explained on the basis of the mild concussion or vestibular injury and as I am not in a position to absolutely exclude the possibility of a mild traumatic brain injury, I would like to state that I believe that this possibility does exist, that it was mild in nature and should not have resulted in any sequelae except for possible transient mild concussional symptomology.

In regard to the prognosis, Ms. Fletcher has chronic and ongoing pain, particularly in the neck and the lower back with some stiffness. I think the prognosis for the persistence of this pain is that it is likely to do so. As far as the coccygeal or tailbone pain is concerned, I find it difficult to relate this symptom to any of the two motor vehicle accidents based on a thorough review of the clinical documentation on the records. It is not possible to absolutely state the cause of this. It should be a local traumatic problem or referred pain to that area from problems unrelated to the motor vehicle accident.

**3. Whether Danica had any prior or existing medical or health problems or conditions pertinent to any injuries she may have sustained in the Accidents.**

Yes, prior to the two motor vehicle accidents, Ms. Fletcher had been injured in prior motor vehicle accidents; at least two which produced symptoms in the neck and in the lower back and we have radiographic evidence that would indicate that she had pre-existing degenerative changes in the lumbar spine at least prior to the first accident. This degenerative condition may have and could have pre-disposed her to pain which might persist longer than anticipated.

**4. Whether Danica's complaints were caused or contributed to by the Accidents.**

The first accident, Accident #1 of July 21, 2007, contributed ongoing neck and lower back symptoms which are aggravated by the second motor vehicle accidents [sic], but I believe, based on the records, that this aggravation was temporary and that the ongoing neck and back symptoms are residual from the first motor vehicle accident.

**5. From what, if any, ongoing problems or complaints does Danica continue to suffer at this point, which were caused or contributed to by the accidents?**

The neck and lower back pain, I believe, is likely to continue and relate to the first motor vehicle accident. There are psychological and psychiatric issues which have been noted in the records and you should have the psychiatrist address the relationship of those symptoms to her pre-accident issues and the accidents themselves and the prognosis.

...

**7. Will there be any permanent disability as a result of the Accidents (even if that disability is a partial disability) and, if so, what is the nature and extent of such permanent disability?**

I do not anticipate any permanent neurological disability as a result of the two accidents. Ms. Fletcher's disability is a reflection of chronic pain. I believe that this will result in a long-term, possibly permanent, partial disability. I am referring in regard to the neck and lower back symptoms, which I believe are related to the motor vehicle accident. As far as the coccygeal pain is concerned, this may respond to treatment to the point that it may not impact on her in the long-term.

It is not possible to apply a percentage to this disability, but it would be partial disability in regard to the neck and lower back.

**8. What recommendations, if any, would you make with respect to future treatment, and what would be the likely duration, frequency and anticipated cost of any such treatment.**

As a result of my assessment and review of the various records, I would like to make the following recommendations:

1. That she be sent for a bone scan, looking for inflammatory change in the spine, sacroiliac area and coccyx.
2. To diagnose whether the possible disc pathology is contributing to some of the pain, i.e. nerve root compromise, and as such, therefore, I would like to recommend a diagnostic left L4 nerve root block.
3. For therapeutic purposes following #1 and #2, sacroiliac blocks may be diagnostic and therapeutic as well as blocking in the coccygeal area.
4. No surgery is anticipated in regard to the axial spine.
5. I would recommend a continued exercise program.
6. Because of the history of possible vestibular dysfunction, I think it would be appropriate to have her undergo a full assessment by an ENT surgeon as well as a series of vestibular function tests to identify whether there is a possible explanation for the dizziness originating from the vestibular apparatus.

**188**  Dr. Gittens corrected a factual error at page 22 of his report and agreed that if Ms. Fletcher's father was not sick from October 2010 to September 2012, then that would not have been a factor in her time off work during that interval. Dr. Gittens also explained his use of the pain scale from 0 to 10, and the nature of the pre-existing degenerative condition found in Ms. Fletcher's spine, which can be aggravated by trauma, may not be symptomatic and may cause symptoms arising from trauma to persist longer than anticipated.

**189**  Under cross-examination, Dr. Gittens was responsive to questions and stood by his opinions. Under cross-examination and later in response to questions from the bench, Dr. Gittens clarified the meaning of the contents of his report found in the last paragraph at the bottom of page 20, and in the first complete paragraph on page 21, which read, as follows:

**CURRENT SYMPTOMS:**

Lower back pain and stiffness:

This pain is mainly in the coccygeal area and is reported to be severe, worse on sitting; but there is also pain in the lower back bilaterally and in the loin along with stiffness. The coccygeal pain, she believes, started after the motor vehicle accident. It is now constant, 7 to 8 on the pain scale, worse on sitting in excess of half an hour, lifting, bending, doing exercises that are strenuous, standing more than half an hour and doing household chores, including vacuuming. It is less prevalent when she has massage therapy, which helps for one or two days. It is eased to some extent by the muscle relaxants for a few hours and she has also lost some weight, which has helped to some extent.

The second component of her pain is related to the lumbar area and the loins. It is 6 to 7 on the pain scale of 1 to 10, constant, becoming shooting with activity. In fact, at times it is severe to the point that she may become stuck in certain positions. There is also a history of shooting intermittent lower back pain and pain which extends from the tailbone into the buttock and the posterior aspect of the thigh to the posterolateral knee. This pain occurs daily. It is variable in severity and last seconds, but at times may last for hours, during which time she has noted difficulty with weight bearing and has a limp.

**190**  Dr. Gittens stated that the first paragraph is a composite that "deals with both coccygeal and back pain," whereas the second paragraph reproduced above addressed just the lower back pain. He also clarified the meaning of the sentence which reads: "It is now constant, 7 to 8 on the pain scale, worse on sitting in excess of half an hour, lifting, bending, doing exercises that are strenuous, standing more than half an hour and doing household chores including vacuuming." The words "worse on sitting" referred to the coccyx, and the remainder of that sentence, refers to both the coccyx and the back.

**191**  Dr. Gittens was also cross-examined with respect to the efficacy of spinal decompression which is a form of traction. He thinks it does help some individuals but the same help is gained with physiotherapy. Some of his colleagues send patients for the treatment, but for 75% of back and neck pain he would never recommend spinal decompression. He also said that there is no evidence that passive therapy such as massage makes a long-term difference.

1. Giovanna Boniface, Occupational Therapist and Certified Life Care Planner

**192**  Ms. Boniface was initially asked to review the medical information available and prepared a future cost of care projection report dated September 8, 2011. She then saw Ms. Fletcher and again reviewed some of the available medical reports with respect to the recommendations made by the various practitioners and prepared a July 17, 2014 Future Cost of Care Report and a July 23, 2014 Addendum. Ms. Boniface was qualified to give opinion evidence in the areas of her expertise in occupational therapy and the cost of future care. Ms. Boniface's July 17, 2014 report includes the following:

**OPINION**

Ms. Rutter was involved in MVAs on July 21, 2007 and September 9, 2011. Prior to these accidents, Ms. Rutter was independent with all activities of daily living including self-care, productivity (full-time work, home management) and leisure. She was seen in her home on July 17, 2014 for a cost of future care evaluation. She continues to experience physical difficulties specifically, neck pain, headaches, low back pain, and bilateral knee pain. In addition, Ms. Rutter experiences fatigue and emotional symptoms (depression and anxiety).

These difficulties have an adverse impact on her ability to engage in activities of daily living including reduced ability to engage in heavier housekeeping and leisure tasks.

...

A detailed explanation for each of the recommendations is provided in a table format in Appendix B. The goals of these recommendations are to enable Ms. Rutter to:

1. maintain a quality of life which resembles, as closely as possible, that which she would have led but for the injuries she sustained in the MVAs of July 21, 2007 and September 9, 2011;
2. functional [sic] optimally on a daily basis;
3. develop and maximize her skills in order to allow her to pursue a meaningful and productive life, including personal relationships and recreational pursuits;
4. cope optimally and compensate for her functional losses;
5. optimize her ability to live independently (including the provision of paid assistance so that she does not have to rely on family, friends or charitable organizations to enable independent community living);
6. access aids and supplies that are now necessary as a result of her limitations;
7. reduce (or prevent) future complications;
8. reduce the need for crisis-based interventions'

**193**  Under cross-examination, Ms. Boniface acknowledged the scope of her report and her expertise. She also explained the difference between the Cost of Care Projection she had initially prepared in 2011, which does not require an in-person meeting with the subject, whereas a Future Cost of Care Report does require such a meeting.

1. Hassan Lakhani, Economist

**194**  Mr. Hassan Lakhani of Peta Consultants prepared a July 22, 2014 Future Cost of Care Report and a July 24, 2014 Addendum, in which he calculated the present value of the items and services found in Ms. Boniface's July 17, 2014 Future Cost of Care Report and her July 23, 2014 Addendum.

**195**  Mr. Lakhani also prepared a July 18, 2014 Future Income Loss Multipliers Report to assist in determining the present value of the income the plaintiff will lose in the future as result of the first accident and the second accident. Mr. Lakhani was qualified to give opinion evidence in the areas of his expertise in economics.

**196**  Mr. Lakhani explained the nature and scope of the reports. His opinions are tools to determine how much an individual would need today to compensate for a future loss. Mr. Lakhani also explained that Table 1 of his July 24, 2014 Addendum-Future Cost of Care Report replaces Table 2 of his July 22, 2014 Future Cost of Care Report.

**197**  The table he produced lists the "Item[s]/Service[s]" and the "Cost" of such items and services using the same numbering as appears in Appendix "B" to Ms. Boniface's July 17, 2014 report and Appendix "A" to her July 23, 2014 addendum. The column "Claimed" has Mr. Lakhani's calculations of the present value of the items and services found in Ms. Boniface's reports. The table is discussed below in the Cost of Future Care.

1. Carey Scarrow

**198**  The plaintiff claims that her 2006 Toyota Matrix was damaged and its value was reduced as a result of the first accident. When Ms. Fletcher and her husband purchased new vehicles during the spring of 2008, they traded in her 2006 Toyota Matrix. Mr. Scarrow was asked to review the available photographs and damage estimates and to determine the amount of any accelerated depreciation or diminishment in the value of Ms. Fletcher's vehicle. Mr. Scarrow was qualified to give opinion evidence in the areas of vehicle evaluation and appraisal. Mr. Scarrow prepared an Accelerated Depreciation Assessment Report dated September 8, 2011, which includes the following:

It is my opinion the result of the collision repairs upon the vehicles Actual Cash Value was accelerated in terms of depreciation by Two Thousand Five Hundred Dollars [$2500/ Cdn.] plus applicable taxes.

**IV. DISCUSSION**

**A. Overview**

**199**  The ultimate issue for the court is the quantum of damages under the applicable heads that the plaintiff is entitled to as a result of the two accidents in 2007 and 2011. In order to reach those conclusions, it is necessary to assess the credibility and reliability of the plaintiff, and to determine the weight to be attributed to the evidence of the expert witnesses.

**200**  The law is not in issue between the parties. It is set out to summarise the principles that counsel agree are to be applied to the findings of fact.

**201**  The plaintiff says that in the more than seven years which have passed since the first accident and three years since the second accident, she continues to suffer from chronic, disabling pain and psychiatric maladies. As a result, she requires ongoing care and assistance.

**202**  It is the submission of the defendants that Ms. Fletcher has made significant recovery in many areas of injury, particularly with regard to the headaches and psychological symptoms. They say that the plaintiff's residual pain complaints and psychological distress are wholly subjective. Further, she suffers from symptoms unrelated to the accidents and her reports of pain and disability lack both consistency and accuracy.

**203**  I will turn first to a discussion of the evidence of the plaintiff.

**B. Credibility and Reliability of the Plaintiff's Evidence**

**204**  It is submitted on behalf of Ms. Fletcher that her evidence ought to be assessed in light of the fact that more than seven years have passed between the first accident and the trial. During that time she has had four jobs and seen many health care practitioners and experts. In such circumstances, she says that the minor inconsistencies on the documentary record should be expected as a matter of course. It is submitted that Ms. Fletcher was a credible and reliable witness overall.

**205**  The defendants submit that there are inaccuracies and inconsistencies in the plaintiff's evidence. 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 may carry less weight: *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.

**206**  The defendant says that although it is not submitted that the plaintiff intentionally misled the doctors and the court, there is a repetition of inaccurate and inconsistent reporting. I agree. Some examples follow.

**207**  The first area of concern is not of itself relevant, but is indicative of a pattern of generalisation and exaggeration. The plaintiff described her childhood as "idyllic". However, she suffered when her parents temporarily separated, and in Grade 9 she was bullied to the degree that she became clinically depressed and suicidal. She moved away to live with an aunt and attend a different school for a year.

**208**  With regard to residual effects from the 2000 and 2003 motor vehicle accidents prior to the first accident, she reported to Drs. Stewart, Gittens and Ms. Boniface that she had recovered or fully recovered from those injuries. However, in 2007 she told Dr. Kokan that she had a sore back from a previous injury and it would flare up if she lifted something too heavy or turned the wrong way. Her testimony confirmed that prior to the first accident she had back pain about 2 to 3 times per month for 2 to 3 days each time.

**209**  Similarly, she told Dr. Kokan at the same time in 2007 that she had injured her coccyx when she was young and that it remained a source of pain when sitting. With regard to the absence of any report to Dr. McLeod of coccyx pain prior to August 2013, she blamed it on the fact that Dr. McLeod only permitted her to discuss her top three complaints. Dr. McLeod, a most caring physician, denied that that was her practice.

**210**  In her testimony, Ms. Fletcher was, at times, understandably upset. At other times, she was very professional and articulate. However, her evidence in cross-examination was frequently defensive and argumentative such as in describing the Coquitlam Crunch hikes; inconsistent such as in describing the days missed from work at Golder for headaches; or evasive as in describing why she received so little treatment in 2012. Although she is a highly organized person, her memory was sporadic; she could not remember how many or what jobs she applied for when unemployed. It was most concerning when, with regard to her testimony about spending weekends in bed, she could not remember the previous weekend and what she had done on that weekend three days prior.

**211**  I am unable to agree with the plaintiff that the inconsistencies between Ms. Fletcher's evidence and the documentary record or the opinions of the experts before the court were of limited, if any, significance. There is a pattern of inconsistencies in her evidence and reports to physicians and Ms. Boniface. I accept that her testimony was well-intentioned, but it is not entirely reliable. While I generally accept her evidence that she was injured in the accidents and that she suffered pain, the degree of pain, the history of improvement and the effects of the injuries must be more carefully considered in the context of the evidence as a whole.

**C. The Evidence of the Expert Witnesses**

**212**  The substance of the specific evidence of the doctors who provided expert opinions will be discussed below.

**213**  However, the manner of calling the evidence caused a concern which I expressed during the trial. After the plaintiff commenced her evidence on the first morning of the trial, Dr. Stewart was called as a witness the first afternoon. Dr. Robinson was called the following morning, the second day of the trial. The evidence of the plaintiff then continued, and the evidence of Dr. Stewart was completed later in the trial, it also being interrupted.

**214**  It would not have been possible to have concluded the evidence of the plaintiff in a half day, nor was the plaintiff's evidence more than introduced in that time. I then requested counsel not to schedule any further witnesses until after the plaintiff's evidence was complete in direct, cross-examination and re-direct. These were the reasons for that request.

**215**  Generally, and particularly in personal injury cases, it is preferable that the plaintiff testify first. Not only is the plaintiff's evidence important on its own, it is the framework or foundation for assessing the evidence of each witness that the plaintiff may call. A trial is much more than simply creating a record. It is the best opportunity for the trial judge to absorb the evidence and begin the analysis of the evidence. The orderly calling of the witnesses is crucial to the ability to consider and analyze. Sequence matters. It is very difficult to understand the evidence as a whole if the plaintiff's testimony is preceded by or interrupted by an expert or other witness.

**216**  For example, in this case, Dr. Stewart gave evidence regarding the limited physical capacity of the plaintiff. I later heard from the plaintiff that she, since two years post-accident, had participated regularly in Bikram or hot yoga, and also had frequently done strenuous hiking as well as working extremely long hours. It would have been of assistance to have had a full understanding of the history of the plaintiff's injuries and recovery as a framework on its own, and by which to assess the evidence of the expert witness.

**217**  While I do appreciate the necessity for courtesy to the busy and often over-worked professionals who are the expert witnesses, the orderliness of the trial proceedings should take priority. When an expert witness accepts the important task of providing a report, the witness is aware that attendance in court is possible. Pursuant to Rule 11-6(9) of the *Supreme Court Civil Rules*, the witness is notified by counsel in advance of the trial date. Subject to any last minute emergencies, it is then incumbent on the witness to attend at a time that facilitates the orderly calling of the evidence.

**D. Non-Pecuniary Damages**

**218**  Of the two accidents, the first accident was much more serious. The expert reports and evidence attribute the most significant injuries and the ongoing symptoms to the first accident. Neither counsel sought an apportionment of damages between the two accidents. I have therefore assessed damages globally with the only increase due to the second accident being in non-pecuniary damages.

**219**  The parties have differing views of an appropriate quantum of general damages. The plaintiff seeks $110,000 to $140,000. The defendant submits that damages under this head should be assessed at $75,000.

**220**  Ms. Fletcher is entitled to damages for the pain, suffering and loss of enjoyment of life she experienced as a result of the first accident and the second accident. 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.

**221**  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] 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=)).

**222**  The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with 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.

1. Consideration of the Factors

**223**  Ms. Fletcher was 29 years old on the day of the first accident, and is now 37 years old. She was living with Kevin Fletcher and they were starting to plan for marriage and children. She had studied for and obtained experience in a field about which she was passionate. She was very active vocationally, recreationally and socially. She had a positive and outgoing personality and attitude.

**224**  The first accident was a significant collision that caused Ms. Fletcher's head to strike the driver's side window of her vehicle. There was no loss of consciousness. Her anxiety at the scene was increased because the defendant's vehicle collided with hers a second time as it drove away. While in hospital she remained in a neck brace on a spine board while she waited for the results of diagnostic imaging to determine whether she had suffered a fracture to her spine. She has been experiencing various degrees of neck pain, back pain, headaches and psychiatric problems ever since.

**225**  However, the degree of pain and psychiatric issues have significantly diminished.

**226**  It is not in issue that Ms. Fletcher's physical pain and the onset of the associated psychiatric problems left her totally disabled for approximately four months following the first accident. She was unable to care for herself and was afraid to be left alone for that time. She had cognitive difficulties consistent with a concussion and experienced nausea, dizziness and fainting in addition to neck and back pain and headaches.

**227**  The diagnoses are consistent that she suffered from a concussion, which was likely mild. By November 2007, the symptoms were mostly gone and resolved within a year. There was no neurological injury.

**228**  In December 2007, Ms. Fletcher returned to her job at Cinequip. Although her passion was stagecraft, she had decided in January 2006 to take a break, and Cinequip was intended to be a temporary job in what she described as warehouse work. It involved hard physical labour lifting and carrying heavy equipment and long hours. When she returned to that job, she could not do what she had done prior to the accident. Her employer accommodated and she did administrative tasks.

**229**  In 2009 there were improvements to Ms. Fletcher's physical injuries and abilities. As the Cinequip work was no longer satisfying with her reduced capacity, Ms. Fletcher quit in October 2008 and went to work at Panther as a project coordinator. This job was also administrative as her injuries prevented physically demanding work. In the fall and winter of 2009 she worked consistent long hours, up to 70 hours per week for six months prior to the Olympics to complete projects. In May 2009, Ms. Fletcher reported to her family doctor, Dr. McLeod, that she was doing Bikram or hot yoga four or five times per week and aquacise. In May 2009, Dr. McLeod concluded that she was 50% to 60% recovered with a lot more neck and upper back progress to go.

**230**  When the work returned to more normal hours in April 2010, Ms. Fletcher began a serious spiral into depression and suicidal ideation with the realisation that her dreams of work in the physically demanding area of stagecraft were over. In September 2010, she was laid off from Panther and felt relief that she did not have to go to work. She then became severely depressed and withdrawn. Dr. McLeod prescribed Paxil for her depression, and she remained on Paxil until February 2012 when her father was diagnosed with terminal cancer. The medication was interfering with her ability to be emotionally present for her parents at that difficult time.

**231**  Ms. Fletcher did not attend to see her family doctor at all in 2012. Her explanation is that she was more concerned with her father's health. I accept that explanation, and I also conclude that in 2012 her physical symptoms, including her coccyx, had improved to the extent or were not in issue such that she did not feel the need for medical attention for that period of time.

**232**  Ms. Fletcher was unemployed for eleven months. During that time she started her crafts business and participated in fairs where she sold the crafts she made. That business continues to the present along with monthly craft classes she teaches.

**233**  When she returned to work in September 2011, Ms. Fletcher worked in ticket sales for four months until a lay-off when her employer had a lack of funds to continue. After four months of unemployment, she obtained her present position at Golder where she works at a desk having started as a project coordinator and is now working as a controls administrator. After a year working on contract, she became a permanent full-time employee in May 2013. At Golder she has received an award and raises. The work results in back and neck discomfort but the sit/stand desk and changing positions assists.

**234**  Ms. Fletcher's symptoms persist although improved. Her testimony was that she continues to suffer from neck and lower back pain which is exacerbated by some activity. Housework causes pain, and she does housework in pain. She no longer participates in 4x4ing, and has not since the first accident. She can now do the gentle rides at the PNE.

**235**  I accept the evidence of Dr. McLeod that Ms. Fletcher has a chronic neck and low back strain. She opined that that would be the most difficult issue in the future. Dr. Gittens makes the same diagnosis of chronic neck and lower back pain.

**236**  It is to Ms. Fletcher's credit that she has, since 2009, made exercise a priority. In addition to continuing yoga in 2014, she started a program of frequent hiking, daily noon hour walks with a coworker and exercising with friends once or twice per week. Although her headaches have increased with the exercise, Dr. Robinson is hopeful that the headaches will subside to previous levels.

**237**  It was the evidence of Dr. Stewart that Ms. Fletcher reported to her that she spends every other weekend in bed, and that she consistently collapses at the end of a work day after dinner. At trial, Ms. Fletcher said that "there are weekends" that she stays in bed. In this area, the evidence was concerning as Ms. Fletcher, who is a highly organised person, could not recall the prior weekend. Given the evidence of her exercise program, weekend hikes and craft business and fairs which I do accept, I find that Ms. Fletcher spends an occasional weekend in bed as she testified. I do not find that Ms. Fletcher spends every other weekend in bed and every weekday evening after dinner resting.

**238**  With regard to the frequency and intensity of the headaches, I accept the evidence of Dr. Robinson. He notes that the migraines or more severe headaches improved after a year, and there was gradual improvement in both severe and mild to moderate headaches from his initial review in 2011 to his second report in 2014. Ms. Fletcher reported to him that the headaches were much improved from 2013. Most of the present headaches are relatively mild although he states in his last report that the more severe headaches will continue.

**239**  The evidence of Ms. Fletcher and Dr. Stewart raised the issue of pain in the coccyx. This pain had its onset when Ms. Fletcher was 12 years old. It becomes worse as a result of sitting, which is what her jobs have entailed since the first accident. She told Dr. Stewart that in 2012 it was "100 times worse", and at the time she met with Dr. Gittens in 2014 it was one of the predominant complaints. Recently, with the sit/stand desk it has been ameliorated. Ms. Fletcher did not attend to or report the coccyx pain to Dr. McLeod, blaming it on there being insufficient time in her appointments. However, Dr. Gittens concludes that it is difficult to relate the coccyx symptom to either of the two accidents. I accept his evidence, and the plaintiff's final submissions agreed that there is insufficient evidence on which to base a finding that the first accident was the cause of the coccyx pain.

**240**  There is also continuing pain in Ms. Fletcher's left knee.

**241**  The emotional, psychological and psychiatric problems as a result of the first accident had the most significant detrimental effect on her quality of life. The evidence of her husband and her mother was compelling: Mrs. Rutter feels that she had lost not only her husband but also her daughter, and Kevin would like to have his wife back.

**242**  I rely upon and accept the evidence of Dr. Shane and Dr. Krywaniuk. The experience of the pain from the physical injuries led to and caused the psychiatric conditions.

**243**  Dr. Krywaniuk stated that "the major consequence of Ms. Rutter's accident have been in the emotional domain and are coupled to symptoms of depression and anxiety." He opines that she "has developed a maladaptive psychological adjustment pattern in response to her accident and injury she sustained as a result."

**244**  The diagnosis of Dr. Shane was that she had Major Depression, now in remission, Somatic Symptom Disorder, persistent and moderate, Post Traumatic Stress Disorder, now sub-clinical, Panic Disorder in remission, and Excoriation Disorder, chronic. The symptoms include underlying depression, and a sustained sense of sadness, some obsessive-compulsive traits, and ongoing anxiety. She continues to struggle to maintain her relationships with family and friends and her equilibrium while at work. Her emotional suffering has been profound. It has also improved and ameliorated, although it continues to affect her life. Dr. Shane stated that with appropriate support there is a reasonable chance this will resolve to a reasonable degree.

**245**  Dr. McLeod noted in her last report that the anxiety and depression are not gone but doing better. From the first to second report of Dr. Shane, improvements are noted in all areas except for Somatic Symptom Disorder. He states in his last report that although he recommended that she have psychotherapeutic support, Ms. Fletcher had not continued with her counsellor. He concluded that it was perhaps because she had been able to manage.

**246**  The period of disability was four months following the first accident. In 2009, after approximately two years, her physical injuries were 50% to 60% resolved. The self-reports of pain using the pain scale are not of assistance since with pain at 8 out of 10, Ms. Fletcher worked long hours for six months in the winter of 2009-2010. Dr. McLeod concludes that with regard to some jobs and recreational activity, the chronic neck and low back pain will be partially disabling. Dr. Gittens states that the chronic neck and back pain: "will result in a long-term, possibly permanent, partial disability."

**247**  I accept the evidence of Dr. Shane that due to the psychiatric issues, Ms. Fletcher was unable to work for the eleven months of unemployment from September 2010. I also accept the evidence of Dr. Shane that: "there is no evidence she is disabled in any way whatsoever to work in the type of position, in which she is now involved." Dr. Robinson opines, and I accept his evidence that, Ms. Fletcher has proven to be capable of working full-time in a job with light physical demands.

**248**  I do not accept the opinion of Dr. Stewart that Ms. Fletcher is not able to sustain her present work schedule. The opinion is based on an assumption that the plaintiff spends every other weekend in bed. That is not a fact found by the court. Further, Dr. Stewart did not know or did not take into account the plaintiff's admirable physical exercise regime and abilities. The opinion was based on her incomplete understanding of the factual background. Further, when Dr. Stewart was questioned in cross-examination about other facts before the court, she did not acknowledge any adjustment to her opinion. She therefore assumed to some degree the role of advocate for the plaintiff.

**249**  With regard to the indication of thoracic outlet syndrome made only by Dr. Stewart, I prefer the evidence of Dr. Gittens who did not consider this a possible diagnosis.

**250**  The most helpful description of the effects of the second accident is found in the report of Dr. Gittens. He states that the aggravation from the second accident was temporary and the ongoing neck and back symptoms are residual from the first accident. This accords with the evidence of the plaintiff. The aggravation lasted approximately four months.

**251**  The defendants submit that the present neck and back pain and present depression were caused in part by prior motor vehicle accident injuries and by previous periods of depression. The fact that she had those injuries and symptoms in the past and was more susceptible after the first accident does not assist the defendants. I am satisfied that the neck and back pain and depression as set out above are caused by the first accident.

**252**  Ms. Fletcher is both stoic and prone to catastrophizing. She was tested by Ms. Boniface as having "a very high level of perceived injustice and a very high level of catastrophic thinking." Her accomplishments in overcoming adversity are many notwithstanding her perception.

**253**  Although her parents separated for a time when she was a child and she was the victim of significant bullying during junior high, Ms. Fletcher completed high school and succeeded in her post-secondary academic pursuits at Douglas College and the Banff Centre. She began a career in stagecraft and design.

**254**  Since the first accident, Ms. Fletcher has done her best to move forward. When she could not meet the physical demands of her pre-accident employment, she obtained a series of positions better suited to her post-accident physical capabilities, even though they were less rewarding jobs. She attempted to find work related in some way to the entertainment and event industries, such as her job with Panther working on Live City sites for the 2010 Olympics.

**255**  After a period of severe depression, she obtained a temporary position with Comedy Central beginning nine days after the second accident. Ms. Fletcher obtained her current job with Golder in April 2012, despite the fact that her father had been diagnosed with terminal cancer in February 2012. Ms. Fletcher weaned herself off her anti-depressant medication to support her family, and was able to excel at her new job.

1. Authorities and Assessment

**256**  The plaintiff seeks $110,000 to $140,000 in non-pecuniary damages relying on *Shapiro v. Dailey*, [*2010 BCSC 770*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-222V-00000-00&context=), varied on other grounds [*2012 BCCA 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62B8-00000-00&context=); *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=); *Sekihara v. Gill*, [*2013 BCSC 1387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B25G-00000-00&context=); and *Marois v. Pelech*, [*2007 BCSC 1969*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M2XG-00000-00&context=), aff'd [*2009 BCCA 286*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0GS-00000-00&context=).

**257**  *Shapiro* is particularly helpful in its similarities in the pre- and post-accident effects on the plaintiff. In that case, the plaintiff was 23 years old and happy, ambitious and outgoing when she was involved in the motor vehicle accident. After the accident, along with her physical injuries, the plaintiff suffered from multiple psychological issues, including chronic pain disorder, depressive symptoms, post-traumatic stress disorder, anxiety disorder and panic attacks. Like the plaintiff in this case, Ms. Shapiro went from being very active to "a lifetime of struggling with pain and fatigue in everything she does" (at para. 59). The description in that case is not unlike the circumstances of Ms. Fletcher:

This has wrought a profound change in every aspect of her life, from interpersonal relationships with her family, friends and partner to her ability to love, work, play, exercise, relax, sleep, and her ability to move forward with her life (at para. 59).

The plaintiff was awarded $110,000 in non-pecuniary damages.

**258**  In *Crane*, the extent of the plaintiff's psychological effects was comprised of panic attacks associated with driving. The physical injuries included soft tissue injuries in her neck and upper back and a herniated disc in her lower back. The pain associated with her lower back was found to likely be permanent. I find that in this case the psychological effects were much less severe but the physical effects were somewhat more serious. She was awarded $100,000 in non-pecuniary damages.

**259**  In *Sekihara*, the plaintiff had some psychological effects. She experienced depression due to her pain and the inability to do what she used to be able to. The psychiatrist in the case found that she had a chronic pain disorder and periods of depression. The depression was found to be caused by the accident. Her physical symptoms related to her lower back but were found to be significant due to her previous professional snowboarding career and she was awarded $130,000.

**260**  Athough in *Sekihara* the injuries were similar to those suffered by Ms. Fletcher, the effect on the plaintiff's life was more severe. Ms. Sekihara lost her established career as a professional snowboarder and photographer about which she was passionate and which formed the basis of her life in Whistler as well as her work. In this case, Ms. Fletcher had a dream of a career in stagecraft and design, but was not working in that area at the time of the first accident.

**261**  In *Marois*, the plaintiff suffered from suffered from PTSD, a chronic pain disorder and depression as the result of the accident. The plaintiff was also awarded $130,000.

**262**  The defendants rely on *Ladret v. Stephens*, [*2013 BCSC 1999*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S3WV-00000-00&context=); *Azuma-Dao v. MKA Leasing Ltd.*, [*2012 BCSC 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1DM-00000-00&context=); *Loveys v. Fleetham*, [*2012 BCSC 358*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-628C-00000-00&context=); and *Klim v. Purdy*, [*2014 BCSC 578*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-620V-00000-00&context=). They suggest that non-pecuniary damages of $75,000 are appropriate in this case.

**263**  In *Ladret*, the plaintiff suffered from chronic, significant back pain and was awarded $60,000 in non-pecuniary damages. However, there were no psychological conditions in this case that developed as a result of the accident. There was no mention at all that her pain resulted in symptoms of depression.

**264**  In *Azuma-Dao*, the plaintiff had some depressive symptoms and found to be withdrawn and moody as a result of her chronic pain. However, her psychological symptoms are significantly less severe and did not result in any psychiatric diagnoses. She was awarded $65,000 in non-pecuniary damages.

**265**  In *Loveys*, there is an extensive discussion on the plaintiff's psychological symptoms but the trial judge ultimately finds that none were caused by the accident. She is awarded $65,000 for soft tissue injuries in her neck, back and shoulder and the chronic pain associated with them. Given this finding, this case is similar to the others relied on by the defendants as the psychological symptoms were not factored into any assessment of damages.

**266**  In *Klim*, there is also no discussion of psychological symptoms. The frustration that the plaintiff experienced in that case as a result of his pain is distinguishable from the multiple psychological conditions that are present in this case. The physical injuries were neck and should pain and headaches and the plaintiff was also awarded $65,000.

**267**  I find all of the cases relied on by the defendants distinguishable as none address the serious level of psychological effects that have been found in this case. While the physical injuries are somewhat similar, the damages awarded in those cases are insufficient considering the additional psychological symptoms of Ms. Fletcher that were the result of the first accident.

**268**  The ability of Ms. Fletcher to function physically, recreationally, socially and vocationally has been significantly affected. The witnesses all described the physical and emotional effects of the first accident upon Ms. Fletcher, and those who knew her best gave compelling testimony regarding the changes they had observed. The evidence of the expert witnesses upon which I rely is that there have been improvements in the seven years since the first accident. The physical effects were most acute for the first four months, then improved again after two years. However, the emotional and psychiatric effects worsened at two years when Ms. Fletcher realised the limitations on her career path. After a further year, she was able to return to work, and her emotional stability has continued to improve. There are present physical and emotional effects, and the physical effects on her neck and low back are likely chronic.

**269**  Ms. Fletcher was disabled for four months. I am mindful that the ongoing physical injuries have resulted in the loss of a dream for Ms. Fletcher. Taking into account the evidence in this case and the guidance provided by the cases cited, I award the plaintiff damages in the amount of $115,000 under this head for both accidents.

**E. Loss of Past and Future Housekeeping Capacity**

**270**  The law with respect to loss of past and future housekeeping capacity is summarized in *Klim* as follows:

[146] *Kroeker v. Jansen* [*(1995), 4 B.C.L.R. (3d) 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (C.A.), is the leading authority in British Columbia on this head of damage. It is a separate head of damage that can be awarded in circumstances where the plaintiff's capacity and ability to perform household tasks have been compromised by injury. The damage award is to be commensurate with the loss.

[147] In *Wesbroeke 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. 74-77, Garson J.A. stated for the Court of Appeal:

[74] I agree that the trial judge miscategorised the homemaking award under the head of future cost of care damages. In *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at paras. 59--68, this Court clarified that homemaking costs, properly considered, are awarded for loss of capacity and are distinct from possible future cost of care claims. An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff.

[75] In *O'Connell*, the required service was correctly seen as damages for future cost of care. What was required in that case were the services of a personal care attendant for 16 hours daily to ensure the safety of the plaintiff, who had suffered a brain injury, in addition to cuing and guiding her in activities of daily living. At the time of trial the plaintiff's husband was rendering this care on a full-time basis. The judge erred by misapplying case law related to homemaking to find that an award for future cost of care was justified regardless of whether there was a reasonable expectation that the financial losses would be incurred.

[76] As noted in *O'Connell* damages for loss of capacity to complete homemaking tasks are not dependent upon whether replacement costs are actually incurred because what is being compensated is the loss of capacity itself. In contrast, damages for future cost of care are "directly related to the expenses that may reasonably be expected to be required" (*O'Connell* at para. 67) and cannot be awarded should no such reasonable expectation of an actual future expense be found. In the instant case, the evidence supports an award for the loss of capacity to perform certain homemaking tasks; however, I agree that this award should be approached conservatively.

[77] Gibbs J.A., speaking for the majority in *Kroeker*, suggested a cautionary approach to awards for the loss of ability to perform household tasks. At para. 29 he wrote:

There is much merit in the contention that the court ought to be cautious in approving what appears to be an addition to the heads of compensable injury lest it unleash a flood of excessive claims. But as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case.

Ultimately, the award for loss of ability to perform household tasks in *Kroeker* was reduced by two-thirds, from $23,000 to $7,000. As in *Kroeker*, a cautionary approach should be taken here.

[78] Mr. Kerr estimated the annual cost of replacement homemaking at $1,872 on the basis that Mr. Westbroek required three hours of homemaking services every two weeks to assist with his share of household tasks. He based his calculation on an hourly rate of $24.00. My understanding of the evidence is that Mr. Westbroek did not pay anyone else to perform the household chores he was unable to do himself but rather his wife assumed those responsibilities. The judge appears to have awarded and capitalized the $1,872 to age 65. There was no evidence at the second trial as to the allocation between the spouses of household tasks. A cautionary approach would suggest that this award should be reduced by two thirds.

**271**  The evidence of Ms. Fletcher regarding her ability to perform housework was inconsistent. In direct examination, she testified that the ratio was about 70:30 between her and her husband before the first accident and a ratio of 40:60 at present. However, in cross-examination she agreed that she is able to do about 75% of the household tasks.

**272**  The report of Ms. Boniface states that Ms. Fletcher does 75% of her pre-accident duties. That percentage is consistent with the list provided by Ms. Boniface which indicates difficulties with the tasks involving bending and reaching such as high level dusting, unloading the dishwasher, vacuuming and cleaning the litter box. It is bending that throughout the evidence has been identified as a cause of pain.

**273**  I award the amount of $4,000 for loss of past and future housekeeping capacity.

**F. Past Income Loss**

**274**  At the time of the first accident, the plaintiff was employed as an inside sales representative for Cinequip. She remained off work following the first accident from July 21, 2007 until December 3, 2007. The parties have agreed on the amount of the plaintiff's net past income loss for that interval of $11,328.53.

**275**  The plaintiff did not miss any work as a result of the second accident.

**G. Loss of Opportunity**

**276**  Ms. Fletcher claims damages for the opportunities she lost to earn income following her lay-off by Panther (over 11 months); the four months she was off after her job at Comedy Central ended in December 2011, and before she started her current job with Golder on April 12, 2012; the additional on-call work she could not accept in the entertainment industry; and income lost from her own business. It is submitted that but for the first accident, Ms. Fletcher would have remained consistently employed as demonstrated by her pre-accident work history. With the exception of the year of the first accident, Ms. Fletcher earned an average employment income of approximately $35,000 in each year since 2003.

**277**  Before the first accident, Ms. Fletcher worked on a casual, on-call basis for companies such as Showtime. She remained on Showtime's call list for some time, but was unable to accept such work after the first accident because of the heavy labour required. The plaintiff says that her inability to take advantage of all employment opportunities previously available to her resulted in financial hardship.

**278**  However, the plaintiff did relatively little call out work prior to the first accident. Although there is a claim that she lost the opportunity for "call outs" as a freelance roadie for Showtime, in 2005 she earned only $97.00 from Showtime, and $713.00 in 2006, notwithstanding that Mr. Matthews testimony that she would have been at the top of the call out list. She had no call outs in the first half of 2007 to the date of the first accident. The claim for lost opportunity to earn income as a freelance lighting worker is not proven.

**279**  I rely on the evidence of Dr. Shane that Ms. Fletcher was unable to work after the layoff from Panther in September 2010 due to the first accident. But for the first accident, she would have earned that additional income. After making allowances for the short period that would have been required to obtain a new job after being laid off by Panther in any event, and for other contingencies of the labour market, I accept Ms. Fletcher's claim of $30,000 for the loss of opportunity to earn income from October 2010 to September 2011.

**280**  There is no award for the claimed additional $20,000 for the four month period of unemployment in late 2011 and April 2012. I am not satisfied that it was caused by the first accident. Nor is there any evidence that she lost income from her own business as a result of the accident.

**281**  Ms. Fletcher is therefore awarded damages in the amount of $30,000 for loss of past income earning opportunities as a result of the first accident.

**H. Loss of Future Earning Capacity**

**282**  The law governing awards of damages for loss of future income and loss of future income earning capacity is summarized in *Shapiro* as follows:

[101] The law concerning loss of future income and loss of future income earning capacity was recently reviewed most helpfully by Garson J.A. for the court in *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=). Madam Justice Garson again approved the considerations set out by Finch J. (now C.J.B.C.) 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.), as previously approved by the Court of Appeal in *Kwei v. Boisclair* [*(1991), 60 B.C.L.R. (2d) 393*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30K-00000-00&context=). What Mr. Justice Finch had said was this:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[102] Madam Justice Garson then went on to say this:

[12] These cases, *Steenblok* [*v. Funk* [*(1990), 46 B.C.L.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4N2-00000-00&context=) (C.A.)], *Brown*, and Kwei, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in *Pallos* [*v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=)] the 'real possibility' approach. Such an approach may be appropriate for a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is accessible in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that has been compensated. The other approach is more appropriate for the loss, although proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain.

...

[32] A plaintiff must always prove ... that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach would be more useful when the loss is not as easily measurable, as in Pallos and *Romanchych* [*v. Vallianatos*, [*2010 BCCA 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=)].

**283**  With regard to future loss of earnings, the plaintiff submits as follows:

On the evidence before this Honourable Court, it is clear that Ms. Fletcher's capacity to earn income has been diminished as a result of the First Accident and, as such, that she has lost a capital asset.

Given the nature and extent of Ms. Fletcher's physical and psychiatric injuries, and her ongoing disability arising from the first accident, Ms. Fletcher is less capable overall from earning income from all types of employment; she is less marketable or attractive as an employee to potential employers; she has lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured; and she is less valuable to herself as a person capable of earning income in a competitive labour market.

It is also clear that there are very real and substantial possibilities that such diminished earning capacity will result in future economic losses for Ms. Fletcher. Before the First Accident, Ms. Fletcher had a solid work history; she worked part time during high school and had been consistently gainfully employed and/or pursing [sic] academic credentials and experience to further her chosen career.

**284**  The plaintiff seeks between $150,000 and $350,000 under this head of damages.

**285**  It is the defendants' submission that there are no damages that should be awarded under this heading, or at most, the amount of $10,000. They say:

The Plaintiff is presently employed in a position where she earns almost 50% more annually than she had in any year prior to the 2007 accident. She has moved from a contract temporary position, to a permanent position in 2013 and in February of 2014, received a glowing formal employee review from her employer, noting she had become a valuable member of the Golder team. She works for a company rated by the Financial Post as one of the best employers in the country. Golder is a company that has a specific stated policy to accommodate the disabilities or limitations of its employees. Moreover, its work in the mining and construction sector places it in a Statistics Canada category that enjoys a rate of employment almost 50% higher than in the field of entertainment and the arts.

In short, whatever might be the nature and extent of residual symptoms from the motor vehicle accidents, there is no issue; they do not result in a loss of earnings.

**286**  The plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss. If that burden is discharged, then the quantification of the loss of earning capacity may be proved either on the earnings approach or the capital asses approach (*Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32).

**287**  As stated by the British Columbia Court of Appeal in *Kim v. Morier*, [*2014 BCCA 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MC-00000-00&context=): "The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace - with economic consequences, not merely psychological ones" (at para. 8).

**288**  In this case, the plaintiff has not proven a real and substantial possibility of an income loss. Although I accept that it was her goal to have a career in stagecraft, she admitted in cross-examination that she had left that field, albeit with an intention of the departure being temporary, prior to the first accident. Ms. Fletcher took on the physically demanding job at Cinequip in the warehouse doing work that could be compared to that of a roadie. In the year prior to the first accident, 2006, her earnings at Cinequip were $31,291.

**289**  The plaintiff spoke of her dream to work at Cirque du Soleil which I understand is the pinnacle of a career in stagecraft. I characterise this as a dream since there was no evidence of a plan by which such employment could be obtained. Many of the Cirque shows are in Las Vegas; Ms. Fletcher does not have either the immigration status to work in the United States nor did she address how that would be obtained. The other Cirque shows are travelling productions; nor was there evidence regarding the practical considerations of life on the road, particularly at the child bearing and rearing stages of a family. Further, there was no evidence of potential earnings at Cirque du Soleil for stagecraft jobs.

**290**  There may be other potential jobs in stagecraft if Ms. Fletcher decided to return to that area of work. In that case, she would be impeded by her chronic neck and lower back pain from physically demanding positions. However, there is no evidence that she would suffer a loss of income from her present position or a comparable position as a controls administrator. The loss of her physical ability has not resulted in a loss of income.

**291**  Ms. Fletcher has proven herself to be a capable and valued employee as a controls administrator. Her job at Panther ended with a lay-off as a result of a slow market. She is excelling at Golder. Notwithstanding her fears of the security of her job at Golder, particularly understandable given her ongoing depression and sadness, the evidence of the plaintiff and Ms. Salo does not establish workplace uncertainty to the degree that her job is not stable. Indeed, Ms. Fletcher reported to Ms. Boniface in July 2014 that she had a good job with a good employer.

**292**  At Golder Ms. Fletcher earns $50,000 per year plus benefits. Ms. Fletcher has the capacity to continue to earn such income in the future. As stated by Drs. Shane and Robinson, she is not disabled or prevented physically or psychologically from doing this type of work on a full-time basis.

**293**  Ms. Fletcher relies on the opinion evidence of Dr. Stewart that she did not think that Ms. Fletcher's current position was sustainable. Dr. Stewart stated that "it would be preferable for Ms. Rutter to work three or four days of the week rather than full time and for her to have mid-week breaks (that is, that she work Monday, Wednesday and Friday, or Monday/Tuesday and Thursday/Friday, to allow her to recover better from her work days rather than becoming progressively sore and tired over her workweek." For the reasons set out in the discussion above, I do not accept the opinion of Dr. Stewart in this regard and place no reliance on this recommendation because it is based on an inaccurate understanding of the facts, such as the frequency that Ms. Fletcher spends weekends in bed. Ms. Fletcher has been physically able to do much more than Dr. Stewart understood or acknowledged.

**294**  Ms. Fletcher may change paths and return to school in order to pursue a career in interior design. She testified that although she chose stagecraft and design over interior design when she began her studies at Douglas College, she has been considering going back to school to attempt to find a career in a creative field. This change of career is a real possibility on the evidence. However, it is not because she is unable to earn income in a job such as she presently holds at Golder. A change of career would be a choice, not an economic necessity.

**295**  As stated by Mr. Justice Silverman in *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=), there is no real and substantial possibility that the lost physical capacity will result in actual income loss now or at any time in the future:

[68] In this case, I have already found that the plaintiff earns as much as a service manager as she would if she were able to work as a mechanic. There is nothing in the evidence which raises the substantial possibility that this is going to change at any time in the future.

[69] ...there is no substantial possibility that this lost capacity will result in actual income loss, now or at any time in the future. The reasoning that flows from *Perren* leads therefore to the conclusion that the plaintiff is not entitled to be compensated under this head of damages.

**296**  Given the finding that there is no substantial possibility of an income loss, it is not necessary to consider the future income loss evidence of the economist, Mr. Lakhani.

**297**  Under this head of damage, Ms. Fletcher is not awarded any damages.

**I. Cost of Future Care**

**298**  The medical experts who have prepared written opinions have made recommendations with respect to the future care and assistance required by Ms. Fletcher.

**299**  The legal framework for the cost of future care was well set out by Ballance J. in *S.R. v. Trasolini*, [*2013 BCSC 1135*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M126-00000-00&context=) at paras. 222-224:

[222] The purpose of damages for the cost of future care is to compensate for a financial loss reasonably incurred to sustain or promote the mental and/or physical health of an injured plaintiff: *Gignac* [*[2012] B.C.J. No. 1719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at para. 30. The services and items must be justified as reasonable in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them based on the evidence: *Milina,* [*[1985] B.C.J. No. 2762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) *Izony v. Weidlich*, [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=); *Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=).

[223] Recommendations made by a medical doctor or made by various other health care professionals are relevant in determining whether an item or service is medically justified: *Gregory* [*[2011] B.C.J. No. 513*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 38. An evidentiary link between the medical assessments and the recommended treatment is essential: *Gregory* at para. 39; *Gignac* at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where appropriate: *Gignac* at para. 52.

[224] The approach to be taken in assessing future care costs was settled by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), at paras. 21-22:Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

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

**300**  The plaintiff submits that:

The evidence establishes that Ms. Fletcher will need ongoing care, treatment and rehabilitation well into the future. All of the medical experts whose opinions are in evidence have made recommendations for such care treatment and rehabilitation. The cost of those recommendations was the subject of the expert opinions prepared by Ms. Boniface and the present value of such costs was the subject of the opinions of Mr. Lakhani. The recommendations and the opinions of the experts accurately reflect a financial loss that Ms. Fletcher will reasonably incur to sustain or promote her mental and physical health. The evidentiary link between the medical assessments and the recommended treatment care and assistance is found in the opinions adduced on behalf of the plaintiff as summarized below.

**301**  It is the submission of the defendants that:

Ms. Boniface prepared a cost of care/life plan report without the benefit of a functional capacity evaluation. She acknowledged the value for her and of course for the Court, in having a functional capacity evaluation. That type of report frequently presented to a court in support of a future care claim, provides an objective assessment of the Plaintiff's functional capacity as determined in a laboratory setting. Through the testing of ability to sit, stand, bend, lift, push and pull, an occupational therapist can with the benefit of their education and training, extrapolate and offer on [sic] opinion on functional impairment in the workplace and the home. Without such an evaluation available, Ms. Boniface acknowledged she was significantly, if not exclusively, dependent upon subjective reports from the Plaintiff as to what she could and could not do. To the extent this Court finds those reports were to a degree inaccurate or imprecise, the opinion of Ms. Boniface is impaired accordingly. It is noteworthy that in the limited "mini" functional assessment performed by Ms. Boniface, the Plaintiff in fact displayed normal and full function in all ranges of motion, including her neck and lower back. Ms. Boniface made no attempt to reconcile that normal functional assessment with the disability reported by the Plaintiff.

...

Dr. Shane and Dr. Robinson's assessment changed dramatically from their earlier opinions. Those changes are not incorporated in Ms. Boniface's opinion. It would seem elementary that a future cost of care assessment, if it is going to be of any value to the trier of fact, must of necessity incorporate the most current and compelling medical evidence as at the date of trial. In her case, it did not. Her consideration of the reports of Dr. Stewart of July 18, 2014 and Dr. McLeod of July 20, 2014 in the Addendum report of July 21, 2014 did not remedy this defect.

...

The Plaintiff's Mental Status testing conducted by Ms. Boniface indicated a very high level of perceived injustice and a very high level of catastrophic thinking. However, Ms. Boniface appears not to have considered how that catastrophic thinking impacted the Plaintiff's self reports of pain, disability and functional ability. The evidence before the Court suggests that the Plaintiff has a propensity for catastrophic thinking or pain focus as described by Dr. Shane which in turn leads to a disconnect between both experienced and reported pain levels, reported disability and actual displayed functional ability. In such a case, surely an adjustment must be made to the Plaintiff's self reports to determine the Plaintiff's actual functional ability and support requirements. Ms. Boniface made no such adjustment.

Additionally, Ms. Boniface did not attempt to make a distinction between those recommendations for care necessitated by back pain from the accident and coccyx pain unrelated to the accident, for which no compensation would be payable. It is trite that where the Plaintiff is impaired by injuries stemming from divisible tortious and independent non-tortious causes, she would only be compensated for those arising from tortious causes.

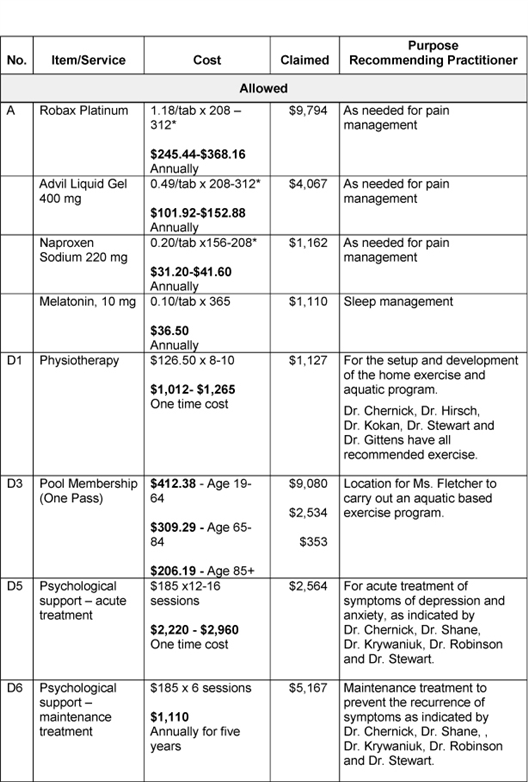
Dr. Gittens testified in cross-examination, the coxygeal injury would impact the Plaintiff in her work, homecare and future childcare activities. Any award which compensates the Plaintiff for the undifferentiated broad category of "back pain", must be reduced by the consequences of the non-tortious pain that Dr. Gittens said was reported as "severe" and paramount in the areas of pain reported by the Plaintiff.

**302**  The evidence of Ms. Fletcher regarding the recommendations in the July 17, 2014 report and the July 23, 2014 addendum prepared by Ms. Boniface was as follows:

1. Robax Platinum: She takes Robax Platinum 3-4 times per week to control neck, back and occasionally headache symptoms.
2. Advil Liquid Gel: She takes the Advil liquid gels as needed for migraines and it is sometimes effective.
3. Naproxen: She still takes Naproxen 3-4 times per week for neck and back muscle stiffness.
4. Melatonin: She takes Melatonin almost every weeknight to calm herself, aid in sleep and reduce nervous tension.
5. Physiotherapy: She fairly stated that she did not find physiotherapy helpful and would prefer a program similar to the one offered by trainers at Karp Rehabilitation. If physiotherapy was recommended by her physician, she would attend.
6. Pool Membership (OnePass): She found aqua therapy helpful as it reduced the impact on her body and was more comfortable for her. She said she would pursue such therapy with a pool membership through a local community centre.
7. Occupational Therapy: She fairly stated that she had already had an ergonomic assessment at work and did not believe she needed any further occupational therapy at present. If she had a different job, she would avail herself of this assistance.
8. Psychological support and treatment: She stated that she would pursue further psychological treatment. Cam Oxendale was very helpful. She would follow any treatment recommendations made by her physician.
9. Chiropractor: She did not find chiropractic treatments helpful. Ms. Fletcher said that she found that spinal decompression treatments alleviate discomfort. The relief is short-term but joyous.
10. Massage Therapy: She found massage therapy helpful, again with relief lasting couple of days. She would pursue further massage therapy.
11. Housekeeping support: She described experiencing pain and difficulty performing many household tasks, such as vacuuming, extending her arms, squatting or bending to pick up simple items around the house, dusting, washing the floors, and cleaning the cat litter box. When asked whether the impediment to such tasks was her coccyx, she said that area does not really bother her except when sitting and that her coccyx is not in constant pain. She still manages to perform nearly 100% of the shopping and cooking, and does most of the laundry. She avoids vacuuming, and cleaning tasks which bring on a great deal of pain, discomfort and stiffness, especially in her lower back. She needs a day of recovery, the next day, in bed or relying upon medication. Ms. Fletcher would avail herself of housekeeping support, which she believes would be helpful.
12. Childcare Support: She has a strong desire to have children. She is restricted in lifting and is unable to lift even modest weights comfortably. The weight of the laundry baskets she handles can cause pain. She would avail herself of assistance with childcare when she has children.
13. Wheeled shopping cart: This device is not required at present because it would not be useful in the context of her current residence.
14. Gardening stool: This item is not required because she has no garden at present and her landlord is responsible for the yard work at present.
15. Orthotics: She described Canadian Medi-Pain as having the latest in foot mapping technology, which generates computerized images of feet to determine where arches lie and to inform recommendations for the types of orthotics before they are custom made. This is covered under her medical plan.

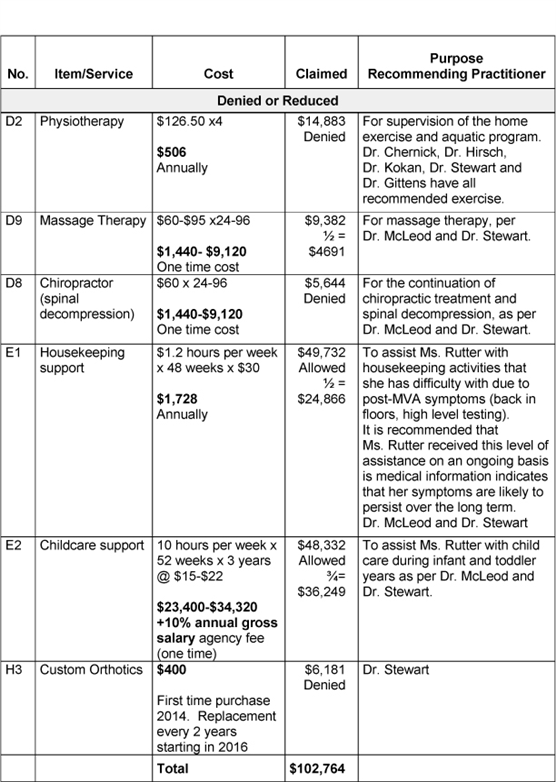
**303**  The plaintiff's table below lists the "Item[s]/Service[s]" and the "Cost" of such items and services using the same numbering as appears in Appendix "B" to Ms. Boniface's July 17, 2014 report and Appendix "A" to her July 23, 2014 addendum.

**304**  The amounts claimed in the table below are stated in present value from Table 1 of the July 24, 2014 report prepared by Mr. Lakhani of Peta Consultants. The items not listed in the table below are not being pursued based on the evidence adduced from the plaintiff and other witnesses at trial. I accept the evidence of Ms. Fletcher and allow the following claims.



**305**  The reasons following items are denied or reduced as follows:

1. Supervision of the home exercise and aquatic program is not an allowable item as Ms. Fletcher has been actively involved in exercise programs since at least 2009. The set-up cost, which is allowed, can address any questions and provide direction.
2. One-half of the cost of massage therapy is allowed as Dr. McLeod recommended that it continue for a time shorter than contemplated in the claim.
3. The cost of spinal decompression is not allowed. Other than Dr. Stewart, the preponderance of medical evidence which I accept is that this treatment is not in accordance with the usual medical practice in such circumstances. Chiropractic treatment is not allowed because Ms. Fletcher did not find it helpful.
4. Housekeeping and childcare support are reduced for the reasons set out in the submissions of the defendants. Ms. Boniface did not have the most recent medical opinions and appears not to have been aware of the improvements in Ms. Fletcher's injuries. Further, she was not aware of Ms. Fletcher's program of exercise and physical abilities, such as the report of having difficulty with stairs but being able to hike the Coquitlam Crunch. While I accept that the plaintiff has ongoing low back problems that are responsible for pain on bending and lifting, her range of motion, as noted, physical capacity, and other injuries have improved.
5. The cost of orthotics is covered by Ms. Fletcher's medical plan.



**306**  The total therefore allowed for the cost of future care is $102,764.

**J. Damages in Trust**

**307**  Ms. Fletcher claims damages in trust for the time spent by her mother, Marion Rutter, and her husband, Kevin Fletcher, taking care of her needs, primarily during the first three to four months following the first accident, when her needs were particularly acute. Ms. Fletcher, her husband and her mother all gave consistent accounts of the care and assistance provided to Ms. Fletcher following the first accident.

**308**  Mrs. Rutter stayed with her daughter for a number of days following the first accident because she was afraid to be alone when Kevin had not yet returned from working out-of-town. Mrs. Rutter and Kevin Fletcher continued to assist Ms. Fletcher with shopping, laundry, meals, driving, and other day-to-day needs as required. With respect to driving, the "Travel Expenses Owing" spreadsheet prepared by Ms. Fletcher, lists the dates upon which "Mom drove" (23 trips) and "Fiancé Drove" (24 trips) to various doctor, massage therapy, physiotherapy and chiropractic appointments between July 26, 2007 and November 2, 2007.

**309**  The assistance provided for the first four months, especially from Mrs. Rutter, is more than what would reasonably be expected from family members. This exceeds the normal "give and take" which is necessarily part of family life.

**310**  Taking into account the extent of assistance provided and the relatively short length of time involved, I award to Ms. Fletcher the amount of $8,000 in trust for Mrs. Rutter, and $6,000 in trust for Kevin Fletcher, for a total of $14,000 in trust.

**K. Accelerated Depreciation and Loss of Use**

**311**  As a result of the first accident, Ms. Fletcher's 2006 Toyota Matrix sustained damage that cost $9,282.46 to repair. She says that its value was reduced as a result. When Ms. Fletcher and Kevin Fletcher became frustrated with repeated trips to the automotive repair shop and what they viewed as inadequate repairs to the vehicle, prepared it for sale. It was a fully loaded 2006 Matrix, which appeared to be in reasonably good condition. As they did not believe they would be able to sell it privately with its history, they traded it in at a dealership.

**312**  The defendants dispute this claim.

**313**  Mr. Scarrow's Accelerated Depreciation Assessment Report, dated September 8, 2011, includes the following:

It is my opinion the result of the collision repairs upon the vehicles Actual Cash Value was accelerated in terms of depreciation by Two Thousand Five Hundred Dollars [$2500/ Cdn.] plus applicable taxes.

**314**  As set out in *Signorello v. Khan*, [*2010 BCSC 1448*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2YD-00000-00&context=), such losses can include a "loss of use and the inconvenience of having to return the vehicle on several occasions" (at para. 33). I am satisfied that the Fletchers suffered these losses. Their claim for damages for accelerated depreciation and loss of use is allowed in full. I award $2,500.

**L. Special Damages**

**315**  It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses that they incur as a result of an accident. In this case, Ms. Fletcher claims special damages in the amount of $23,358.33. In support of the claim, a detailed spreadsheet of the items purchased and expenses incurred for treatment, travel, counselling and other expenses was produced.

**316**  The amount claimed has been reduced from the initial amount of $24,858.33, to reflect removal of the claim for $500 as the Loss of 1/2 of Christmas Bonus, which was included in the amount agreed upon between the parties in relation to the plaintiff's past income loss from July 21, 2007 until her return to work on December 3, 2007.

**317**  The defendants dispute only the three car payments claimed of $485.85 each, which she had to make while her car was in the shop and not available for her use; an orthopaedic mattress to attempt to address persistent discomfort and difficulty sleeping; and duplication of medication expense.

**318**  I am satisfied that Ms. Fletcher incurred the reasonable expenses claimed. Her claim for special damages is allowed in the amount of $22,639.10, which omits the car payments and the amount of $261.68 for duplicate expenses.

**V. CONCLUSION**

**319**  In summary, as a result of the injuries sustained in the accidents of July 21, 2007 and September 9, 2011, Ms. Fletcher is awarded damages as follows:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary Damages | $115,000.00 |  |
| Loss of Past and Future Housekeeping Capacity | $4,000.00 |  |
| Past Income Loss | $11,328.53 |  |
| Loss of Opportunity | $30,000.00 |  |
| Loss of Future Earning Capacity | $0.00 |  |
| Cost of Future Care | $102,764.00 |  |
| Damages in Trust | $14,000.00 |  |
| Accelerated Depreciation and Loss of Use | $2,500.00 |  |
| Special Damages | $22,639.10 |  |
| **TOTAL:** | **$302,231.63** |  |

**320**  With regard to costs, unless there are matters of which I am unaware, Ms. Fletcher is entitled to her costs on Scale B. If either party seeks a different cost result, submissions should be filed within 30 days of the date of these Reasons. A reply submission should be provided 21 days thereafter.

J.E. WATCHUK J.

**End of Document**

[***R. v. Siemens, [2000] B.C.J. No. 2306***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2BD-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Grand Forks, British Columbia

McEwan J.

Heard: September 29, 2000.

Judgment: October 27, 2000.

Grand Forks Registry No. 2732

**[2000] B.C.J. No. 2306** | 2000 BCSC 1015 | 7 M.V.R. (4th) 220 | 48 W.C.B. (2d) 152

IN THE MATTER OF an application for relief sought in the nature of certiorari AND IN THE MATTER OF Regina v. Paul Joseph Siemens a.k.a. Douglas Lawrence Butler Between The Attorney General of British Columbia c/o Crown Counsel Office, 3rd Floor - 310 Ward Street, Nelson, BC, petitioner, and The Honourable Judge Takahashi, a Judge of the Provincial Court of British Columbia, 320 Ward Street, Nelson, BC, respondent, and Paul Joseph Siemens also known as Douglas Lawrence Butler, 843 Lee Street, White Rock, BC, respondent

(35 paras.)

**Case Summary**

**Civil rights — Canadian Charter of Rights and Freedoms — Denial of rights — Remedies, damages — Practice — Administrative law — Judicial review, certiorari — When available, criminal matters.**

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| --- |
| Petition by the Attorney General of British Columbia for an order of certiorari quashing an order made by a provincial court judge. Siemens was charged with drinking and driving. He was arrested and breath samples were taken. He was over the legal limit. After the last sample was taken, at 10:34 p.m., Siemens was placed in the cells. The arresting officer left and failed to notify any other officer of Siemens's presence. No other officer had contact with Siemens until he was released at 9:46 a.m. the next day. Siemens did not take issue with the arrest or initial placement in the cells. He challenged the 11 hours spent in the cells. The judge found that the officers did not comply with section 498 of the Criminal Code, as they failed to consider his release in a timely fashion. He found that Siemens's right to be free from arbitrary detention under the Canadian Charter of Rights and Freedoms was violated. The Crown argued that no remedy was necessary, or that a remedy could be fashioned at sentencing. The defence argued that the breath sample results should be excluded. The judge found that a remedy was required, but that a stay was inappropriate, and the breath samples should not be excluded, as they were obtained before the Charter violation. He awarded damages of $1,500, payable upon completion of the trial. No evidence as to actual damages had been led and counsel were not advised that an order for damages was being contemplated. The Crown stayed the charges.  HELD: Petition allowed.  The order awarding damages to Siemens was quashed. The judge erred in granting damages as a Charter remedy just because there was a breach, without evidence, and without giving both parties an opportunity to be heard. The error went to jurisdiction and was the proper subject of a judicial review proceeding. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, ss. 7, 9, 24(1).

Criminal Code, ss. 253(a), 253(b), 498.

**Counsel**

O. Butterfield, for the petitioner. B. Ralston, for the respondent, Paul Joseph Siemens.

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| **McEWAN J.** |

**1**   The Attorney General of British Columbia petitions this court for an order in the nature of certiorari quashing an order made by a provincial court judge on December 21, 1999.

**2**  The order is in the following terms:

Upon hearing the application of the defendant Paul Joseph Siemens for the remedy of exclusion of evidence resulting from the breach of his rights under section 9 of the Charter of Rights and Freedoms;

And upon written submissions having been filed in respect of the application by both the defendant and by Crown Counsel; and judgment having been adjourned to this date;

This Court orders that Her Majesty the Queen in Right of the Province of British Columbia pay the sum of fifteen hundred dollars to Paul Joseph Siemens upon completion of the trial of the charges herein.

**3**  A further prayer for relief in the nature of mandamus directing that the provincial court judge settle the terms of the order was abandoned at the hearing.

**4**  The order was given in the course of the respondent's trial on drinking and driving offences. The trial commenced on September 23, 1999 with a voir dire on a constitutional question raised by the defence alleging that the respondent's Charter rights had been breached in that he had been arbitrarily detained.

**5**  The remedy the defence sought was a judicial stay of proceedings.

**6**  Following the voir dire the provincial court judge reserved his decision. On October 1, 1999 he gave written reasons rejecting the application for a stay, while finding that there had been a Charter breach. The following is the text of those reasons:

The Defendant is charged with breaches of Sections 253(a) and (b) of the Criminal Code. At the outset of the trial a voir dire was declared to determine whether Charter relief lay for an alleged violation of the Defendant's right to be free from arbitrary direction.[**1**](#Forward_fnref_fnr-1)

Facts

After receiving a civilian complaint about a possible impaired driver Cpl. Pemberton, who was stationed at the Midway police detachment, stopped the Defendant at 915pm on August 9, 1996 approximately 28 kilometers from Grand Forks. The Defendant showed signs of impairment including an odour of alcohol on his breath; bloodshot, watery, eyes; flushed face; sleepy speech[**2**](#Forward_fnref_fnr-2), and unsteady and unsure walking. The Defendant was taken to the Grand Forks police detachment where he provided 2 breath samples, the lowest being over twice the legal limit. After the last breath sample was taken at 1034pm the Defendant was put into cells. No other officer had contact with the Defendant until he was released at 946am the next day.

The Detention

The Defendant does not complain about the initial arrest or his initial placement in cells following the breath samples. He complains about the subsequent 11 hours spent in cells.

In 1996 if a person was detained in custody then, as soon as practicable, the officer in charge was to consider releasing the person pursuant to Section 498.

After putting the Defendant in cells Cpl. Pemberton left some written instructions then left the detachment. He never returned to the Grand Forks detachment and took no steps to inform the officer in charge at Grand Forks that the Defendant was in cells. No police officer had contact with the Defendant until shortly before he was released.

The unexplained passage of 11 hours was not "as soon as practicable" and was not in compliance with Section 498.

The most serious punishment that a court may exact upon a person is to deny his freedom. The criminal judicial system cannot condone the denial of freedom except with rigorous compliance with the law. In this case the Defendant has proven there was a lengthy delay in the consideration of Section 498. The delay is unexplained. I find that the right of the Defendant to be free from arbitrary detention was breached.

Remedy

The Defendant submitted that the appropriate remedy should be a judicial stay of proceedings. Simpson v. The Queen[**3**](#Forward_fnref_fnr-3) confirmed that this remedy was available in these circumstances but the Supreme Court of Canada subsequently determined that this remedy is a last resort and was only appropriate.

"...where the prejudice to the accused's ability to make full answer and defence or to the integrity of the criminal justice system is irremediable."[**4**](#Forward_fnref_fnr-4)

The prejudice suffered by the Defendant in this case occurred after the alleged criminal activity. The actions of the police do not prejudice the accused's ability to make full answer and defence.

The Defendant has submitted that suing for breach of the Charter is meaningless but he has not established that he is without any remedy.

I find that this is not one of those "clearest of cases" which justify a stay of proceedings.

I require further submissions from counsel regarding the appropriate remedy. I order that counsel file submissions on this point by October 31, 1999 and replies to the other side's submissions by November 15, 1999.

**7**  Further submissions were delivered in accordance with the court's direction. The submissions on behalf of the accused sought exclusion of the "Notice of Intention" and the "Certificate of a Qualified Technician" pertinent to the alcohol offences. The Crown submitted that it was not necessary to find a remedy just because there had been a Charter breach, or that, alternatively, a remedy could be addressed at sentencing. Substantively, the Crown argued that exclusion of evidence was not called for in the circumstances.

**8**  The court ruled on December 21, 1999 as follows:

THE COURT: In my decision filed October 11, 1999, I found that the defendant had been arbitrarily detained after he had provided breath samples. In that portion of my decision, I declined to order that the proceedings by stayed. I say a proceedings as a remedy to that breach. (sic)

Defence has submitted that the appropriate remedy in this case is for the breath sample results to be excluded. In considering that submission I consider the Collins test. Firstly, with respect to fairness of the trial I find that this evidence is conscripted, not real evidence. However, I also find the evidence had been legally and properly collected before the Charter violation. I find that the admission of this evidence into the trial would not greatly affect the fairness of the trial.

With respect to seriousness of the breach, I look to Section 7 of the Charter which says that everyone has the right to life, liberty and security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice. I also note that the most serious penalty that a judge may order is to deprive a person of his liberty. In this situation I find that the breach is a serious breach.

Next I consider whether the reputation of the administration of justice would suffer more from the admission or the exclusion of the evidence. I found in this case that the officer had valid reasons to initially detain the defendant in custody. These included a consideration of the safety of the defendant and the prevention of further criminal activity. The breach was a failure to consider whether the concerns of the officer remained valid as the detention continued.

Considering that fairness of the trial would not be affected by admitting the evidence I find that there would not be greater disrepute brought upon the reputation of the administration of justice if the evidence was admitted. I rule that the evidence is admissible in this trial, but that does not end the matter.

I find that there is no explanation offered for the failure to comply with Section 498 of the Criminal Code. There is no apology extended to the defendant during these proceedings, there is no remorse expressed as to the oversight. I am not confident that this practice will be discontinued if no remedy is given the defendant.

I cannot determine whether or if the defendant would've been released earlier had the officer in charge complied with Section 498. The effect of the breach was that the defendant was not given the chance to be considered for an earlier release. In these circumstances I fix damages at $1,500.00, payable upon completion of the trial. So is there a date for --

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|  | MS. MOFFAT: | Could you repeat that last part? |  |

THE COURT: Damages are fixed at $1,500.00 payable by the Crown to the defendant upon completion of the trial.

MS. MOFFAT: But only if the matter goes and finishes the trial?

THE COURT: No, it's only due at the completion of the trial. It's payable, but not due until the trial is completed. Meaning it's not due today, but it's due whenever the trial is completed.

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|  | MS. MOFFAT: | And what if the trial never continues? |  |

THE COURT: Well, that would be something that you would discuss with your friend I suppose. If the matters are stayed I don't think there's anything else that I can do.

MS. MOFFAT: Would the money still by payable if it was stayed?

THE COURT: That would be something that you might negotiate with your friend. Without determining the matter I would say if he matter is stayed there is not order, there is nothing if the trial does not complete.

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|  | MS. MOFFAT: | All right, it's stayed then. |  |

THE COURT: Okay, there's nothing I can do about that. The matter is stayed. Thank you.

**9**  The Crown and defence never did agree on whether the $1500 was payable in the event of a stay. The Crown conceded for the purpose of this hearing that if the order is valid, the money is payable.

**10**  Both the Crown and defence agree that certiorari lies to quash an order of an inferior tribunal arising out of jurisdictional error or excess of jurisdiction (see: R. v. Dubois [*(1986), 25 C.C.C. (3d) 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-239K-00000-00&context=) (S.C.C.)).

**11**  There is no doubt that the Provincial Court is a "court of competent jurisdiction" for the purpose of fashioning a remedy under s. 24(1) of the Charter (see: R. v. Mills, [*[1986] 1 S.C.R. 863*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23B7-00000-00&context=), [*26 C.C.C. (3d) 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23B7-00000-00&context=)).

**12**  It appears at least possible that such a remedy may include damages. In R. v. Genest [*(1986), 32 C.C.C. (3d) 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JG11-JWBS-63KG-00000-00&context=) at p. 17, Owen, J.A. of the Quebec Court of Appeal observed:

1. Section 24(1) provides a broad general remedy to such persons. They may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. This is a very wide recourse. The court of competent jurisdiction may grant any remedy it considers appropriate in the case. Such remedies are not otherwise restricted and they are not enumerated.

These remedies might include:

- a notice to quash a search warrant;

- a stay of proceedings;

- an action for damages;

- a prosecution for an offence;

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| - |  | a prosecution for an infringement of the Charter; |  |

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| - |  | a petition for an injunction or a |  |
|  |  | declaration; |  |

- the institution of disciplinary proceedings;

- or perhaps, a developed contempt remedy.

**13**  In Mills (cited earlier) Lamer, J. (as he then was) made the following observations in a somewhat different context:

... Where, however, on balancing the various factors, the court decides that the accused's right to be tried within a reasonable time has already been contravened, a stay of proceedings will be the appropriate remedy. It is not necessarily the only remedy, for additional remedies may be just and appropriate in the circumstances of the case. The stay is a minimum remedy, to which others may be added, such as, possibly damages, if it be proved that there was malice on the part of the Crown and resulting prejudice.

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| [emphasis added] |  |

**14**  The respondent submits that the authorities show clearly that the provincial court judge had the jurisdiction, under the Charter, to fashion the type of remedy he did. Although the cases the respondent relied upon all involved "costs", his submission was that damages are analogous to costs, or that, in the alternative, the "damages" referred to by the provincial court judge were tantamount to costs and should be read that way.

**15**  The respondent also submitted that, because the court had jurisdiction, even if it erred in making the order, the error could only be properly addressed on an appeal. The respondent cited R. v. Dikah and Naoufal [*(1993), 19 C.R.R. (2d) 374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCS1-FJTD-G3SJ-00000-00&context=) for the proposition that superior courts cannot employ extraordinary remedies (i.e. certiorari) to upset decisions reached by competent trial courts where there has merely been an error of law.

**16**  The Crown, for its part, submits that the provincial court judge committed the error of exceeding his jurisdiction when he granted a Charter remedy that neither the defence nor the Crown had raised and which had never been drawn to the attention of the parties by the judge himself.

**17**  The Crown also submitted that it is beyond the jurisdiction of the court to award damages in a criminal proceeding, notwithstanding that superior courts have obviously allowed of the possibility. For reasons that will become clear, I do not think that question needs to be addressed in this case.

**18**  I should also say, at this juncture, that the respondent's argument that the provincial court judge must have meant "costs" and that his judgment ought to be read that way is, in my view, untenable. The term is used twice and there is nothing on the record to suggest any mistake. The distinction has no particular bearing, however, given the view I have taken of the case.

**19**  The critical issue is whether the court erred in a manner that went to its jurisdiction, not whether it had theoretical jurisdiction to give the type of remedy that was given.

**20**  The Crown relied particularly on R. v. Erickson [*(1984), 13 C.C.C. (3d) 269*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F528-G1TM-00000-00&context=) (B.C.C.A.) and R. v. Fraillon [*(1990), 62 C.C.C. (3d) 474*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JG41-JSJC-X0BX-00000-00&context=) (Que. C.A.) for the proposition that it is jurisdictional error for the court to grant a remedy of its own motion without giving counsel the opportunity to address an issue.

**21**  R. v. Erickson bears some resemblance to the case at bar. There, the trial court purported to quash an indictment on a charge of possession of counterfeit government marks, on the grounds that, during an application to exclude evidence on the basis that the search was unreasonable, it came to light following arrest that the accused had not been brought before a judge for four days. The trial judge found that the detention had nothing to do with the evidence that was obtained, but went on to say:

In effect, my thinking throughout these reasons has been, why am I wasting my time worrying about whether this piece of evidence or that piece of evidence is inadmissible or admissible when there has been a fundamental breach of the right not to be unlawfully imprisoned that the Charter should be invoked, regardless of the admissibility of the evidence?

**22**  He did, however, give counsel the opportunity to address the issue before ruling that the indictment would be "quashed".

**23**  In the Court of Appeal, Mr. Justice Esson, after dealing with other matters, made the following observations:

That brings me to the issue upon which, in my view, the appeal must succeed. That is the question whether, assuming everything else in favour of the accused, there was any ground in law for making an order under s. 24(1) that the indictment be quashed.

Assuming everything else in favour of the accused, the question is whether the trial judge erred in law on the facts found by him in granting such a remedy. In my view, he clearly did. He granted the most sweeping and drastic remedy in the arsenal of remedies without any factual basis that could possibly permit the conclusion that it would be either just or appropriate to do so. He concluded as a fact that there was no malice or ***negligence*** by either the Crown or the police. In the light of that conclusion, the point as to whether the remedy could be granted is really not arguable. The need to impress upon all parties the requirement that the law be obeyed is not enough to justify granting a remedy which is not otherwise just and appropriate. I say that with full recognition of the fundamental nature of the right crated by s. 454 and the importance of it being complied with by those who are obliged to do so; but a breach does not in itself justify turning the system on its head.

**24**  Mr. Justice Esson went on to say:

The source of the error may be the view of the trial judge, which is implicit in his decision, that having found that, in connection with the charges before him there had been a breach of the rights of the accused, he must grant some remedy. I will assume that for every breach of a Charter right there is some remedy. It simply does not follow that every breach must lead to some remedy being granted at trial. The purpose of the trial is, as it was before the Charter, to decide whether the accused is guilty. Breaches of Charter rights do not become a proper subject of inquiry at trial simply because they occurred in relation to the charge being tried.

An unfortunate aspect of this case is that the accused was granted a remedy for which he did not ask, although an application was made eventually at the urging of the trial judge.

**25**  The parallels between what happened in R. v. Erickson and what occurred in the present case are obvious. Here, the provincial court judge clearly had a reaction similar to that of the trial judge in R. v. Erickson, owing to the length of the accused's detention. He clearly felt that this called for a remedy, notwithstanding that, respecting the issues in the case, the detention was incidental. Here there is the added factor that, while the court asked for submissions on what remedy ought to be fashioned, it never signalled that "damages" were within the court's contemplation or invited submissions on the subject.

**26**  It is evident on the face of the December 21, 1999 ruling that there was no evidence of actual damage:

I cannot determine whether or if the defendant would've been released earlier had the officer in charge complied with Section 498. The effect of the breach was that the defendant was not given the chance to be considered for an earlier release. In these circumstances I fix damages at $1,500.00, payable upon completion of the trial.

**27**  Damages are ordinarily compensatory, of course. The damages the judge imposed, having no evidentiary foundation are presumably in the nature of punitive or exemplary damages. While it is, in theory, possible to imagine compensatory damages so obvious as to be amenable to summary disposition, punitive or exemplary damages owing by their nature being matters of discretion should clearly be subject to a hearing.

**28**  R. v. Fraillon (cited above) is a case where a Quebec trial court entered a stay of proceedings on its own motion without granting the parties an opportunity to make submissions. The Quebec Court of Appeal, per Vollerand, J.A. had the following comments (at p. 476):

It is first wrong that the trial judge ruled as he did without giving the parties an opportunity to argue the issue. Generally, it is open to the judge to point out to the parties that, in his mission to do justice, he is troubled by a point in the facts or in the law which neither one raised. This is especially the case where it is a right recognized by the Charter. But again, he must point it out to the parties and give them all the time necessary to completely argue the question before he rules on it. Here the parties to their great astonishment learned during the rendering of judgement that it was based, and based solely, on a question that the judge had only raised and resolved proprio motu. This manner of proceeding is inadmissible and is sufficient in and of itself to result in the granting of the appeal.

**29**  On the basis of these authorities, I do not think there is any doubt that the provincial court judge erred in law in granting damages as a Charter remedy just because there was a breach, without evidence, and without giving both parties an opportunity to be heard. I turn to whether the error went to jurisdiction.

**30**  It is important to note that both R. v. Erickson and R. v. Fraillon were decided on appeal. Because jurisdictional errors that are raised on appeal are sometimes treated as just another species of error in law, it is important to be careful about what is being described as "jurisdictional error".

**31**  In R. v. Chesham, [*[1999] B.C.J. No. 2533*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22M8-00000-00&context=) (S.C.) Mr. Justice Preston dealt on appeal with a case where a provincial court judge of his own motion, without a hearing, directed a stay of proceedings. He called this jurisdictional error:

The learned trial judge acted without jurisdiction in the sense that he failed to exercise his discretion judicially. He did not permit counsel for either the Crown or the accused an opportunity to be heard. In the case of a matter as serious as a judicial stay of proceedings there can be no other alternative but to order a new trial. That will be the result.

**32**  In R. v. Helmka, [*[1993] B.C.J. 3044*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F8D9-M1X8-00000-00&context=) (S.C.) Mr. Justice Esson dealt with an application to quash an order made by a provincial court judge dismissing a charge for want of prosecution, where the Crown was delayed in coming to court. In granting the application Mr. Justice Esson observed:

In my view, to dismiss for want of prosecution on a first appearance without a factual basis for concluding that the Crown did not intend to proceed is to fail to exercise the discretion judicially. To justify such a result, there must be more than some minor tardiness or lack of courtesy on the part of Crown counsel.

I am therefore of the view that the order was made in excess of jurisdiction in the sense that it was not a judicial exercise of the discretion, and I grant the application.

**33**  In R. v. Daigle, [*[1997] N.S.J. No. 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-JYYX-64Y1-00000-00&context=) (S.C.) Mr. Justice Hood of the Nova Scotia Court of Appeal granted the crown's application for certiorari in a case involving an order of solicitor and client costs as a remedy for a Charter breach. During the trial counsel had questioned a Crown witness about the police investigation. In answer to the Crown's objection as to the relevance of that line of questioning, defence counsel advised that he was eliciting evidence that would assist in an application for costs as a Charter remedy in the event of an acquittal. When there was an acquittal and counsel applied for costs, the provincial court judge refused to permit evidence to be called but directed that there be written submissions. Hood, J. observed in quashing the decisions (at para. 91):

A provincial court judge has the jurisdiction to hear an application for costs as a remedy under the Charter but has no inherent jurisdiction to award costs. This was, therefore, a Charter application. Accordingly, defence counsel should have given notice of the Charter application to the Crown. Upon Crown objection to the lack of notice, it was incumbent upon Judge Atton to require appropriate notice.

It was also inappropriate for costs to be dealt with during the criminal trial. It would have been improper for the Crown to comment upon the testimony of the complainant or call evidence about its review of the case before the trial was concluded and a verdict rendered.

The failure to give notice was compounded by the trial judge's refusal to allow the Crown an opportunity to call evidence about the exercise of the Crown's discretion and about how the decision to proceed with the prosecution was made. All of this made the hearing an unfair one for the Crown.

However, there is an even more fundamental problem with the decision.

A decision to award costs can only be made based upon evidence of improper exercise of prosecutorial discretion. There was no such evidence. The cases are clear about what evidence is required to find an abuse of prosecutorial discretion. There was no finding by the trial judge of the essential ingredients of abuse of discretion. Evidence was required about what the Crown knew and what it did at the time it was decided to prosecute. That was what was missing.

However, there is an even more fundamental problem with the decision.

A decision to award costs can only be made based upon evidence of improper exercise of prosecutorial discretion. There was no such evidence. The cases are clear about what evidence is required to find an abuse of prosecutorial discretion. There was no finding by the trial judge of the essential ingredients of abuse of discretion. Evidence was required about what the Crown knew and what it did at the time it was decided to prosecute. That was what was missing.

The decision must be quashed as it was beyond the jurisdiction of the provincial court judge. He lost jurisdiction by making a decision based upon no evidence.

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| --- | --- |
| [emphasis added] |  |

**34**  I think it evident from the above that not only was it an error of law for the provincial court judge in the present case to give damages on no evidentiary basis and without a hearing, but that in both respects the errors went to jurisdiction and were, hence, reviewable on an application for certiorari.

**35**  The petition is accordingly granted and the order of the Honourable Provincial Court Judge made December 21, 1999 awarding $1500 damages to the accused against Her Majesty the Queen is hereby set aside.

McEWAN J.

[**1**](#Backward_fnref_fnr-1) Section 9 of the Charter of Rights.

[**2**](#Backward_fnref_fnr-2) I rejected the evidence of slurred speech because the officer made no note of this symptom, which related to an event that occurred over 3 years before his testimony.

[**3**](#Backward_fnref_fnr-3) [*(1995), 95 C.C.C. (3d) 96*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3H4-00000-00&context=) (SCC).

[**4**](#Backward_fnref_fnr-4) R. v. O'Connor, [*(1995) 103 C.C.C. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3M7-00000-00&context=) at 43.

**End of Document**

[***Skibinski v. Community Living British Columbia, [2010] B.C.J. No. 2076***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B311-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Chilliwack and New Westminster, British Columbia

N. Brown J.

Heard: March 23-27 and 30-31, April 1-2, May 26-29, November

2-6 and 9-10, 2009; March 1-4 and 29-31, April 1 and 30, 2010.

Judgment: October 26, 2010.

Docket: S18769

Registry: Chilliwack

**[2010] B.C.J. No. 2076** | 2010 BCSC 1500 | 78 C.C.L.T. (3d) 185 | 13 B.C.L.R. (5th) 271 | 2010 CarswellBC 2903 | 194 A.C.W.S. (3d) 467

Between Sheila Elizabeth Skibinski, Plaintiff, and Community Living British Columbia and Her Majesty the Queen in Right of the Province of British Columbia as represented by The Ministry of Children and Family Development, Defendant

(380 paras.)

**Case Summary**

**Commercial law — Unjust enrichment — Remedies — Damages — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for fair reward compensation for provision of care services to a disabled woman allowed — No contract reached between parties, however plaintiff continued to provide services — Plaintiff's prompt intervention was in the public interest — Disabled woman's needs were great, and plaintiff was ready, willing and able — Suitable alternatives were not otherwise readily available — It was fair and just for defendant to disgorge benefit it had received — Expert evidence supported a finding of necessitous intervention — Plaintiff was entitled to $334,308 in compensation.**

**Contracts — Formation — Incomplete agreements — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a mentally disabled woman since July 11, 2007 allowed — The plaintiff was entitled to $334,308 in compensation — The plaintiff's prompt intervention was in the public interest — The woman's needs were great, the plaintiff ready, willing and able and suitable alternatives were not otherwise readily available — It was fair and just for the defendant to disgorge the benefit it had received — The expert evidence supported a finding of necessitous intervention.**

**Contracts — Validity — Public policy — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a mentally disabled woman since July 11, 2007 allowed — The plaintiff was entitled to $334,308 in compensation — The plaintiff's prompt intervention was in the public interest — The woman's needs were great, the plaintiff ready, willing and able and suitable alternatives were not otherwise readily available — It was fair and just for the defendant to disgorge the benefit it had received — The expert evidence supported a finding of necessitous intervention.**

**Government law — Crown — Contracts with Crown — Consensus, lack of — Breach of contract — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a mentally disabled woman since July 11, 2007 allowed — The plaintiff was entitled to $334,308 in compensation — The plaintiff's prompt intervention was in the public interest — The woman's needs were great, the plaintiff ready, willing and able and suitable alternatives were not otherwise readily available — It was fair and just for the defendant to disgorge the benefit it had received — The expert evidence supported a finding of necessitous intervention.**

**Health law — Health care professionals — Compensation — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a mentally disabled woman since July 11, 2007 allowed — The plaintiff was entitled to $334,308 in compensation — The plaintiff's prompt intervention was in the public interest — The woman's needs were great, the plaintiff ready, willing and able and suitable alternatives were not otherwise readily available — It was fair and just for the defendant to disgorge the benefit it had received — The expert evidence supported a finding of necessitous intervention.**

**Health law — Health insurance, government — Insured services — Extended health care services — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a mentally disabled woman since July 11, 2007 allowed — The plaintiff was entitled to $334,308 in compensation — The plaintiff's prompt intervention was in the public interest — The woman's needs were great, the plaintiff ready, willing and able and suitable alternatives were not otherwise readily available — It was fair and just for the defendant to disgorge the benefit it had received — The expert evidence supported a finding of necessitous intervention.**

**Professional responsibility — Self-governing professions — Remuneration — Fees — Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a mentally disabled woman since July 11, 2007 allowed — The plaintiff was entitled to $334,308 in compensation — The plaintiff's prompt intervention was in the public interest — The woman's needs were great, the plaintiff ready, willing and able and suitable alternatives were not otherwise readily available — It was fair and just for the defendant to disgorge the benefit it had received — The expert evidence supported a finding of necessitous intervention.**

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| Action by plaintiff against Community Living B.C. in contract and unjust enrichment for provision of care services to a Ms. Savone since July 11, 2007. The plaintiff had taught or cared for people with mental disabilities since the mid 1970s. Government ministries either employed her or contracted with her to provide services for adults with developmental disabilities. Savone was a 48-year-old woman with developmental disabilities and serious medical problems. The plaintiff assumed responsibility for Savone's care and took her home in July 2007. However, she and her husband did not have a residential home share contract in place with the defendant for Savone. The CLBC care analyst was unwilling to negotiate one with the plaintiff because she did not have a licence for having a third resident in her care. A residential care bylaw prohibited more than two adults living in full-time residential care. The defendant continued paying for the residential care of the plaintiff's other two patients. The parties contin ued to negotiate, but they never did close a contract. Savone's mother died before the trial ended, but stated she wished the plaintiff to care for Savone. The plaintiff claimed the defendant had breached an alleged agreement that it would retain her services with an implied term that they would negotiate for fair compensation. Alternatively, she sought compensation based on unjust enrichment. The plaintiff also aggravated damages and damages for intentional infliction of mental suffering allegedly caused by its conduct. The defendant denied liability. It argued the plaintiff's actions constituted an officious intervention and her actions released it from any obligation to pay the plaintiff for her services.  HELD: Action allowed.  The plaintiff was required to show: (1) she provided necessary services and incurred expenses of a kind the defendant was obligated to fund; (2) the defendant likely would have had to pay someone for those expenses and for performance of those necessary expenses and services; (3) a reasonable expectation she would receive something for her services despite the absence of agreement; (4) she did not act officiously; and (5) considering fairness to both parties, was it fair and just for the defendant to disgorge that benefit. The plaintiff satisfied the first three requirements. To the extent that her conduct deprived the defendant of significant interests the court could restore any resulting imbalance with compensation that paid due regard to the defendant's significant interests it was deprived of. The defendant reasonably would have been likely willing to pay had negotiations continued. Based on the evidence, the plaintiff was able to manage Savone's behaviour more effectively than anyo ne else. The expert evidence supported a finding of necessitous intervention. The plaintiff's prompt intervention in July 2007 was in the public interest. Savone's needs were great, the plaintiff ready, willing and able and suitable alternatives were not readily available at that time. Considering fairness to both parties, it was fair and just for the defendant to disgorge the benefit it had received. The defendant's community obligations already encompassed its obligations to Savone, a long-time client. Savone's needs and entitlements were undoubted. Savone's circumstances, including her long-term relationship with the plaintiff and her challenging care needs, were factors the defendant was obligated to consider. It was also obligated to consider Savone's mother's wishes. The compensation ought to reflect amounts which could be reasonably inferred the defendant would agree to pay for services provided by the plaintiff. The plaintiff was entitled to compensation from July 11, 2007 to the judgment date, for a total amount of $334,308. The plaintiff was not entitled to damages for mental distress or aggravated damages. The plaintiff failed to mitigate her damages by failing to renew the day program contract for Savone after it required, and there would be no court-order interest award on principal amounts owing for that portion of the contract. |

**Statutes, Regulations and Rules Cited:**

B.C. Supreme Court Rules, Reg. 221/90, Rule 57(7)

Community Living Authority Act, [*SBC 2004, CHAPTER 60, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61JJ-00000-00&context=), s. 3, s. 3(1), s. 11(a)

Crown Proceeding Act, [*RSBC 1996, CHAPTER 89, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-JG59-220D-00000-00&context=), s. 2(b), s. 2(c), s. 3(2)(d), s. 10(1)

Mental Health Act, *RSBC 1996, CHAPTER 288*,

Privacy Act, *RSBC 1996, CHAPTER 373*,

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 14-1*(7)

**Counsel**

Counsel for Plaintiff: D. Sands.

Counsel for Defendants: J. Rost, E. Clough.

[Editor's note: A correction was released by the Court October 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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| **N. BROWN J.** |

**I Introduction**

**1**  The deciding question in this case is whether, based on the modern principles of unjust enrichment, I can award the plaintiff, a professional care giver, fair reward judgment for care services she has been providing without payment for over three years to a disabled woman; a long-time client of the defendant. The parties never concluded a contract, mostly because they could not agree on the amount the defendant would pay the plaintiff for her services. And despite the fact that after negotiations collapsed and the defendant stated in letters that no care services contract existed between it and the plaintiff, she continued to provide these services to the disabled woman, looking to the court to order fair reward compensation. The case raises numerous ancillary questions.

**2**  Due to the sensitive nature of the issues in this case, the privacy interests of multiple individuals are affected. The names of clients of the parties have been changed to pseudonyms in order to protect their privacy.

**3**  The plaintiff has sued the defendant, Community Living B.C. ("CLBC") in contract and unjust enrichment for payment of care services that, since July 11, 2007, she has been providing without compensation to Ms. Lydia Savone. Ms. Savone is a 48-year-old woman with developmental disabilities and serious medical problems. The plaintiff had known Ms. Savone and her mother, Pat Chalmers, for thirty-two years, and for most of those was involved in some aspect of Ms. Savone's care, paid for either by the defendant or a government ministry of the Province.

**4**  By July 2007, Pat Chalmers had decided for various reasons she was no longer able to care for her daughter at home, even with others providing help the defendant agreed to pay for. Ms. Chalmers wanted the plaintiff to take Ms. Savone into care in her residence and for the defendant to pay the plaintiff for that care under its Home Share residential support program. The plaintiff had already been providing a day program for Ms. Savone for sixteen years and this would expand the level of services the defendant had been paying: from a day program to a residential care program with a day program component.

**5**  Some days before the plaintiff took Ms. Savone home from the hospital, Ms. Chalmers' neighbours had been complaining to Abbotsford police about Ms. Savone's trespasses and aggression towards residents. The police asked Ms. Chalmers to take her daughter to Abbotsford's MSA Hospital psychiatric award, there to be apprehended and admitted under the *Mental Health Act,* *R.S.B.C. 1996, c. 288*. Ms. Savone remained a patient in the MSA Hospital psychiatric ward for about ten days. Her behaviour was very disruptive and the hospital wanted her discharged. At Ms. Chalmers request, on July 11, 2007, the hospital discharged Ms. Savone into the plaintiff's care.

**6**  The plaintiff says that although Ms. Savone was a client of CLBC, it had no caregiver on hand able to manage Ms. Savone's challenging combination of her medical care needs and aggressive behaviour. The plaintiff says her taking Ms. Savone home in these circumstances constitutes what the law calls a necessitous intervention.

**7**  The defendant replies that the plaintiff's actions constitute an officious intervention and her actions release it from any obligation to pay the plaintiff for her services, either under contract or under the principles of unjust enrichment.

**8**  As mentioned, and explained more fully later, the parties tried to negotiate a contract to compensate the plaintiff for her services and failed, mainly because the parties could not agree on price. The plaintiff continued caring for Ms. Savone anyway, to the present, with the exception of two brief periods when Ms. Savone was admitted to hospital in October 2007 for surgery, and in December 2007, after negotiations between the parties had collapsed.

**9**  There are many issues in this case but two main ones. One is whether the defendant must compensate the plaintiff for the fair value of her services to Ms. Savone under the principles of unjust enrichment. These reasons consider the modern principles of unjust enrichment, the plaintiff's claims under them and the multiple defences the defendant raises against them.

**10**  The other main issue is whether the plaintiff can recover personal injury damages for the defendant's alleged mistreatment of her and the emotional suffering she says it caused her.

**11**  Ms. Savone cannot live independently due to brain damage she suffered at birth. This resulted in severe cognitive deficits and behavioural problems that, over the years, have made looking after her often challenging.

**12**  When the plaintiff took Ms. Savone from MSA Hospital into residential care in July 2007, the already existing challenges her behaviour problems posed were further complicated by diabetes. She developed this in 2004, followed in 2006 by insulin dependence. Then she developed congenital heart and kidney failure and required dialysis to survive. This complicated her health and care needs even more. Further, it also appears that when, in late December 2006, physicians induced a coma so they could administer dialysis, Ms. Savone suffered further brain damage.

**13**  The plaintiff has taught or cared for people with autism and other mental disabilities since the mid seventies. Over the years since then, government ministries either employed the plaintiff or contracted with her to provide services for adults with developmental disabilities.

**14**  The Provincial Government Community Living B.C., on July 1, 2005, pursuant to the *Community Living Authority Act,* *S.B.C. 2004, c. 60*., assumed responsibility for the delivery of services and support to adults with developmental disabilities living in the community. Previously, this had been the responsibility of the Ministry of Children and Family Development.

**15**  After CLBC assumed responsibility for delivery of these services in the province, it continued contracting for Ms. Savone's care by the plaintiff under CLBC's community inclusion day program. It also continued to contract with the plaintiff for the full-time residential care of two autistic adults: Brian Brest and Hilda Kennerly. By the time this litigation began unfolding in the middle of 2007, Hilda had been living with the plaintiff and her family for 14 years and Brian for 23.

**16**  When the plaintiff assumed responsibility for Ms. Savone's care and took her home in July 2007, she and her husband did not have a residential home share contract in place with CLBC for Lydia Savone. Bruce Morgan, a CLBC care analyst, was not yet willing to negotiate one with the plaintiff because she did not have a licence for more than two residents in care. City of Mission, B.C. residential care bylaws prohibited more than two adults living in full-time residential care. Adding Lydia Savone as a full-time resident meant the plaintiff would be in breach of the bylaw. And so long as the plaintiff remained in contravention, the defendant refused to negotiate a residential care contract. Despite the contravention, the defendant continued paying for the residential care of Hilda Kennerly and Brian Brest.

**17**  The plaintiff and her husband looked into what they would need to do to qualify for a licence permitting three full-time residents in care. Because the costs were too high, they decided against this option. The defendant rejected work-arounds the Skibinskis proposed, such as a separate address for another residence on their property. Given these rejections, the plaintiff asked CLBC to move Hilda Kennerly to another home. Once Hilda was moved, the plaintiff would be in line with the bylaw and this would allow the start of contract negotiations.

**18**  After about a four month delay in the defendant's finding another home for Hilda, the plaintiff became frustrated and insisted the defendant move Hilda Kennerly right away. The defendant then took Hilda to live with her mother until it could find a permanent placement for her. Even then, the defendant did not meet with the plaintiff to start negotiations until December 13, 2007, because by then another condition, completion of a health care plan by a community living nurse, signed by the parties, had still not been completed.

**19**  Chiefly because they could not agree on how much the defendant would pay the plaintiff for her services, the parties never did close a contract.

**20**  Ms. Chalmers could not afford her daughter's care. If the plaintiff was to receive any payment for her services, it would have to come from the defendant.

**21**  Both before and after the parties' negotiations failed, the defendant offered Pat Chalmers alternative arrangements. She rejected them. Ms. Chalmers was elderly and in poor health. She felt incapable of looking after her daughter properly, especially her diabetes; and she believed the alternative care arrangements the defendant proposed were not suitable. She strongly believed the plaintiff was the best person able to fully meet her daughter's needs and she felt CLBC was being unreasonable.

**22**  Ms. Chalmers died before the trial ended. Ms. Savone's committee endorsed Ms. Chalmers' position: she also wishes the plaintiff to care for Ms. Savone.

**23**  The parties placed details of their negotiations before the court. Judges rarely hear about negotiations but, as will become clearer, in an unjust enrichment case such as this, with its questions relating to the defendant's funding protocols and its limited resources, it was appropriate. Towards the end of negotiations, about $1,200 monthly compensation separated the parties, not a large difference given the total amounts involved; but there the die was cast, and left on the negotiating table.

**24**  After negotiations failed, the plaintiff started sending large invoices to the defendant. It denied any liability and refused to pay them. The plaintiff advised the defendant she intended to bring action. She started her claim on March 11, 2008, about eight months after she took Ms. Savone home.

**II Claims and Defences**

**25**  The plaintiff claims damages for breach of an alleged agreement the defendant would retain the plaintiff's services; with an implied term that says they would negotiate fair compensation. Alternatively, she seeks fair reward for services compensable when contracts are ineffective - a traditional type of restitution. Alternatively, the plaintiff claims compensation based on the modern principles of unjust enrichment.

**26**  In addition, the plaintiff sues the defendant for aggravated damages and for damages for intentional infliction of mental suffering allegedly caused by the defendant's conduct, which the plaintiff says has caused her mental suffering and economic loss.

**27**  CLBC denies liability on all claims. It says there are certain legal principles the plaintiff must satisfy on each of the claims she has advanced. The defendant claims she has failed to do so on each of them, and therefore her case ought to be dismissed with costs.

**III Further necessary factual background**

**A. The Plaintiff**

**28**  The plaintiff's training and experience equipped her well for her career. She testified her formal qualification was "child and youth care counsellor, specializing in autism." In addition to courses in psychology and child development at Simon Fraser University, the plaintiff obtained a diploma in special care needs from Douglas College in 1973. She also trained in the residential program for autistic children offered at Vancouver's Laurel House. It was there she learned the skills she was to use when teaching and caring for the plaintiff and others she cared for.

**29**  After the plaintiff completed her Douglas College program in 1973, she was hired to work as a member of a teaching team at Donald Patterson School in Burnaby, B.C. The team taught 12 multi-handicapped children in a classroom setting. She became team leader after 2 years.

**30**  In 1978, on the recommendation of her former Douglas College instructor, Ms. Elva McManus, Maple Ridge School District hired the plaintiff to work at Arthur Peake School. While the plaintiff was there, she met several developmentally disabled high-needs students and began what was to become a long-term connection with several of them, most notably Ms. Savone. In 1986, the plaintiff left Arthur Peake and started to work as a teacher's aide at Albion School in Maple Ridge. She remained at Albion for one year until transferring to Maple Ridge Secondary School. She worked there for academically struggling teenagers.

**1. Testimony of Elva McManus**

**31**  Before continuing with the plaintiff's work history, I will discuss the evidence of Elva McManus on the plaintiff's skill and her abilities caring for developmentally challenged children and adults. Ms. McManus' evidence is relevant because the defendant challenged the plaintiff's claims that she has special skills used to manage clients' extreme behaviours and connects with them particularly well.

**32**  Ms. McManus testified she considered the plaintiff an outstanding student. She noted that of the 18 students who had completed the Douglas College program, the plaintiff was the only one of them who expressed any interest in working with high-needs autistic children. She testified that within three days the plaintiff had bonded with a boy who until then had totally isolated himself. Ms. McManus explained the plaintiff was one of a few people who seemed to have an innate ability to work with children such as that autistic boy.

**33**  Ms. McManus testified that of the 1500 students she had taught she considered 5 exceptional; of that exceptional group she placed the plaintiff at the top. She described her as "fantastic," saying she was "blown away" by her abilities. She mentioned she didn't see the "burn-out factor" that usually develops in people caring for autistic children. She remarked that because she could not tolerate the stress herself, within two years she had moved on from Arthur Peake School to another area of education; whereas the plaintiff seemed to keep her enthusiasm.

1. **Arthur Peake School**

**34**  Ms. McManus remarked on what she felt was her own ineffectiveness in her own teaching of developmentally challenged children at Arthur Peake. This perceived ineffectiveness is what had led her to recommend the plaintiff to the principal. Ms. Savone was one of those developmentally challenged students at Arthur Peake; Ms. McManus had known her for some years before.

**35**  Ms. McManus sees the plaintiff as expert at designing techniques that improve the behaviour of the students, some of them children with severe autism, cognitive deficits and/or behavioural problems that were complex and multi-dimensional. For example, she explained Debra Solymane, who the plaintiff later took into residential care, was considered one of the most difficult cases in the province, as she had observed firsthand when Ms. Solymane was a resident at Laurel House. Ms. McManus described how the plaintiff had worked effectively with Ms. Struevysant, Hilda Kennerly, another student who the plaintiff took into residential care, and Lydia Savone. Ms. McManus said she herself had been unable to maintain any semblance of organization, let alone learning, in the classroom until the plaintiff came to work with the students. She described Ms. Savone's assertive personality and her habit of attacking less capable children. This is mentioned here because this type of behaviour formed part of a long standing pattern that made caregivers' managing of her care needs difficult.

**2. Lydia Savone**

**36**  In 1981, Lydia Savone became the first person the plaintiff provided residential care for. At that time, Ms. Savone had been living in a group home and attending school during the day. The plaintiff taught her at school.

**37**  One day, the plaintiff received a call from the group home where Ms. Savone was living to come and pick her up, as Ms. Savone had thrown a staff member through a plate glass window. As noted earlier, the Ministry of Children and Family Development asked the plaintiff to provide therapeutic care for Ms. Savone, which she did for two years, until the birth of her daughter. Afterwards, she continued to see Ms. Savone at school and, on occasion, socially.

**38**  In 1990, the Ministry asked the plaintiff to provide a day care program for Ms. Savone, but this was not finalized until 1992.

**39**  The evidence of Pat Chalmers, the plaintiff and Ms. McManus revealed Ms. Savone had a long-standing history of serious behavioural problems. Documents in the defendant's possession report many instances of aggressive behaviour, including assaults, physical and verbal abuse, and refusal to follow directions, among other behaviour problems.

1. **Purchase of rural property to provide care**

**40**  Returning now to the plaintiff's background history; in 1992, the plaintiff and her husband purchased 96 acres in rural Mission so they could offer residential programs for Brian Brest and Debra Solymane and a day program for Ms. Savone. Ever since then, Lydia Savone has continued in the day program provided by the plaintiff and Mr. Skibinski. However, the plaintiff did not renew her day program for Ms. Savone after it expired in December 2007. While the reasons for this are not clear, I find the plaintiff was willing to renew it, despite differences that had developed between the parties. The plaintiff's failure to renew the day program after negotiations collapsed in February 2008 led the defendant to submit that because the plaintiff did not renew the day program contract with the defendant, she failed to mitigate her damages.

**41**  Debra Solymane was in residential care with the Skibinskis for 14 years, between 1984 and 1998. Hilda Kennerly was in their residential care for 6 years, between 2002 and October 2008. Brian Brest was in their residential care for 23 years, between 1985 and October 2008. Mr. Bruce Morgan, a CLBC analyst, testified on cross-examination that his reading of Ministry files confirmed that throughout those years, no concerns were noted about the quality of care provided.

**42**  Considering the evidence as a whole, there is no question the plaintiff is a very capable and gifted service provider in her field and has dedicated herself to the care of the developmentally challenged adults, taking pride in her skills and methods.

**B. The Defendant: authority, funding allocation**

**1. Statutory Regime and Services**

**43**  The *Community Living Authority Act* [*CLAA*] established Community Living British Columbia. Mr. Jai Birdi, manager of quality services for the Upper Fraser Region for Community Living British Columbia (CLBC), states in his affidavit the role of CLBC is to provide support and services to adults with developmental disabilities.

**44**  Section 2 of the *Act* states:

Authority established

2(1) There is established an authority to be known as Community Living British Columbia to exercise the powers and perform the functions and duties given to it under this Act.

1. The authority is a corporation consisting of the board.

Agent of government

3(1) The authority is for all purposes an agent of the government.

1. The authority, as an agent of the government, is not liable for taxation except as the government is liable for taxation.

**45**  CLBC provides services for over 1200 developmentally disabled adults in B.C., with 200 of those involved in home share programs; where the caregiver family shares their home under contract with CLBC, like those the plaintiff and her husband provided for Hilda Kennerly and Bruce Brest.

**46**  CLBC provides several categories of services: various residential services; community inclusion services, which includes day programs; and professional support services.

**a) Residential services**

**47**  CLBC funds a range of residential services. The most basic service is to help individuals manage their lives. The next type is assisted living with the client's own family. The next type is sharing the home of third parties who are under contract with CLBC (i.e. home share/ residential care). The next type of service is 24 hour care in a home with non resident staff working in shifts.

1. **Community inclusion day program services**

**48**  Day programs usually form part of the community inclusion program. At the end of the day, clients usually return to their residential home. Day programs give developmentally-challenged adults recreation, learning in social skills and opportunities to develop relationships. In some programs, clients are employed. The nature of the program depends on individual characteristics and abilities of the client.

**49**  As mentioned, Ms. Savone had been in a day program with the until the plaintiff took her home from the hospital on July 11, 2007, and into full-time residential care. The day program continued as before.

1. **Respite services**

**50**  The defendant pays for respite services for residential care providers so they can break away from their demanding work. Contracts with third-party care providers for home share services always include payment for respite. Respite performs three main roles: to prolong the longevity of a caregiver's relationship with the client by reducing caregiver's burn-out; to provide "another set of eyes" on a client; and to ensure continuity of care, should the existing residential care provider be unable to continue. CLBC pays respite direct to the home share provider and "the home share provider can use respite dollars in the manner that best suits their unique circumstances."

**51**  In 1997, the plaintiff and Mr. Skibinski had been receiving monthly respite monies of $799.43 related to their care for Brian Brest and Hilda Kennerly. CLBC does not provide respite caregivers. Some agencies, such as The Mission Association for Community Living, do. Otherwise, it's up to care providers to arrange their own respite, "in the manner that best suits their unique circumstances," as Mr. Birdi stated.

**52**  The Skibinski's did not have regular respite providers for Brian Brest. The plaintiff explained it was very difficult to find qualified respite care providers for Brian, and although the plaintiff and her husband had been receiving respite funding, in the period leading up to July 2007 I find she and Mr. Skibinski needed more actual away time than was the case.

**53**  In December 2007, when the parties began negotiating a residential care contract for Ms. Savone, the plaintiff argued that none of the existing model types the defendant used to base its funding on accurately reflected the nature and standard of care she gave Ms. Savone. The defendant thought the home share services model mirrored Ms. Savone's care needs; whereas the plaintiff thought, given the nature and extent of the care she was providing, funding at the level of 24-hour care was more fitting. This typecasting dispute constituted a major stumbling block to concluding a contract.

**54**  The defendant also pays outside professionals to give care-givers advice and assistance needed in their work, particularly in the areas of health care and behaviour management.

1. **Caregiver reporting obligations**

**55**  In paragraph 13 of his affidavit, Mr. Birdi stated:

CLBC monitors the care providers who are contracted to provide home share to CLBC clients. CLBC monitors its care providers because people with developmental disabilities may be vulnerable. Many of CLBC's clients cannot speak for themselves: either they do not have the capacity to speak or they do not have the mental capacity to provide feedback on the services they are receiving. CLBC is particularly concerned with monitoring the care received by clients who have no family, as they individuals are even more vulnerable.

**56**  CLBC has two main ways to monitor the health and well being of clients. The first is through annual health and safety checks and the second is through monthly reports caregivers are required to write.

The annual health and safety check assesses health and safety features and health care planning, individual care and support, safety and security and home atmosphere. The monthly report monitors whether the home sharing provider is meeting expectations in each area or whether improvement is required. [affidavit of Mr. Birdi, para. 14]

**57**  Too much of the testimony in this case parsed the question whether the defendant had the right to require caregivers to report client's personal information such as activities of their family members. The plaintiff said she was particularly concerned about breaching her obligations under the *Privacy Act,* *R.S.B.C. 1996, c. 373*. She felt the *Act* placed restrictions on disclosure of such information. However, whichever of the plaintiff or the defendant's legal views were correct, when the parties were entering their negotiations in December 2007, they had resolved this issue and it was no longer an obstacle to concluding a residential care contract.

**2. CLBC funding sources and allocation**

**58**  In partial answer to the plaintiff's claims for compensation, the defendant pointed to its limited finances, to requests for its funding that exceeded money available to it, and to its obligation to distribute available money equitably. The defendant submitted these financial limitations, funding demands and community obligations make it essential it retain discretion to allocate funding within its policy guidelines as it sees fit. Therefore, the defendant presented evidence on its sources of funding, how it evaluates funding applications from the community, and the methods it uses to decide the right amount of funding for eligible applicants.

**59**  CLBC does not have unlimited funds to carry out its work. Almost all its funding comes from the provincial government. Section 12 of the *CLAA* requires CLBC to develop a service plan, budget, and capital plan to pay for community living support and for CLBC's administrative services. In line with this statutory obligation, CLBC prepares and publishes a Public Service Plan that covers a two-year period. The plan tells the funding Ministry and the public how it intends to manage community living support for the period in the plan. Section 10(2)(b) of the *CLAA* forbids a deficit.

**60**  Although CLBC does not receive enough funding to satisfy all requests, all clients in the plaintiff's care had been receiving funding from CLBC or its predecessors for many years: there is no question they are entitled to support and CLBC continues to fund their care (with new care caregivers).

**61**  As the demands for its services have increased with population increases and an aging population, CLBC faces increasing financial pressure. It cannot respond to funding demands by running a deficit, so ultimately it must look to government to respond through sufficient funding increases. The evidence on funding and budgeting processes indicates the defendant has enough financial flexibility that it can deviate from its support guidelines to some extent in order to ensure the special needs of clients like Ms. Savone are met. Even so, the defendant has to be guided by its own financial models, funding protocols and the need to manage its own limited resources.

**62**  Section 11(a) of the *CLAA* requires CLBC to deliver services either through its own employees or by entering into agreements with third parties. Section 11(c) requires CLBC to develop its policies and priorities and to allocate its resources in accordance with its plans.

**63**  This requirement is recognized in the defendant's own "individual" and "family support policy" in effect at the time:

**Decision Making Guidelines**

Requests for individualized or agency funded supports must:

1. Be based on a support plan
2. Reflect the most cost effective support options without compromising quality
3. Adhere to the values and principles of CLBC
4. Meet standards to ensure the person will be safe
5. Reflect the balance of informal supports, generic resources and funded services
6. Provide a clear linkage between an individual's disability related needs, personal goals, and the supports required to achieve the goals

Decisions regarding funded supports are subject to CLBC's financial and legal accountabilities.

**3. How CLBC funding decisions are made**

**64**  I heard extensive testimony about methods CLBC uses to determine the appropriate level of funding.

**65**  The cornerstone of the defendant's funding decisions is the Person Centered Plan (PSP). A CLBC facilitator prepares the PSP based on information gathered from the applicant, family members, physicians, service providers and others, all with a view to their finding care needs and tailoring services to meet them. [Exhibit F.3 p. 11]

**66**  CLBC analysts confirm individual eligibility for support, and decide the right amount of funding based on the PSP and other available information. After the facilitator has completed the PSP, a CLBC analyst reviews it to find areas that need more information and/or have to be negotiated with care providers. For example, in the case at bar, the defendant's analyst, Bruce Morgan, felt that before finalizing an amount for respite, the parties needed further discussions about a respite plan. He considered respite an important aspect of Ms. Savone's overall residential care plan.

**67**  Analysts also negotiate terms of contracts. Mr. Morgan explained that parties might have to become involved in several negotiating sessions before they are able to finalize a contract. Because negotiations between the parties collapsed, Mr. Morgan's view was that a complete residential care plan was never fully developed.

**68**  In the case at bar, Mr. Morgan decided Ms. Savone fell within residential (or home share) care. But because he identified special needs in several categories of functioning, he added several flags. In sum, based on the base funding allowed under residential care, Mr. Morgan offered the plaintiff, in December 2007, $3,000 monthly funding support, added to the base rate of $1,709.64.

**69**  It is surprising to hear that when the parties started negotiations in December 2007, the plaintiff did not know how the defendant arrived at the amounts offered her for residential care. She was unaware of methods used by CLBC to assess funding levels. In my view, much misunderstanding could have been avoided had the defendant explained from the beginning how it assesses care needs.

**70**  That aside, the plaintiff's position is that the nature and extent of the care she provides Ms. Savone does not fit within any existing categories, though she believes 24-hour staffed facilities most closely mirrors care she provides. She insisted she provides the equivalent of 24/7 care, only provides it at home. I find she was not providing the type of 24/7 care meant for non-resident staffed facilities. However, I agree with the plaintiff that the nature and extent of care she and her family give Ms. Savone does not fit neatly into the home share model either, as discussed more fully later.

**71**  CLBC funding is guided as well by what it refers to as values. One of CLBC's stated values is its respect for the role of family and friends in peoples' lives. Witnesses called by the defendant confirmed the important role family members have in deciding the care arrangements best for the client, including who would be the most appropriate caregiver. In sum, the defendant agrees family members should be involved in their decision-making process; and the family ultimately has the right to approve the care provider. However, I agree with the defendant that neither its policies nor the law obligates it to pay caregivers the family wants CLBC to retain at whatever price the caregiver has demanded.

**IV Discussion of claims and defences raised**

**A. Mr. Skibinski's interest in the contract**

**72**  The defendant says Ron Skibinski's absence from the lawsuit should limit the relief available to the plaintiff. It submits the plaintiff may have chosen to ignore the fact that Mr. Skibinski was a contracting party with CLBC for Ms. Savone's day program as well as for the residential care services for Brian Brest and Hilda Kennerly, and was also involved in Ms. Savone's residential care, but any contractual claim should therefore be limited to the plaintiff's share of the contract.

**73**  I reject the defendant's submission. It is not uncommon for whole families to be involved in the care of clients in a home share arrangement. The defendant was well aware of the fact other members of the family have been involved in Ms. Savone's care and that there was some informality in the contractual arrangements between the Skibinski's and the defendant and its predecessors. Further, it knew Ms. Skibinski was Lydia Savone's primary caregiver.

**74**  With respect to the submission that the court ought to draw an adverse inference against the plaintiff for her failing to call Mr. Skibinski as a witness, I reject this submission.

**75**  The defendant referred to *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=), which held at para. 31:

An inference adverse to a litigant may be drawn if, without sufficient explanation that litigant fails to call a witness who might be expected to give supporting evidence.

**76**  The plaintiff argued it was not necessary to call Mr. Skibinski, despite his continuing involvement in Ms. Savone's care.

**77**  But the defendant submits the plaintiff appears to overstate care needs of individuals to obtain greater funding, and Mr. Skibinski could shed some light on Ms. Savone's behavioural problems, which the defendant submits were not as serious as the plaintiff suggests.

**78**  However, the court has ample evidence, documentary and testimonial, about the extent of Ms. Savone's behavioural problems. Dr. Starko has provided ample evidence about the quality of the care provided by the plaintiff to Ms. Savone. After so many days of testimony, with thousands of pages of documents at hand and minutiae of evidence canvassed in more than sufficient detail, I find it difficult to conceive Mr. Skibinski's evidence would have made a difference to the final outcome.

**79**  As for Mr. Skibinski's possible commitment, or not, to his continuing participation in Ms. Savone's care in the future, I do not see that should make any material difference to my decision.

**80**  Finally, it was always open to the defendant to interview Mr. Skibinski or seek an order to examine him pursuant to the former Rule 28.

**B. Liability of the Crown**

**81**  The defendant says the plaintiff cannot succeed against the Crown, either in tort, contract or equity because the *Crown Proceeding Act,* *R.S.B.C. 1996, c. 89* bars her claims and because she has not properly pleaded or proved any of her any claims.

**1. In tort**

**82**  The plaintiff's claim in tort relates to her allegations of intentional infliction of mental suffering by the defendant, discussed later.

**83**  The government can be sued in tort pursuant to s. 2 of the *Crown Proceeding Act.*

2 Subject to this Act,

1. the government is subject to all the liabilities to which it would be liable if it were a person,

**84**  However, s. 3(2)(d) does not allow proceedings against the government "for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government."

**85**  Therefore, if the plaintiff can enforce its claim against the defendant, and the defendant is a corporation or agency owned or controlled by the government, the Crown would continue to enjoy the common law immunity it enjoyed before the 1974 passage of the *Crown Proceeding Act*: *Arishenkoff v. British Columbia*, [*2005 BCCA 481*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B21X-00000-00&context=).

**86**  The defendant referred to *Rossmeisl v. Keewatin Yatthé Regional Health Authority*, [*2006 SKQB 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-JJ6S-630X-00000-00&context=) [*Rossmeisl*], a Saskatchewan case that dealt with a provision similar to section 2(c) in the *Crown Proceeding Act.* Currie J. decided the Saskatchewan equivalent of section 2(c) involved a two-step inquiry. The first was finding whether the defendant was a corporation owned or controlled by the Crown. The second was deciding whether the claimants were alleging the Crown was responsible for the actions of the Health Authority or for something specific, independent of the Health Authority's actions. See also *Vanmackelberg v. Insurance Corp. of British Columbia* [*(1995), 5 B.C.L.R. (3d) 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X14V-00000-00&context=) (S.C.), a case where the court held ICBC was an agent of the Crown and also *McIntyre v. Nova Scotia (Attorney General)*, [*2008 NSCA 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-DXHD-G1JR-00000-00&context=).

**87**  The defendant also relies on the wording of s. 3(1) of the *Community Living Authority Act*, which states, (referring to Community Living B. C.), "the authority is for all purposes an agent of the government."

**88**  In Hogg and Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000), the authors state at page 337:

If (as is common) a statue expressly provides that a public corporation is to be "an agent of the Crown", then the corporation will be an agent of the Crown. A Parliament or Legislature, acting within its competence, is free to confer on a public corporation any privileges or immunities that it chooses ... If it chooses to confer on the corporation and the privileges and immunities of the Crown, that is a matter of legislative policy that is unreviewable by the Courts. The express stipulation that a public corporation is to be an agent of the Crown is accordingly conclusive, even if the public corporation is not subject to the control of a minister of the Crown, and would for that reason not be treated as an agent of the Crown at, law.

**89**  I accept this statement of the law and agree with the submissions of the defendant. I find the defendant is an agency controlled by the Crown. I see no claim against the minister responsible for the conduct of the *Act* standing independently of the plaintiff's claims against the defendant. Therefore, the plaintiff's claim in tort against the Province of British Columbia as represented by the Ministry of Children and Family Development is dismissed.

**2. In contract**

**90**  In *The Law of Contracts*, Fifth Edition (Toronto: Carswell, 2006), Fridman describes the ways a person could bring a claim of breach of contract against the Crown before the passage of a crown liability statute (at p 166):

At common law, in England and Canada, there was no right to sue the Crown in contract. In the event that the Crown was alleged to be in breach of contract the subject could only petition for some redress, by a procedure known as petition of right. It was a matter of grace on the part of the Crown whether permission was granted to allow the proceedings to continue, although it would appear that this was probably more normal than unusual. However, the subject had no clear right of action but was dependent upon the clemency of the Crown.

**91**  Section 2(b) of the *Crown Proceeding Act* allows a plaintiff to bring a claim against the Crown in contract without the need for a petition of right. Under s. 10(1) of the *Act*, CLBC is given the powers and capacity of a natural person, including the power to contract on its own behalf.

**92**  In *Government Liability: Law and Practice* (Aurora, Ont.: Canada Law Book, looseleaf), Karen Horsman and Gareth Morley describe the ability of a corporate Crown agency to act on its own behalf (at p. 1A-5) (emphasis in original):

Just as a private agent is a distinct person from the agent's principal, a Crown agent is distinct from the Crown ... While a corporate Crown agent *may* enter into contracts on behalf of the crown, it may also act "on its own account."

**93**  The defence suggests, under s. 11(a)(ii) of the *Act*, CLBC is given the authority to contract with persons or the government to deliver or provide for the delivery of community living support. It further suggests this ability to enter into agreements with the government indicates it contracts on its own behalf, not on behalf of the government. The defence also suggests the pleadings and evidence indicate contract negotiations took place between the plaintiff and CLBC without any involvement of the Crown.

**94**  I accept this statement of the law and agree with the submissions of the defendant. I find the defendant was, at all material times, contracting on its own behalf and not on behalf of the Crown. Therefore, the plaintiff's claim in contract against the Province of British Columbia as represented by the Ministry of Children and Family Development is dismissed.

**3. In equity**

**95**  The Court of appeal recently clarified that a claim in equity is governed by the *Crown Proceeding Act* in the same manner as a claim in tort. In *Richard v. British Columbia*, [*2009 BCCA 185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M26H-00000-00&context=), the Court of Appeal held a claim in equity was blocked by Crown immunity prior to August 1, 1974, in the same way as an action for damages in tort (at. para 64).

**96**  At common law therefore, there is no right to sue the Crown in equity, just as there is no right to sue in tort. The right to claim in equity against the Crown is created by s. 2 of the *Crown Proceeding Act* and should be limited by the express provisions of s. 3(2)(d).

**97**  The same two-part *Rossmeisl* test, as outlined under the discussion of the claim as against the Crown in tort, therefore applies to determine whether a claim in equity can be enforced against the Crown.

**98**  The defendant submits that just as the plaintiff did not assert an independent claim in tort against the Crown, it has not asserted an independent claim in equity against the Crown. I agree with the submissions of the defendant on this point as well. I see no independent claim in equity against the Crown in the plaintiff's pleadings. Therefore, the plaintiff's claim in equity against the Province of British Columbia as represented by the Ministry of Children and Family Development is dismissed.

**C. Statutory duties of CLBC and breach of statutory duty**

**1. Defendant's position**

**99**  The defendant concedes it may owe a statutory duty to Ms. Savone because she is an adult resident in British Columbia and she has a developmental disability; but owes none to the plaintiff. The defendant contends that, at most, Pat Chalmers, Ms. Savone's mother, and Ms. Savone might have had a right of action against CLBC if it were to arbitrarily deny her any community living support. The defendant submits that nowhere in the *Act* does it say family members can dictate what services should be provided, and at what costs and by whom. And neither can a third-party service provider impose an obligation on CLBC to use their services and pay their rates.

**100**  The defendant also argues the plaintiff's claim the defendant breached a statutory duty resulting in damages is not a claim the law recognizes. Defendant's counsel submits the plaintiff's claim the law imposes on government a duty of care to a particular class of claimants to ensure the *Acts* and Regulations of Legislation "were administered in accordance with the law and not to operate in breach of them," falls into the category of breach of statutory duty, which the law does not recognize. *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, [*2008 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1CS-00000-00&context=), states, at para. 9:

The law has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute ***negligence***. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity.

**101**  Speaking to the plaintiff's statutory obligations more generally, the defendant points out that the definition of Community Living Support in s. 1 of the *CLAA* identifies only those people entitled to support and services from the defendant. The defendant argues this definition does not state the nature and extent of the services people are entitled to, the costs of them, or who would be proper caregivers.

**102**  The defendant submits the case at bar is comparable to *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [*2004 SCC 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12V-00000-00&context=) [*Auton*], because in *Auton* the legislative scheme in question, the Medical Services Plan, likewise did not include a benefit the plaintiff sought. This was because it was not a form of core therapy under the Medical Plan. The Court found funding for such non-core services had been left to the Province's discretion. Absent evidence government had discriminated against the plaintiffs by refusing to pay core services available to other eligible claimants, the Medical Services Commission had no power to order payment of the therapy the plaintiff was seeking.

**2. Discussion**

**103**  In the case at bar, I see significance in the fact the *Act* identifies only those people eligible for support and services and not the nature and extent of those services, the costs of them, or who would be proper caregivers. Those are highly individual fact-based matters obviously best left to individual assessment, based on evidence of the claimant's needs, and funding appropriate to those needs, in accordance with the defendant's funding guidelines and other relevant considerations.

**104**  Counsel further submits the case at bar is analogous to *Auton* because of the nature of the benefit claimed. The defendant characterises this benefit, "Pat Chalmers' first choice in a caregiver at the Plaintiff's stated rate," as one that is not a benefit the law provides and one which, in any event, would be to the benefit of Ms. Savone or her mother, not the plaintiff.

**105**  But in my view, the defendant mischaracterizes the plaintiff's case. Ms. Chalmers did not say the plaintiff was her only choice; but rather, of those proposed by the defendant, the best choice for her daughter. The amount the defendant was to pay the plaintiff was a matter she left between the parties. CLBC could not persuade Ms. Chalmers the other care-provider options it presented to her were suitable alternatives,for reasons that I did not find untenable. Ms. Chalmers wished her daughter to be cared for by the plaintiff because she believed that is where Ms. Savone would receive the best care and would be happiest. Ms. Chalmers based this largely on her experience with Ms. Skibinski over the past 30 years, and on her desire that her daughter live her few remaining years in familiar surroundings. She also acknowledged that if the plaintiff were unable or unwilling to provide care, another suitable caregiver would have to be found.

**106**  The case at bar is also distinguishable from *Auton* in that the defendant does not dispute Ms. Savone is clearly eligible for care. Either the defendant or a predecessor Ministry had been funding her care for many years, and Ms. Savone's needs fall wholly within the compass of the defendant's core services.

**107**  That said, I agree with the defendant that the legislative scheme does not leave funding decisions unfettered. The level of funding provided must be decided within the ambit of the funds available, the duty of the defendant to distribute funds on an equitable rational basis (i.e. in accordance with the legislative scheme), the policies established by the board and the specific needs of the client. Still, the fact remains the defendant was obligated to provide funding to meet the community living and care needs of Ms. Savone. I agree the plaintiff cannot dictate to the defendant the rates it must pay, but as I understand the plaintiff's claim, she seeks fair compensation in accordance with the defendant's obligations to Ms. Savone and her specific care needs. The plaintiff's own assessment of the proper amount of money to compensate her for the care she has been providing is no more than that, her own assessment, which the court can consider, together with other evidence and considerations, in due course discussed.

**108**  The defendant referred also to *Fahlman (Guardian Ad Litem of) v. Community Living British Columbia*, [*2007 BCCA 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61MK-00000-00&context=) [*Fahlman*], at para. 50, wherein the B.C. Court of Appeal recognized the legislator had granted CLBC discretion to determine eligibility for adult services. Counsel for the defendant submitted the Court in *Fahlman* appeared to accept CLBC has a wide ranging discretion in providing benefits it is authorized to administer.

**109**  But *Fahlman* centered on the question of eligibility for services, and whether CLBC had improperly fettered its discretion by imposing a blanket policy on itself: i.e., deeming applicants automatically ineligible for services if their IQ scored higher than 70. Kirkpatrick J.A. found CLBC had a duty to exercise its duty based on the facts of each case:

[50] In the case at bar, I see no sound basis for interfering with the chambers judge's conclusion that CLBC fettered its discretion. First, I prefer the respondents' characterization of CLBC's mandate. In my view, the *Act* clearly grants to CLBC discretion in determining eligibility for adult services. As is evident from para. 37 of the chambers judge's reasons, CLBC recognized in Supreme Court its "wide ranging discretion with respect to the provision of the benefits it is authorized to administer". Whether an applicant has "significantly impaired intellectual functioning" so as to have a "developmental disability" and therefore warrant "community living support" appears to be a discretionary decision. Application of the statutory criteria does not necessarily yield an incontrovertible result. CLBC's duty to satisfy itself as to the presence of a qualifying impairment is to be exercised on the facts of each case.

**110**  At paragraph 55, the Court noted also that if the legislature had intended an IQ to be partially determinative, it could have specifically prescribed IQ thresholds as an additional criterion for the purposes of defining developmental disability. Meanwhile, CLBC was obligated to consider fully the facts, circumstances and merits of each application. The IQ policy had precluded such consideration, and CLBC's application of policy had fettered its discretion improperly.

**111**  Again, there is no question Ms. Savone is eligible for services in the case at bar. Assuming Ms. Chalmers was unable to care for her daughter, CLBC would have to pay someone for Ms. Savone's care. Further, would not the defendant in the circumstances of this case similarly be obliged to fully consider the facts, circumstances and merits of an individual and not unduly fetter its discretion?

**112**  That said, in my view, no person seeking compensation for their services to clients of the defendant can place their claims wholly outside the circle of the defendant's discretion, or of its statutory obligations and funding policies.

**113**  The defendant relies also on *Mendoza (Guardian ad litem of) v. Community Living British Columbia*, [*2009 BCSC 932*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0DT-00000-00&context=) [*Mendoza*]. Sewell J. had considered the plaintiff's application for an interim injunction that would have required CLBC to provide certain support services to the plaintiff before the trial.

**114**  I find two problems with the defendant's reliance on this decision. The plaintiff suffered severe cerebral palsy; but since he had just turned 20, he was no longer eligible for services formerly available to him, and adult programs did not include them. As Sewell J. noted at para 15,

[a]t the heart of the dispute ... is the fact that the respondent Province offers different services and supports to children with disabilities than are offered to adults with disabilities.

**115**  Sewell J. found if he were to grant injunctive relief the plaintiffs sought he effectively would have granted them "all of the substantive relief they seek in the amended petition ... [which] would require CLBC to deviate from its established policies and procedures and provide funding and services for which there do not appear to be adequate funds available in its budget" [para. 72].

**116**  He went on to note, referring to *RJR-MacDonald Inc. v. Canada*, [*[1994] 1 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CB-00000-00&context=), at paragraph 80, that he must assume the legislative scheme contained in the *Act* and regulations promoted the public interest.

**117**  I of course agree with counsel that a judge cannot brush aside constraints imposed on CLBC by government funding: *Mendoza*, at para. 73, citing *Harper v. Canada,* [*2000 SCC 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M467-00000-00&context=). But the defendant's argument presumes a compensatory judgment in the case at bar would invariably disregard the defendant's constraints. This argument also presumes a judgment could not give suitable recognition to the defendant's financial constraints, its funding guidelines and its wider community obligations. In the case at bar, the defendant presented extensive evidence about its policies, financial limitations, funding guidelines and the methods it uses to establish the appropriate level of funding for individual eligible applicants.

**118**  In summary, the case at bar does not involve questions of eligibility, discrimination or interference with the exercise of the defendant's discretion. *Auton, Fahlman* and *Mendoza* are distinguishable and their conclusions, standing alone, do not defeat the plaintiff's claim.

**119**  The defendant also relies on *Maple Lodge Farms Ltd. v. Canada,* [*[1982] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M24Y-00000-00&context=) [*Maple Lodge*]. Counsel submits *Maple Lodge* enunciates a rule that Courts should not interfere with a statutory authority's exercise of discretion merely because the court might have exercised it in a different manner than the authority had.

Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. [pp. 7-8]

**120**  *Maple Lodge* involved a case where the appellant had applied unsuccessfully for a writ of mandamus to require that the Minister of Economic Development issue supplementary import permits for live chickens. The plaintiff proceeded on the rationale that once conditions for a permit as set out in the Statute and Regulations were satisfied, the Minister was obligated to issue it. The statute, referring to the Minister's powers, used the modifier "may," which the Supreme Court found gave the Minister discretion whether to issue an import permit.

**121**  Those facts do not respond to the questions here. I am not asked to interfere with the exercise of a statutory authority, but to decide whether the plaintiff can recover against the defendant in contract or under the principles of unjust enrichment.

**122**  Past that point however, the defendants' position is that it met its statutory obligations under the *Act* to Ms. Savone. The *CLAA* requires the defendant to live within its means: s 10(2)(b). CLBC is also required to manage the delivery of community support, to set its priorities and to allocate its resources in accordance with the Service Plan and Capital Master Plans. The defendant says, having presented a variety of suitable care options to Pat Chalmers for Ms. Savone's care, it has fulfilled all its statutory obligations. Additionally, the defendant points to its July 2007 offer to pay respite funding to Pat Chalmers, which she could have used to pay the plaintiff pending completion of a contract between her and the defendant, and to its offer, also in July 2007, of a "home share placement" through the Mennonite Central Committee.

**123**  After negotiations with the plaintiff collapsed, CLBC reiterated its offer to find a residential caregiver for Ms. Savone and proposed a registered nurse living in Chilliwack willing to provide care. Ms. Chalmers rejected these and other options and gave her reasons for doing so.

**124**  The defendant further submits negotiations with the plaintiff were incomplete, since respite and other matters such as compensation for travel had not yet been decided when the plaintiff finally took the position, in her December 28, 2007 letter to the defendant, that she would accept nothing less than her offer, yet would continue to provide service for Lydia Savone until the matter was heard by the Court.

**125**  The defendant submits the plaintiff was seeking an amount well in excess of what other providers were paid for comparable services, and points to its obligation to endeavour to promote equitable access by not overpaying one individual at other eligible individuals' expense. The defendant says the residential option plan, as opposed to staffed residences, was intended to reduce costs, and had done so, so that consequently it had been able to offer others new or enhanced programs. And, cautioned the defendant, "increasing costs two or threefold would be detrimental to its ability to offer these programs."

**126**  However, the plaintiff points to amounts the defendant has paid other care providers: as much as $15,543 a month. She submits the level of care required in the case at bar is as high. I cannot find that instance a suitable basis for comparison, given the incomplete particulars of the care that client required.

**127**  To this point, I conclude, *given the particular circumstances and client history in this case,* CLBC owed Ms. Savone and her mother a continuing statutory obligation to provide Ms. Savone support for community living. Given Ms. Savone's obvious eligible care needs and her long-time connection with the defendant, her entitlement is not a matter of discretion. In my view, such a finding does not in any way constitute an interference with whatever other discretion the defendant may have.

**128**  The duty the defendant owed was to offer funding, not at large, but in an amount that accords with Ms. Savone's particular needs, its statutory obligations, its policy guidelines and its wider its obligations to the community to distribute funding to eligible applicants in an equitable way. The defendant did not owe the plaintiff or Ms. Savone a statutory obligation to pay whatever amounts the plaintiff demanded.

**129**  Absent bad faith in the discharge of its statutory obligations, I conclude the defendant owes the plaintiff no legal obligations related to the services the plaintiff has provided, other than those that could arise in common law.

**D. Contract**

**1. Did the parties make a contract with an implied term the plaintiff be paid a reasonable rate?**

**130**  The plaintiff says that before the parties met December 13, 2007 to negotiate a contract, they had agreed the defendant would pay her for her services. She says all terms except price were agreed upon and they were to negotiate a reasonable rate in good faith after the defendant's preconditions to negotiation had been met. She asks the court to find for a contract in just such terms: an agreement to pay, with an implied term a reasonable rate would be negotiated.

**131**  The defendant sees it differently. CLBC does not deny its readiness to negotiate a contract with the plaintiff for Lydia Savone's care if she met preconditions: no more than two full-time residents in care; completion of a health care plan; and the plaintiff's agreeing to comply with the defendant's reporting requirements. The plaintiff met those conditions well before the December 2007 meeting, when the parties tried but failed to achieve meeting of minds on price, the length of the contract and some secondary items. Had the parties agreed on price, none of these other items likely would have stood in the way of their concluding a contract. Even so, the fact remains there was no meeting of the minds on essential terms, so no they did not conclude a contract: *Jedfro Investments (USA) Ltd. v. Jacyk*, [*2007 SCC 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1B5-00000-00&context=), [*[2007] 3 S.C.R. 679*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1B5-00000-00&context=). Where the parties' minds do not truly meet, a court cannot make a bargain for the parties, especially where they are clearly at cross-purposes on an essential term: *British Columbia (Minister of Transportation and Highways) v. Reon Management Services Inc.*, [*2001 BCCA 679*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M435-00000-00&context=).

**132**  Even if for the sake of argument I were to find the parties had agreed on all essentials except price, the law requires a finding that the parties intended a term that the defendant would pay the plaintiff for care services, with a reasonable price settled later: and the term cannot be found on grounds of fairness: GHL Fridman, *The Law of Contract in Canada*, 5th ed (Toronto: Thompson Carswell, 2006) at page 466, referring to *Mr. Convenience Ltd. v. 040502 N.B. Ltd.* [*(1993), 137 N.B.R. (2d) 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW71-F7VM-S137-00000-00&context=). Before the court can imply a term, it must have a certain degree of obviousness to it. If evidence shows a contrary intent by either party, a judge cannot impose a term: *MJB Enterprises Ltd. v. Defence Construction (1951) Ltd.* et al., [*[1999] 1 S.C.R. 619*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41Y-00000-00&context=), para. 29. In the case at bar, I find the evidence goes so far to show only the defendant agreed the plaintiff was a suitable caregiver and that it was willing, after preconditions were met, to negotiate a residential and day program contract with her. The parties did not form a contract. Given lack of common intent on price, I cannot find for the existence of a contract with an implied term the defendant should pay the plaintiff a reasonable rate.

**E. Promissory Estoppel**

**133**  The plaintiff alleges that CLBC is estopped from refusing to pay the plaintiff because CLBC requested, accepted, or acquiesced in the plaintiff providing the required services. As I understand this submission, the plaintiff alleges a promissory estoppel, namely that CLBC made a promise to pay her in the future.

**134**  The leading statement on promissory estoppel in Canada was made by Sopinka J. 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 para 13:

The principles of promissory estoppel 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 which 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.

**135**  In the Supreme Court of Canada decision in *Engineered Homes Ltd. v. Mason*, [*[1983] 1 S.C.R. 641*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M288-00000-00&context=) at 646, the Court adopted a definition of promissory estoppel from *Halsbury's Laws of England*:

When one party has by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.

**136**  Promissory estoppel can operate only as a shield, not as a sword. The traditional source of this legal doctrine is *Combe v. Combe*, [1951] 2 KB 215, CA, but it can be found throughout Canadian jurisprudence (see, for example, Costco *Wholesale Canada Inc v. Cazalet*, [*2008 BCSC 952*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M2XK-00000-00&context=), at para. 30).

**137**  In the case at bar, the defendant submits the plaintiff is attempting to use promissory estoppel as sword in that she is attempting to found a cause of action in promissory estoppel, should her claim in contract fail. The defendant further submits the law is clear that estoppel cannot be used in this fashion. I agree.

**F. Unjust enrichment and quantum valedat**

**138**  The plaintiff claims fair reward for her services. She says the defendant would be unjustly enriched by the services she has provided Ms. Savone.

**139**  The plaintiff denies the defendant's claim she acted officiously in taking Ms. Savone home from hospital; she says her intervention and subsequent care were necessary for the preservation of Ms. Savone's emotional and physical health. Therefore, she asserts CLBC is obligated to compensate her for the value of her rendered services.

**140**  The Supreme Court of Canada continues to clarify the law of unjust enrichment as it evolves from *Pettkus v. Becker* [*(1980), 117 D.L.R. (3d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1Y0-00000-00&context=) [*Pettkus*], and its seminal laying down of the essentials a plaintiff must prove to succeed:

1. an enrichment of the defendant;
2. a corresponding deprivation to the defendant;
3. an absence of any juristic reason for the deprivation, in other words, it would be unjust in the circumstances for the defendant to retain the benefit. [274]

**141**  *Peel (Regional Municipality) v. Canada,* [*[1992] 3 S.C.R. 762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6096-00000-00&context=), [*Peel*] expands on that basic framework and represents an important transition in the evolution of the law of unjust enrichment in Canada. The defendant relies on it to support its position that the plaintiff never conferred a direct benefit on it, and an indirect or secondary benefit is insufficient.

**1. Facts In *Peel***

**142**  McLachlin J., as she then was, noted at paragraph 12 in *Peel* that the facts in unjust enrichment cases are very important to the court's deciding whether to grant relief. In *Peel*, the plaintiff municipality had sued the provincial and federal governments for the return of money it had spent to provide group homes for juvenile offenders, as ordered by Family Court judges. The judges were relying on s. 20(2) of the *Juvenile Delinquents Act*, R.S.C., 1970, c. J-3, which authorized their ordering parents of the child, or the municipality, to "contribute to the child's support such sum as the court may determine."

**143**  The Supreme Court eventually struck down the legislation as ultra vires the Federal Government. The plaintiff municipality then sought restitution for what it had paid in compliance with the orders made on authority of the ultra vires legislation.

**2. Discussion of traditional categories**

**144**  McLachlin J. explained the three-part principle of *Pettkus* grew out of traditional categories of recovery: money had and received to the defendant's use (direct to the party); money paid to the defendants use (to a third party); quantum meruit (bestowal of goods and services), and quantum valedit (rendering of services) on the defendant. These traditional categories are instructive, but do not determine whether a claim lies. Paragraph 32 of *Peel* states:

[32] the traditional categories of recovery, while instructive, are not the final determinants of whether a claim lies. In most cases, the traditional categories of recovery can be reconciled with the general principles enunciated in *Becker v. Pettkus*. But new situations can arise which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule.

**145**  The court found the class of traditional case most analogous to the facts in *Peel* was 'benefit conferred under compulsion.' In the case at bar, the most analogous traditional class would be either 'benefit conferred out of necessity,' 'benefit conferred at a request of an ineffective transaction,' or 'benefit conferred at the request of the defendant.'

**3. *Peel* and defendant's reliance on it to show defendant not enriched**

**146**  In *Peel,* there was no question the plaintiff's payments could attract the doctrine of unjust enrichment. The question was whether the plaintiff's payments had conferred a benefit on the higher levels of government: "without a benefit which has "enriched" the defendant and which can be restored to the donor in specie or by money, no recovery lies for unjust enrichment" [para. 34].

**147**  A review now of reasons why the defendant relies on *Peel* will give more context for the further discussion of *Peel* that follows. CLBC relies on *Peel* to support its argument the defendant has not been enriched by the plaintiff's services to Ms. Savone. It submits the only individuals receiving a benefit from the plaintiff are Ms. Savone, Ms. Chalmers before her death, and Ms. Savone's current committee. The defendant argues it is not a recipient of the plaintiff's services because it does not receive the care services itself; instead, it merely arranges funding to provide care services to others. In that sense, CLBC confers benefits rather than receives them.

**148**  The defendant submits Ms. Chalmers, having rejected the funding for care by other third parties that it offered her, is recipient of the benefit of the plaintiff's care she elected to receive: she benefited because the plaintiff's care relieved her of the obligation to provide care and shelter for her daughter.

**149**  Finally, the defendant claims it did not receive any profit or benefit after Ms. Chalmers rejected its offers. It says any money that would have been used to pay for the care of Ms. Savone now would be applied toward the care of other individuals who qualify for funding and choose to accept it. CLBC says that given this, it reaps no unjust windfall from the decision of Ms. Chalmers to reject the funding CLBC offered her. Counsel argues it would be the same situation if Ms. Chalmers had moved with Ms. Savone to another province: in that case, Ms. Chalmers could not reasonably say the defendant was unjustly enriched because it no longer had to pay for Ms. Savone's care.

**150**  In *Peel*, the plaintiff municipality could not meet the compulsion of law test, or any other traditional one, because neither the federal nor provincial governments were constitutionally, legally or statutorily obligated to care for the juvenile delinquents: the parents were ultimately responsible.

**151**  Since the plaintiff municipality could not satisfy any traditional test, it turned to general principles governing recovery, moving the court to consider the question of how 'benefit' should be defined in the general test for recovery under unjust enrichment. This question led the court to analyze benefits in cases where a third party pays for, or otherwise discharges, services the defendant likely would have had to pay someone else. In my judgment, this pattern draws closest to the facts in the case at bar and the court's discussion in *Peel* requires careful consideration.

**152**  McLachlin J. explained a benefit may be "negative," in the sense the benefit conferred on the defendant is that they have been spared an expense they otherwise would have been required to undertake, i.e. a discharge of a legal liability [para 35]. The parties in *Peel* could not show the court a case where a judge has found such a benefit conferred by a plaintiff without the defendant's having owed an underlying legal liability.

**153**  Given the absence of authority, McLachlin J. turned to scholarship. She noted some academics, such as Lord Goff of Chieveley and G. Jones, writing in *The Law of Restitution*, 3d ed (London; Sweet & Maxwell, 1986) and P.D. Maddaugh and J.D. McCamus in *The Law of Restitution* (Aurora, Ont: Canada Law Book,1990), perceived a "whittling away" of the hard and fast rule barring recovery without proof the defendant owed an obligation to take on the expense or to perform the act the plaintiff claims it did on the defendant's behalf [para. 42].

**154**  As McLachlin J. stated at paragraph 42 of *Peel*:

[42] where the plaintiff has conferred on the defendant an "incontrovertible benefit," recovery should be available even in the absence of a defendant's legal liability. An "incontrovertible benefit" is found in the gain of "a demonstrable financial benefit" or the saving of an "inevitable expense." At pp. 21-22 of *The Law of Restitution*, supra, Goff and Jones state:

To allow recovery because a defendant has been incontrovertibly benefitted is to accept that he must make restitution even though he did not request or freely accept the benefit. In the past, the principle embodied in Bowen L.J.'s well known dictum in *Falcke's case*, that 'liabilities are not to be forced upon people behind their back any more than you can confer a benefit upon a man against his will,' has been regarded as paramount. Free choice must be preserved inviolate. To accept the principle of incontrovertible benefit is to admit a limited and, in our view, desirable exception. The burden will always be on the plaintiff to show that he did not act officiously, that the particular defendant has gained a demonstrable financial benefit or has been saved an inevitable expense and that it will not be a hardship to the defendant, in the circumstances of the case, to make restitution.

[Emphasis added]

**155**  McLachlin J. noted that scholarly analyses of "incontrovertible benefit" state the expense must be an inevitable or necessary one. She referred to an article by M. McInnes, ("Incontrovertible Benefits and the Canadian Law of Restitution," (1990) 12 Advocates' Q. 323), and then went on to determine that relief based on incontrovertible benefit was "somewhat extraordinary." The plaintiff must prove it likely that had the plaintiff not paid her it would have had to pay someone else:

The same requirement of inevitable expense is reflected in McInnes's discussion of the notion of incontrovertible benefit. He asserts, at page 346, "restitutionary relief should be available to one who has saved another an inevitable or necessary expense (whether factually or legally based." Arguendo, he suggests that recovery may lie where one "has discharged an obligation which the obligee *would likely have paid* another to discharge." He goes on, at p. 347, to caution that "although otherwise warranted, restitutionary relief should be denied if the benefit was conferred officiously, or if liability would amount to a hardship for the recipient of the benefit." McInnes concludes at p. 362 that the case law provides only theoretical and not express support for the incontrovertible benefit doctrine and suggests that, as such relief is "somewhat extraordinary," it "should not be imposed unless the equities of the circumstances demanded it." [para. 45]

It is thus apparent that any relaxation on the traditional requirement of discharge of legal obligation which may be effected through the concept of "incontrovertible benefit" is limited to situations where it is clear on the facts (on a balance of probabilities) that had the plaintiff not paid, the defendant would have done so. Otherwise the benefit is not incontrovertible. [para. 46]

[Emphasis added]

**156**  McLachlin J. further explains that the benefit must confer a direct benefit on the defendant and be more than just "an incidental blow by." Otherwise, this

[47] would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant.

**157**  The court eventually found the plaintiff could not succeed, even on an incontrovertible benefit basis, because it could not show it had saved either level of government an inevitable expense [para. 48].

**158**  The court concluded that if it were to order the senior governments to repay the municipality, they would be requiring them to pay for what was an incidental benefit of a non-pecuniary nature, such as the 'benefit of its citizens.' In effect, the municipality had failed to establish that its payments had "covered an expense that the federal government 'would have been put to in any event'" [para. 50]. The fact the municipality's payments might have furthered Canada's interest in the welfare of its citizens was not sufficient.

**159**  Given the unfairness the court recognized in the municipality's incurring of expenses imposed on it through a constitutionally *ultra vires* provision, the court also considered whether it could grant recovery on the basis of justice alone. The court steered away from that course, charting one lying midway between inflexible rules and case by case "palm tree justice." Plaintiffs must demonstrate a general congruence with accepted principles [para. 57].

**160**  As I understand *Peel*, the municipal plaintiff failed ultimately because it could not prove an incontrovertible benefit, only a non-pecuniary one at best. The senior government defendants were not legally obligated to pay for the care the delinquents received from the plaintiff municipality, and the beneficiaries of the care were the delinquents and their parents.

**161**  At paragraph 61 of *Peel* the court discusses differences lying between tort and contract law on the one hand and restitution on the other. Restitution focuses on re-establishing equality between the parties, a balancing act that requires a judge to consider fairness to both parties. Focusing on re-establishing equality as between the parties "has dual ramifications for the concept of 'injustice'" in the context of restitution, as McLachlin J. explains:

First, the injustice lies in one persons' retaining something which he or she ought not to retain, requiring that the scales be righted. Second, the required injustice must take into account not only what is fair to the plaintiff; it must also consider what is fair to the defendant. It is not enough that the plaintiff has made a payment or rendered services which it was not obligated to make or render; it must also be shown that the defendant as a consequence is in possession of a benefit, and it is fair and just for the defendant to disgorge that benefit.

[Emphasis added]

**4. Defendant's argument of no benefit based on *Peel***

**162**  Earlier I summarized the defendant's position on the question whether the plaintiff had conferred a benefit on it. This is a refresh: Ms. Savone and her mother are the recipients of the plaintiff's services. The defendant manages and allocates resources government gives it for the care of developmentally disabled persons. Money not spent on Ms. Savone's care would be applied to the care of other eligible individuals. Ms. Chalmers' choosing of the plaintiff to care for her daughter equals a parent moving out of province with a child in need of care, or moving their child from a public school to a private one. In those cases a plaintiff would not have a sound argument they had enriched CLBC for the reason that it no longer had to provide for their child's care or education.

**163**  As McLachlin J. mentioned in *Peel*, facts in unjust enrichment cases are even more important than usual. The facts in the case at bar distinguish themselves above all by Ms. Savone's helpless condition, her need for close supervision and medical care, her mother's limited financial means and incapacity, the defendant's and its predecessor's long-term fiduciary relationship with the plaintiff and by the many years of a employment/contractual relationship between the plaintiff and the defendant and its predecessors.

**164**  The dispute in this case is not over improvements to property, unlawful utility charges, or nonessential services, but compensation for essential services provided a person who, without continuing and knowledgeable services from by a skilled caregiver ready, willing and able to meet these needs, would suffer and perish. I do not find the theoretical case examples of Ms. Savone's moving to another province or from a public to private school analogous or apt, given the nature and extent of the defendant's obligations and the plaintiff's needs. Ms. Savone and her mother could not pay someone for the care she needed and the defendant knew this. She is not moving to another province or electing to attend private school. That said, I recognize the defendant's point that an individual is free to hire and pay for a care-giver privately; and agree it would be unreasonable for them to then expect to be able to do so and just send the defendant the care bill. The facts in this case are more complex than that.

**165**  The defendant is more than a funding agency. Through its staff and other means, CLBC ensures caregivers have suitable experience and credentials. CLBC meets its obligation to safeguard its clients in part through requiring third party caregivers meet certain standards and regularly report to it. And through agents such as community nurses and social workers, it further ensures the health, safety and overall well-being of its clients.

**166**  Ms. Savone had only two places to go after her release from hospital in July 11, 2007: into the care of the plaintiff or another third party caregiver. I find Pat Chalmers then was not willing or able to care for her daughter, even with home care help. I find she lacked the financial resources to retain a caregiver privately and that was never her intention and that the defendant knew this. There is no question the plaintiff was entitled to a certain level of support from the CLBC; indeed the defendant explicitly acknowledged its willingness to provide it in substantial amounts.

**167**  On the defendant's argument CLBC received no benefit from its not having to pay the defendant because it would pay those funds to other eligible applicants; the defendant did not show this occurred. In fact, Mr. Birdi confirmed on cross-examination that CLBC had set money aside to meet the possible eventuality of the plaintiff succeeding in her claim. While he seemed uncertain whether CLBC had invested those reserved funds, good fiscal management makes this seem likely. At any rate, the plaintiff argued the investment returns constituted a benefit to the defendant. This is likely so on the, albeit thin, evidence on the point. However, if I were to find CLBC received an incontrovertible benefit that was not conferred officiously, the question of whether the defendant benefitted from investment returns becomes a somewhat incidental finding--except to the extent it counters the defendant's statement that money it would have used to discharge its obligation to Ms. Savone would then have been used to discharge its obligations to other eligible applicants; thus it receives no benefit from its not paying for Ms. Savone's care.

**168**  The defendant argued also that Ms. Chalmers, and now her current committee, stand in the same position as the parents in *Peel.* I do not agree. In *Peel*, the plaintiff municipality had the statutory right to recover incurred costs from parents of the youthful offenders. In the case at bar, the defendant had been providing funding for day care for many years. She was entitled to support and the defendant had indicated willingness to provide it, at least to a certain level.

**169**  The defendant also argued that because the defendant did not request the plaintiff's services, it is doubtful they could constitute an enriching benefit. Counsel referred to Maddaugh and McCamus, *The Law of Restitution, supra, at* p. 3-13:

Where the plaintiff has provided services to the defendant which have not been requested, there is a danger that the granting of relief will force the defendant to invest resources in the acquisition of an unwanted service for which the defendant may have no use. Understandably, there is a reluctance to grant recovery in such circumstances and thereby constrain the freedom that the defendant would otherwise have to invest his resources as the defendant sees fit. In such circumstances, it might be held that whatever value the services in question might have in the marketplace, they hold no value for the defendant and do not constitute a "benefit" in [his] hands.

**170**  McLachlin J. similarly acknowledged the need to recognize "the importance of the right to choose where to spend one's money ..." [para. 27].

**171**  In my view, concerns about limiting a defendant's right to spend its money as it sees fit can figure less prominently in this case. Here, the plaintiff's services were useful to the defendant at least to the extent that she provided services the defendant otherwise would have had to provide. The defendant had intended to "expend its resources" to pay the defendant something for her services. Assuming the defendant owed a duty to Ms. Savone and the plaintiff discharged it, that discharge was of some value to the defendant and constitutes a benefit in its hands.

**172**  CLBC's capacity to invest resources as it sees fit is not diminished so long as the court's appraisal of the benefit pays real regard to the defendant's views on the value of those services to it, as well as its fiscal and other limits. However, the defendant's concerns about its right to spend its money as it sees fit does not defeat the plaintiff's claim for restitution.

**173**  The defendant has submitted it was under no legal or statutory duty to provide any particular service; and neither was it obligated to pay this particular caregiver at the price demanded by her. I concluded earlier the defendant owed Ms. Savone a duty to provide funding for her care. On the evidence, it is clear both the plaintiff and defendant each knew well the nature of the services required. Various care agencies testified at trial about them and the amount they would charge for them. The defendant remained obligated to offer funding for specific services of a kind the plaintiff was providing - if not paid to the plaintiff, then to another. The particulars of the care she required would depend, as with all individuals eligible for care, on a careful assessment of her particular care needs.

**174**  As for the defendant's argument the plaintiff had conferred on CLBC no more than a secondary collateral benefit of the kind McLachlin J. cautioned against in *Peel,* I do not agree. In *Peel,* the federal government bore no responsibility to house youthful offenders in group homes and the only benefit the plaintiff could link the federal government to was a non-pecuniary one, the general welfare of the population.

**175**  Further, the premise of the defendant's argument on this point rests on the fact the defendant provided the services to Lydia Savone and her mother as "immediate beneficiaries of the plaintiff's services." But the plaintiff never could be in a position to provide direct services to the defendant, only to its clients, those eligible individuals to whom the defendant specifically owed a duty to support. In such circumstances, the most reasonable conclusion is that when a third party care giver provides services to a client to whom the defendant owes a duty owes to support, or as in this case has already agreed to support, this can, in appropriate circumstances, discharge an obligation owed by the defendant and consequently be a direct benefit to the defendant. What amounts the defendant might be obligated to pay the caregiver and for what time period are separate issues that require consideration of fairness to the defendant; including factors such as the defendant's limited resources and other considerations, discussed more fully as these reasons progress.

**176**  Arguments on injustice address the question whether, if the legal tests for recovery are clearly not met, a plaintiff can recover based on justice or fairness alone: as discussed previously, *Peel*, para. 56. The court answered no, pointing out judges must balance predictability in the law and injustice in an individual case, between the two extremes of rigid rules and palm tree justice. The court recognized legal principles are required but also that they must be flexible enough to permit recovery where justice requires, "having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy" [para. 57 - emphasis added]. The court found the three part test of *Becker v. Pettkus* provides flexibility: in effect however, the plaintiff cannot succeed on the basis of fairness alone.

**5. *Garland v. Consumers's Gas Co*, juristic reasons defences, including officious and necessitous intervention as juristic reasons**

**177**  *Garland v. Consumers' Gas Co.*, [*[2004] 1 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B111-00000-00&context=), provides further guidance on unjust enrichment cases, especially on the requirement that the plaintiff show there is no juristic (that is, a legal) reason to deny compensation. The next part of these reasons focus on this issue.

**178**  *Garland* was a class action lawsuit consumers brought against a gas company. The consumers were complaining about late penalties the company levelled in their invoices. Since the gas company had been enriched, it then had to show why it should retain the benefit. The company argued it should retain it because it could show a juristic reason in the form of an Ontario Energy Board order granting it the right to levy the charges. But the plaintiffs showed the levy contravened s. 347 of the *Criminal Code,* which set limits on interest charges; thus the gas company could not rely on the Board's order as a juristic reason.

**179**  Iacobucci J. points out that the law of unjust enrichment is relatively new to Canadian law, and that "[i]t requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable" [para. 43].

**180**  Iacobucci J. noted that later formulations of the *Pettkus* threefold test broadened factors a judge must consider when determining whether there was an absence of juristic reason for the defendant to retain the benefit it had received. He referred to *Peter v. Beblow*, [*[1993] 1 S.C.R. 980*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-60BP-00000-00&context=) [*Peter*], at p. 990 and the words of McLachlin J., as she was then:

It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are 'unjust'.

The test is flexible, the factors to be considered may vary with the situation before the court.

**181**  Iacobucci J. went on to observe that judges have been divided in the ways they have dealt with juristic reason. Some judges have taken the *Pettkus* formulation literally. Others have decided cases by finding a juristic reason for a defendant's enrichment. Still others have decided them by asking whether the plaintiff had a positive reason for demanding restitution. Iacobucci J. discussed scholars' criticisms of the Canadian approach to juristic reason and its requiring the plaintiff prove a negative, "an absence of juristic reason." He stated what he considered is the proper approach:

The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts.

First, the plaintiff must show that no juristic reason from an established category exists deny recovery ... The established categories that can constitute juristic reasons include a contract [*Pettkus*], a disposition of law [*Pettkus*], a donative intent [*Peter*] and other valid common law, equitable or statutory obligations [*Peter*]. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facia* case under the juristic reason component of the analysis. [para 44]

**182**  *Garland* explains that a prima facie case is rebuttable by a defendant. A category of residual defence is left open to the defendant "in which courts can look at all of the circumstances of the transaction in order to determine whether there is another reasons to deny recovery" [para. 45].

**183**  When considering the defendant's attempt to rebut the plaintiff's *prima facie* case, the judge should have regard to two factors: the reasonable expectations of the parties and public policy considerations. Consideration of these factors "may yield a new category of juristic reason ... [one that] will suggest that there was a juristic reason in the particular circumstances of the case ... In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment" [para. 46]. Iacobucci J. also affirms that this area of law is an evolving one and cases will add "additional refinements and developments" [para 46].

**184**  The court in *Garland* found the only juristic reason to allow the gas company to keep the levies it had imposed on gas consumers was the Ontario Energy Board orders that authorized them. However, the defendant gas company could not rely on that juristic reason past a certain year, because by that time they had learned the Board orders likely contravened s. 347 of the *Criminal Code*.

**185**  I turn now to the analysis of juristic reasons in the case at bar, following the principles set out in *Garland* and *Peter*.

**186**  The defendant in the case at bar submits the contract for day services in existence until January 2008 is a juristic reason to defeat the claim that the defendant has been unjustly enriched by the day program services the plaintiff provided. It says she cannot claim restitution for the value of day services while the contract was still in effect until its expiration because the parties had agreed already on a rate of payment for services during that period. On the authority of *Garland,* the defendant submits existence of contract is an established juristic reason to deny recovery. See also *Inglis v. TD Securities Inc.* [*(2006), 50 C.C.E.L. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JCJ5-24NN-00000-00&context=) (Ont. SC).

**187**  I agree with the defendant's submission. The result is the defendant must pay the plaintiff any amounts outstanding under the day program contract in effect until the December 1, 2007, expiration of the contract. Later, I will deal with the day program past December 1, 2007.

**188**  I turn now to consider whether an analysis of the "realistic expectations of the parties" or public policy considerations yield any other potential juristic reasons why the defendant should not be required to disgorge its benefit.

**a) Realistic expectations**

**189**  The defendant submits that after the plaintiff had received the defendant's January 15, 2008, letter, she could have no reasonable expectation the defendant would pay her:

I have reviewed the letter dated January 10, 2008 sent to me on your behalf by Dale Sands, Barrister & Solicitor. I have also reviewed your invoices for services you provided to Lydia Savone from July 2007 to December 31, 2007, for a total of $83,942.02 plus accrued interest at the rate of 19.25% per annum.

Please be advised that I am not prepared to accept your claim for these services. Under Contract Number FL0191CF01 Community Living British Columbia ("CLBC") has entered into an agreement with you to provide day services only to Lydia Savone and you receive a monthly payment for these services as set out in that contract. There is no other contract, or agreement, in effect between you and CLBC to provide additional supports to Lydia Savone. Your decision to provide additional support to Lydia Savone was, and continues to be, between you, Lydia and her family and is without the consent, agreement or approval by CLBC. [Affidavit of J. Birdi - exhibit N]

**190**  To buttress its submission the plaintiff could not have realistically expected she would be compensated, the defendant relied on three decisions: *Nicholson v. St. Denis* [*(1975), 57 D.L.R. (3d) 699*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JBM1-M418-00000-00&context=) (Ont. C.A.) 701-722 [*Nicholson*]; *Campbell v. Campbell* [*(1999), 173 D.L.R. (4th) 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1X3-00000-00&context=) (Ont. C.A.) [*Campbell*]; and *Morton Construction Co. v. Hamilton (City)* [*(1962), 31 D.L.R. (2d) 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JT99-22X8-00000-00&context=) (Ont. C.A.) [*Morton*].

**191**  In *Nicholson*, the court noted the presence of a special relationship in almost all cases where the court has found it would unjust for the defendant to retain the benefit conferred:

[8] in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff -- a benefit, be it said, that was not conferred "officiously". This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and secondly, either an express or implied request by the defendant for the benefit, or acquiescence in its performance.

**192**  The parties did not complete a contract. But between them there was what could be called a special relationship, one of long-standing, especially with the defendant's predecessor agencies included in the history. The parties' past dealings for Lydia Savone did not involve a residential contract, but a day program contract had been in place for nearly twenty years and residential contracts for others for longer. Before entering negotiations, the parties understood they would be negotiating a residential care contract after the defendant's preconditions were met.

**193**  Even so, the defendant denies it in any way acquiesced to the plaintiff's care of Ms. Savone. The defendant says that after Ms. Chalmers had rejected alternative caregivers its proverbial hands were tied. In the sense CLBC had not signalled to the plaintiff it was content she continue without a contract, I agree there was no acquiescence. But I disagree the defendant's hands were tied or that it had become a helpless bystander. After July 11, 2007, the defendant's duty to Ms. Savone through her mother continued. The day program contract continued until its expiration in January 2008. The defendant's presenting of alternative caregivers to Ms. Chalmers does not suggest its hands were tied. The defendant appears to have abandoned efforts to satisfy Ms. Chalmers' concerns about the qualifications of the alternative care givers it had so far presented to her. Given the unusual facts in this case, in my view the long history of the three-way relationship between the plaintiff, the defendant and Ms. Savone and her mother, and other circumstances, such as Ms. Savone's vulnerability, are the more significant factors.

**194**  In *Campbell*, the defendant's sons bought equipment and built a barn on her farm without permission. She refused to pay for them. Claiming their labour and money had unjustly enriched their mother, they sued for restitution based on unjust enrichment. The Court of Appeal confirmed the lower court's dismissal. It noted the mother had done more than disagree - she objected to the construction and the expenditures.

**195**  The absence of any evidence the mother had expressly asked her sons to undertake the work was the crucial reason they failed in their claim [para 22], with officious action as a possible juristic reason for allowing the mother to keep her enrichment. In the case at bar, counsel for the defendant pointed out the importance the court had placed on the element of 'bilaterality:' whatever their own expectations, the sons failed to show their mother understood they had not been making a gift - in other words, they had failed to prove their mother understood their lack of donative intent.

**196**  I fail to see how anyone in CLBC's position could have inferred a donative intent by the plaintiff. The parties had been negotiating a contract. Negotiations failed. The plaintiff sent invoices. The defendant rejected them and the plaintiff at once sued the defendant. The defendant's response confirms the obvious fact the parties had not completed a contract. It provides no basis for the defendant inferring a donative intent.

**197**  In *Morton*, the city demanded the plaintiff repair part of a city sidewalk he built. The demand made no mention of the city's paying him. The plaintiff worried about losing future contracts with the city, so he carried out the repairs and then sued the city after it refused to pay his invoice. He lost both at trial and on appeal, where for the first time he raised the claim of unjust enrichment. Given no evidence the city undertook to pay the plaintiff, the appeal court rejected his appeal.

**198**  But this case, like the others cited, is distinguishable. In *Morton*, the plaintiff made repairs to his own work with no signal by the city at any point that it intended to pay the plaintiff for his work. This, coupled with the plaintiff's hidden motive of ensuring his winning of future contracts in the city, confirmed there was no basis for a reasonable expectation he would be receiving any compensation.

1. **Summary of realistic expectations**

**199**  When analyzing 'realistic expectations of the parties' to see if it provides the defendant a juristic reasons defence, I have not considered how much the plaintiff is claiming. Leaving this aside prevents the parties' realistic expectations becoming conflated with questions related to the reasonableness of the amounts claimed by the plaintiff. In my view, the focus of what the parties realistically expected in this case narrows to whether the defendant could infer a donative intent, I reject the defendant's position there was no realistic expectation of the parties the plaintiff would receive *something* from the defendant for the services she performed. What separated the parties was not whether her expert services were of value to the defendant, but how much she should receive for them. That said, neither could the plaintiff reasonably expect to receive compensation based only on self-assessment of the value of her services to Ms. Savone or that the defendant would pay her on a basis that ignored its own self-interest, which encompasses its statutory obligations and fiscal limits and support allocation other policy guidelines that form the basis for exercising its discretion.

**200**  The defendant's core arguments roots in concerns related to CLBC's right to choose who it wishes to party with; what services it wishes to buy; how much it wishes to pay and for how long, among other choices. Freedom of contract is a basic societal and legal assumption. But in my estimation, the principles of officious intervention, discussed later, largely address those concerns within the context of unjust enrichment.

**201**  I find an analysis of the reasonable expectations of the parties does not so far yield a juristic reason why the defendant should not be required to compensate the plaintiff for services it inevitably would have had to contract for with another party.

**202**  Following the *Garland* guidelines, I turn now to the question whether there are any public policy reasons why the plaintiff should be able to retain its enrichment by the plaintiff's services.

1. **Summing up thus far**

**203**  Summing up to this point, I find the plaintiff does not have to prove CLBC was a direct recipient of the plaintiff's services. She must show:

1. she provided necessary services and incurred expenses of a kind the defendant was obligated to fund;
2. the defendant likely would have had to pay someone for those expenses and for performance of those necessary expenses and services;
3. a reasonable expectation she would receive *something* for her services despite the absence of agreement;
4. she did not act officiously; and
5. considering fairness to both parties, it is fair and just for the defendant to disgorge that benefit. *Peel* [para. 61].

**204**  Thus far, I have found the plaintiff can satisfy the first three requirements. I turn now to deciding whether she can satisfy the third and fourth and also defeat other defences advanced by CLBC.

1. **Public Policy: officious/necessitous Intervention Introduction**

**205**  Defendants defeat a claim for disgorgement of a benefit received if the plaintiff's conduct is officious. The plaintiff's officious conferral of the benefit sets up a public policy reason to deny the plaintiff recovery.

**206**  From the litigation's outset, the defendant has said the plaintiff is an officious intervener who, with no contract in hand and none in prospect, took it on herself to become Ms. Savone's caregiver. Also consistent from the outset has been the plaintiff's position that circumstances justified her taking Ms. Savone into care without a CLBC contract. The plaintiff says, given Ms. Savone's care needs, CLBC's offers were irrational; their delays making them caused her much stress and she found the plaintiff's conduct confusing and exhausting. She had seen no choice but to take Ms. Savone home in July 2007 and after negotiations failed, to bring action in response to what she saw as the defendant's unfair treatment. She denies her conduct was officious and claims her taking Ms. Savone into care in July 2007, considering her needs and the circumstances, was a necessitous intervention. If the amalgam of the plaintiff's conduct rises to a level that made it likely officious, the defendant's argument is near unanswerable.

**207**  The plaintiff clearly can't be an officious and necessitous intervener at the same time. If the court finds the plaintiff acted officiously, the defendant has shown a juristic reason to deny the plaintiff's claim. If the court finds the plaintiff's actions constitute necessitous intervention, she has a basis for making a claim in unjust enrichment--at least for the period of time her actions are found to constitute a necessitous intervention.

**208**  Facts, especially in restitution cases, sometimes resist division or amalgamation into neat hierarchical categories of law such as contract or tort. Aspects of both contract and tort law may be drawn into cases involving claims of officious and necessitous intervention. Even so, general legal principles should not overmaster the sometimes anomalous factual matrices that unfold in restitution cases. Findings should be considerate of the principles, though directed mainly by the facts, though not swayed only by the moral attractions of each argument. The balance that must be struck, then, is between 'palm-tree justice' responsive to the facts, but with little utility outside a narrow factual matrix, and controlling principles that are not lithe enough to respond to the facts of each case. These determinations must be made, as always, with current principles and practices in mind. [*Peel*, para. 57].

**e) Officious intervention**

1. The Law

**209**  A primitive statement of the law on officious intervention is given in *Falcke v. Scottish Imperial Insurance Co.* (1886), 34 Ch. D 234 (C.A.)

Liabilities are not be forced upon people behind their backs anymore than you can confer a benefit upon a man against his will [p. 248].

**210**  The defendant says the plaintiff cannot confer a benefit on CLBC against its will and then expect it to compensate her. Even if the plaintiff conferred a benefit on the defendant, if she conferred it officiously, there is no basis for restitution: *Leigh v. Dickeson* (1884), 15 Q.B.D. 60 (C.A.). Counsel goes further and submits that not only did CLBC not acquiesce; she says when the plaintiff took Ms. Savone into her care after the defendant had said her home was not acceptable, she was acted against its stated wishes. I note CLBC's objections related to the plaintiff's contravention of the bylaw, not on her qualifications or on her becoming Ms. Savone's care giver once the bylaw problem was resolved. Against the defendant's position, the plaintiff claims the defendant had expressly agreed, at the time, to her taking Ms. Savone home. Mr. Morgan, CLBC's analyst, denied this.

**211**  I find while Mr. Morgan did not expressly agree, neither did he object to the plaintiff's taking Ms. Savone home and caring for her. I also find he told the plaintiff CLBC could not negotiate a contract for care while the plaintiff had three full-time residents living in the home. I find the plaintiff told him in reply that one of the two residents could be moved if necessary. Events unfolded from there. In any event, this issue becomes almost immaterial when clarified by the circumstances at the time the plaintiff took Ms. Savone home. These circumstances include the fact the defendant was in no practicable position to oppose the plaintiff taking Ms. Savone home. The hospital wanted to discharge Ms. Savone. Ms. Chalmers could not control her daughter or ensure her demanding care needs were met. The police had already dealt with neighbourhood complaints, not the first, about Ms. Savone's aggressive behaviour. The defendant had no realistic suitable alternative at hand. And evidence about the protracted time it later took CLBC to find other homes for Brian Brest and Hilda Kennerly argues against the likelihood it could have secured alternative home care for Ms. Savone within a reasonable time.

**212**  I find no other viable arrangements to care for Ms. Savone were in place when the plaintiff took her into care on July 11, 2007, a finding that applies to both officious and necessitous intervention.

**213**  The defendant again relies on letters it sent the plaintiff in response to her invoices. These prelitigation letters confirm the obvious fact the parties had no contract, thus precluding any contractual liability to pay the plaintiff for her services. But the words in the letters do not in and of themselves then transform the plaintiff's work into free services or confer a donative intent on her part. That said, I agree the letters are relevant to the issue of officious intervention as well as the court's duty to consider what is fair to the defendant and to the parties' reasonable expectations on compensation levels for the plaintiff's services.

**214**  Authors Maddaugh and McCamus noted at p. 3-37 of the *Law of Restitution* that the principle against officious intermeddling, while a pervasive one, has been the subject of little comment in case law:

The law of restitution clearly recognizes a number of circumstances which constitute sufficient justification for the plaintiff's 'interference in the affairs of others'. Most obviously, the conferral of a benefit through the performance of an agreement or an apparent or anticipated agreement with the defendant constitutes an unofficious conferral. Further it is well recognized that one who confers a benefit on another as a result of a mistake or in order to respond to another's necessitous circumstances may bring a restitutionary claim [3-38].

An unjust enrichment may occur where one who is an appropriate person to do so responds to another's emergency by supplying an incontrovertible benefit such as goods or services needed to meet that emergency ... [R]elief has been granted in cases where the benefit consists of the fulfilment of a duty owed by the defendant, whether that duty is one owed by the defendant to a third party or imposed as a matter of public responsibility [3-43].

In some cases, however, where the benefit is of a kind or the circumstances are such that the plaintiff can be expected to have provided the benefit in question out of a sense of moral obligation and irrespective of the possibility of securing compensation therefore, the claim may fail on the basis that the benefit was conferred as a gift. The courts appear to have taken the view, however, that where the plaintiff has made a profession of providing the goods or services in question, a gratuitous intent should not be inferred [3-43, 3-44].

[Emphasis added]

**215**  The authors rely in their discussions predominantly on the Manitoba Court of Appeal case of *Matheson v. Smiley*, [*[1932] 2 D.L.R. 787*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X268-00000-00&context=) (Man. C.A.). This case is relevant to both the officious and necessitous sides of the intervention coin. The plaintiff sued the estate of the deceased for surgical services he performed in the failed attempt to prevent the death of John Smiley. There was no contract in place between them, and Mr. Smiley could not consent, his condition too perilous. The court found the surgeon's service "necessary for Smiley, even though the effort was unavailing" [para. 16].

**216**  Referring to the *Law of Restitution* passages mentioned just above, counsel for the plaintiff pointed out the plaintiff had been a professional caregiver or service provider for over 28 years, her services paid by the defendant or its predecessors, thus arguing against a gratuitous intent.

**217**  Still, the defendant submits it would be "particularly unjust to permit the plaintiff to recover" where CLBC expressly rejected the plaintiff's services yet has no practical means to prevent her from providing care to Ms. Savone, adding that the required element of bilaterality referred to in *Campbell* (the son's unwanted barn building case) is completely absent from the present case. The defendant forcefully argued that to accede to the plaintiff's submissions would permit the plaintiff to "unilaterally constitute" CLBC's obligations. This argument again raises questions of freedom of contract and fairness. These are significant concerns, supported by deeply rooted general legal principles. However, the facts and circumstances in this case are complex and unusual.

**218**  Events unfolded against a historical background of the plaintiff's many years of service, funded by the defendant and its predecessors. Counsel for the defendant rightly pointed out relations between the parties had been strained for some time, although that does not appear to have been so with CLBC's predecessors. The plaintiff acknowledged she was never happy with the funding regime and she believed funding was inadequate for Hilda Kennerly and Brian Brest. She acknowledged her relationship with CLBC was "strained, difficult, hostile and not functioning well." Although compensated through contracts, she was not clear if she still had the status of an employee, as she had in times past. She felt CLBC was antagonistic towards her and mistrust developed. During argument, I questioned counsel for the plaintiff closely about this, asking if it was reasonable to expect the defendant to partner in such a strained relationship and if it was reasonable for the plaintiff to expect to impose her notion of reasonable compensation on a prospective partner with invoices she must have come to realize the defendant could never agree to pay.

**219**  I find both parties bear some responsibility for the strained relationship that developed. The stress and depression the plaintiff was suffering, her perception of disrespect and unfair treatment by CLBC towards her and her seemingly limited capacity to see things from CLBC's perspective, coupled with CLBC's failure to take the managerial initiative to communicate with the plaintiff at an earlier stage, to comprehensively acknowledge her concerns and assure her she was a valued team member; and its failure also to fully explain the funding process, all contributed to the thicket of tensions that were developing. Even so, as pointed out to counsel several times during trial, the parties had *resolved their differences* over the perceived irritant of the defendant's reporting requirements; and the defendant's negotiating preconditions had been met. Thus, while the defendant objected to the plaintiff's negotiation demands, it cannot say it was opposed to contracting with the plaintiff for services. I find the parties had agreed, at least, the plaintiff was very well qualified to care for Ms. Savone, and in the circumstances, I find she was the person best equipped to do so.

**220**  Eventually, the defendant realized the plaintiff felt the defendant was being unreasonable, treating her unfairly and trying to "grind her down." She became set in her compensation position and intended to turn to the courts for justice if the plaintiff would not pay her what she considered was fair compensation for her services. Although the parties had staked out fixed positions after negotiations had failed, statements made then do not become, as mentioned earlier, the definitive determining factor of whether the plaintiff is entitled to compensation for what has now become three years of unpaid seven-days-a-week services, services that, in the circumstances of this case, the defendant ultimately would have had to pay other caregivers to provide.

1. What marks conduct as officious?

**221**  Authorities give little guidance on when a plaintiff's actions should be deemed officious. The *Concise Oxford Dictionary of Current English*, 9th ed. *s.v.*, "officious", defines 'officious' as asserting one's authority aggressively - domineering; or as, intrusive or excessively enthusiastic in offering help etc. - meddlesome. In the context of a legal claim, this behaviour is most likely to occur in a setting where there is no operative contract.

**222**  Within a litigation context, one should, in my view, add to the conduct descriptors the *Oxford Dictionary* denotes, this: 'conduct that takes no notice of the rights and interests of the other party, perhaps damaging them in some way. At the extreme, the conduct could give rise to a right of action.' This suggested added 'rights and interests' definition is discussed further below.

**223**  Distinguishing offensive behaviour versus officious behaviour gives a useful common-sense analytical checkpoint. Domineering or aggressive behaviour is not necessarily officious in the legal sense. Individuals presenting assertive or meddlesome behaviour may nonetheless be capably carrying out a contract, or absent one, a defendant's obligations to a third party. Some individuals with a can-do attitude and high regard for their own ability may step on toes, but also into situations where passive people or organizations hold back; will quarrel and alienate some, but then accomplish what others would not try. Logically, aspects or portions of a plaintiff's actions, placed on a sliding scale, could be found legally officious but other aspects or portion not so. For example, carrying out the defendant's obligations for a reasonable period could be deemed acceptable; continuing to do so longer than justifiable could raise the plaintiff's actions to a level that makes them officious and bars recovery.

**224**  But what marks conduct that calls for the finding that it has become officious in law? Answering (taking this case as an example), "when it reaches a degree that the plaintiff should receive no compensation for her three-years of services," merely begs the question. Reading the authorities in a consilient way (that is, synthesizing to find unifying knowledge or principles), and to give legs in the case at bar to the principles in *Peel* and *Garland*, I find the plaintiff's behaviour must see her having paid no regard to the rights, interests, or entitlements of the defendant [*defendant's interests*]; and to the extent that it effectively deprived the defendant of an interest, or something of significant value to it; and which it reasonably would expect to have received or preserved, had the plaintiff not conducted itself without regard its interests. This rendering is faithful to the restitution model of equality as well as to bilaterality. But, in my view, such a finding, standing alone, still does not sufficiently encompass the current principles explained in *Peel* and *Garland*, particularly in a case based on incontrovertible benefit/inevitable expense grounds. As McLachlin J. explained in *Peel*, restitution is a restorative form of compensation that seeks to right an imbalance between parties in order to achieve equality. The ultimate intent is to determine whether it would be unconscionable to allow the defendant to keep the benefit it received (and the plaintiff simply to suffer the deprivation) with no attempt to balance the scales).

1. Restorative and balancing role of restitution, *Peel*

**225**  The core restorative role of a restitutionary order role invites another question, one that current principles logically require an answer to: can a judgment be formulated that both restores (and/or preserves) the defendant's interests the plaintiff's actions deprived it of, yet still fairly compensate the plaintiff? Stated another way: assuming the plaintiff's conduct has to some extent deprived the defendant of an interest and has created an imbalance, but also assuming the resulting imbalance can be righted within the court's order, should officious conduct that deprived the defendant still be deemed officious? Given the core objectives of restitution and in my view, of the authorities, I have concluded the answer should be no, it should not be deemed officious. Conversely, if the final judgment cannot sufficiently correct the imbalance, the conduct should be deemed officious. Approaching the problem of officiousness this way ensures fealty to current principles, prevents becoming unduly swayed by the moral attractiveness of each position and places facts relating to officiousness in a legal perspective that enhances a principle-based analysis--with the ultimate objective of ensuring, as nearly as possible, fairness to both parties. The court can then appraise the totality of the circumstances, including ethical dimensions if appropriate; to decide whether it would be unconscionable for the defendant not to disgorge the benefit it received.

**226**  Although I have come to find the plaintiff's conduct deprived the defendant of a significant interest, as later discussed, I have also found an order of compensation can be formulated in a way that reasonably restores the resulting inequity. Thus, to the extent the plaintiff's conduct deprived the defendant of a significant interest and the order remedies it, the plaintiff's conduct should not bar the court's compensating her proportionately.

**227**  A significant aspect of the plaintiff's behaviour that could be deemed officious is her walking away from negotiations before they had concluded and then demanding payment, though without a contract. The plaintiff asserts CLBC owed Ms. Savone a statutory duty; but her actions deprived CLBC, in significant measure, of the means to act on it, in accord with its statutory, fiscal, policy and fiduciary obligations. Although the parties' differences merged into litigation, the plaintiff continued to care for Ms. Savone without providing the plaintiff information about her health and then current circumstances. Yet had the plaintiff concluded a contract with the defendant, she would have been obligated to report regularly to CLBC and to facilitate visits by CLBC representative if requested. Had the parties completed a contract and were the plaintiff seeking an order requiring the defendant to perform specific contractual obligations, the law would expect her to continue performing under the contract her own bilateral obligations, such as regular reporting. The plaintiff's actions instead deprived the defendant of current information it would need to assess Ms. Savone's then and current needs, perhaps through such means as a professional behavioural assessment by Dr. Lee. The defendant could have employed further assessments to complete an improved care plan and enable CLBC to offer Ms. Chalmers or her successor care giver alternatives that might have proven satisfactory and acceptable to them. Further assessments might even have provided CLBC with information to justify increasing the plaintiff's remuneration. While it is true the parties were in litigation, the plaintiff was still obligated to conduct itself in a way that respected the rights, interests and entitlements of the defendant. The plaintiff could not demand the defendant respect her interests while inhibiting the defendant's exercise of theirs, especially interests that include their discretionary right to set compensation levels in conformity with allocation of support guidelines. Therefore, the plaintiff's conduct deprived the defendant of a significant interest.

**228**  That said, I note the defendant never informed the plaintiff of its funding dispute review process; never requested the plaintiff to provide current information on Ms. Savone ; never asked for further assessments (except by Dr. Lee and that was for the purposes of litigation); and did not introduce Ms. Chalmer's to the R.N. it had proposed as a prospective caregiver, and had not evaluated her credentials for management of Ms. Savone's challenging behavioural problems, thereby leaving the task of finding suitable alternatives incomplete. Further, as mentioned, CLBC never explained its funding allocation process, as it should have, and right from the outset; and refused to pay retroactive compensation to July 2007 as it said it would. It ought to have known delays in the start of negotiations were likely to impact the plaintiff's financial interests. These and other factors, such as the plaintiff's depression, influenced the plaintiff's perception of the contracting process, contributing to her belief the defendant's actions were oppressive and unfair. Further, the plaintiff's taking of Ms. Savone into her care in July 2007, which, as will be seen, I found a necessitous intervention for a period of months, together with the supporting facts discussed in that coming section of these reasons, are also considerations. The amalgam of these considerations explains and mitigates to some degree the plaintiff's actions. But it does not fully excuse them.

(4) Findings on officious intervention

**229**  Regardless, I find that to the extent the plaintiff's conduct deprived the defendant of significant interests, the court can restore any resulting imbalance with compensation that pays due regard to the defendant's significant interests it was deprived of. In this way, the court can restore a reasonable level of equality and the plaintiff's conduct need not become a complete bar to compensation. Compensation can encompass and balance the affected interests of both parties: the defendant's deprivation resulting from the plaintiff's actions; the plaintiff's deprivation resulting from her conferring an incontrovertible benefit on the defendant.

**230**  Accordingly, and as explained further in section V, the level of compensation should represent a level that does not depart from compensation the court can reasonably conclude, considering the evidence, the defendant reasonably would have been likely willing to pay had negotiations concluded. This amount should be based on CLBC's own evidence, the evidence of experts it called and aspects of the plaintiff's evidence regarding her activities. While this leaves unrestored reports and assessments the defendant was entitled to, I do not find, considering the totality of the circumstances, this should bar compensating the plaintiff.

**231**  I turn now to discussion of the facts and law relating to necessitous intervention. These facts are also relevant to officious intervention because they also inform findings on officious intervention. On the face of it, my findings on officious intervention should avert need for findings on necessitous intervention. While their underlying principles and factual situations may be shared, necessitous intervention focuses on the specific element of preserving an individual's, life, health and estate in pressing circumstances. Further, if this matter should proceed further, and my analysis of officious intervention be found in error, the plaintiff may still be entitled to compensation on the basis that her actions constituted a necessitous intervention, at least for a certain period of time.

**f) Necessitous intervention**

(1) Facts: necessitous intervention

**232**  I turn now to facts focused on necessitous intervention, followed after by the law.

**233**  The nature and extent of the plaintiff's involvement in the life of Lydia Savone is an important part of the facts to consider when deciding whether the plaintiff's July 11, 2007, intervention and the care she provided Ms. Savone was necessary.

**234**  The plaintiff emphasized she had known Lydia Savone since 1975, when Ms. Savone entered Donald Patterson School.

**235**  A series of serious incidents occurred over the years involving physical aggression and assaults by Ms. Savone. In 1979 an assault on a caregiver in a group home led to her expulsion from the home, followed by numerous other incidents well known to both parties.

**236**  I find that between 1975 and July 2007, the plaintiff, through her classroom teaching, two-year therapeutic residential program, day care program and the help she gave to Pat Chalmers in dealing with Ms. Savone's behavioural and health problems, had been continuously and closely involved in the plaintiff's life. I find the plaintiff was called on to deal with various authorities when Ms. Savone's aggressive behaviour in public caused problems. Considering the evidence as a whole, I find the plaintiff had been uniquely successful in managing Ms. Savone's behaviour and that a close bond developed between the plaintiff, who now, after the death of Ms. Chalmers, is Ms. Savone's closest human bond.

**237**  As for Ms. Savone's health problems, when she developed Type II diabetes in 2004, the plaintiff helped Ms. Chalmers ensure Ms. Savone's medical needs were met. In December 2006, after Ms. Savone's admission to Surrey Memorial Hospital with her congestive heart failure, and the drug induced coma that followed so dialysis could be administered, she helped Ms. Chalmers. And after Ms. Savone's release in January 2007 from Surrey Memorial Hospital due to her verbal and physical abuse and aggression towards staff, she recuperated from her surgery for ten days in the plaintiff's home. At the time, Ms. Savone was on the plaintiff's day program, but the plaintiff did not seek compensation for the help she gave to Ms. Chalmers and Ms. Savone.

**238**  Also at the same time Ms. Savone was on the plaintiff's day program, she arranged for an Abbotsford physician to oversee Ms. Savone's medical needs; and from January 2007 to the end of June 2007, she assumed from Ms. Chalmers the responsibility of ensuring Ms. Savone's medical needs were met, without remuneration. At that time, Ms. Savone was suffering from insulin dependent diabetes, congestive heart failure, chronic kidney failure and diminished psychiatric and behavioural stability. During this period, the plaintiff took Ms. Savone in for her monthly blood tests and ensured she took all prescribed medication for her conditions. In my view, these accepted facts regarding the plaintiff's extensive knowledge of Ms. Savone's medical problems and care needs are relevant factors on the issue of necessitous intervention.

**239**  At the end of June 2007, Ms. Savone was still living with her mother. The Abbotsford Police Department telephoned the plaintiff and instructed her to take Ms. Savone to MSA emergency ward, there to be apprehended by the police under the *Mental Health Act,* [*R.S.B.C. 1996, c. 288, s. 28*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JT42-S17R-00000-00&context=). This police request arose out of complaints of Ms. Savone breaking and entering, and trespassing and making threats. After Ms. Savone remained in the MSA Hospital for about 11 days, discussions on her placement in the plaintiff's home took place at the West Abbotsford MLA's office. Involved were the plaintiff, Ms. Chalmers, a representative from the MLA's office, CLBC representatives and a psychiatrist from the MSA psychiatric ward. During discussions directed towards working out the details of Ms. Savone's residential care, Ms. Chalmers rejected what she had understood to be a proposal by the defendant for Ms. Savone's placement in a group home, and repeated her requests that her daughter be placed in the plaintiff's care. Nothing was finalized at that meeting.

**240**  On July 11, 2007, MSA Hospital psychiatric ward staff released Ms. Savone into the plaintiff's care. Due to Ms. Savone's behaviour problems in the hospital, her blood sugar levels, electrolytes and fluid levels had increased significantly and her health had deteriorated. This necessitated close supervision of Ms. Savone to ensure she complied with the regimen the plaintiff and Ms. Savone's physicians had established to try to stabilize and improve her condition. I accept that achieving this required a rigorous closely supervised diet and fluid regimen, which the plaintiff organized at the request of the family physician.

**241**  In September 2007, Ms. Savone was on the verge of kidney failure and required surgery. The plaintiff had to prepare Ms. Savone for surgery and arrange for transportation to all her appointments, health care meetings and to and from the hospital for surgeries.

**242**  After failed negotiations on December 13, 2007, the plaintiff took Ms. Savone to the psychiatric ward for admission. The evidence conflicted over why the plaintiff did this, the defendant suggesting that it was to use as a bargaining chip in negotiations; the plaintiff testifying she left Ms. Savone in hospital on the advice of Dr. Bayle, Ms. Savone's physician (that she should wait until 2008 and the matter was settled before bringing Ms. Savone home). The plaintiff conceded she was also distraught over the protracted delays and her inability to obtain what she saw as fair compensation, six months after taking Ms. Savone into her care. In any case, while Ms. Savone was in the hospital, she did not do well. She had to be physically restrained and medicated. The plaintiff testified the social worker in the hospital insisted the plaintiff attend and take Ms. Savone home. The social worker was not called to testify, but the evidence suffices to show Ms. Savone could not remain in the hospital, and I find the only realistic alternative in the circumstances was for Ms. Savone to return again to the plaintiff's care in January 2008.

**243**  Since then, the plaintiff has driven Ms. Savone to and from Royal Columbian Hospital for surgery and her initial dialysis treatments, later administered in Abbotsford. Ms. Savone attends her treatments in an ambulance. The plaintiff accompanies her. To minimize behavioural problems, I find it has been necessary for the plaintiff to accompany Ms. Savone on her dialysis treatments.

**244**  Considering the evidence as a whole, I find it amply supports the conclusion the plaintiff is able to manage Ms. Savone's behaviour more effectively than anyone else has been able to. I find the plaintiff has paid for Ms. Savone's out-of-pocket special dietary needs, provided her shelter, paid for some of her non-prescription supplies and provided her transport - other than trips by ambulance to the dialysis clinic. She has also attended to her care and supervision, managed her diet and ensured she is taking her medications properly etc., all since July 2007, unpaid.

1. Ms. Chalmer's evidence relevant to necessitous intervention

**245**  Ms. Chalmers described her frustrating experiences and eventual realization her daughter, whose IQ measures about 41, was incapable of learning the alphabet. School was unproductive, marked by disciplinary measures for acting out and little learning. Other children were cruel towards her daughter. An incident at school of sexual molestation led to Ms. Savone's mistrust of male physicians. At home, Ms. Savone became violent sometimes and when she was placed in a care facility she was eventually sent home due to her behaviour.

**246**  Ms. Chalmers said the plaintiff became involved with her daughter at age 14 or 15 and Ms. Savone was noticeably calmer in her presence. When she came home from her day programs with the plaintiff she was tired and easier to manage. However, at home, she sometimes continued to be aggressive, throw things around, and kick other people, and wandered onto neighbouring properties and refused to leave. After Ms. Savone was diagnosed with Type II Diabetes in 1996, Ms. Chalmers was engaged in a constant struggle, fighting constantly with her daughter over her dietary restrictions, and having to hide food.

**247**  She described the difficulties hospital staff had managing her daughter in December 2006/January 2007, when she had to be placed in a coma and on life support to administer dialysis. On one occasion, a strait jacket was required: it is uncertain whether this was in January or July of 2007. Ms. Chalmers testified she heard staff say they were amazed at the control the plaintiff had over Ms. Savone. She said she could not understand what the plaintiff did or how she managed to control her daughter, but said she did not have the skill or strength to do it.

**248**  Asked what concerns she had if the plaintiff were to be moved from the plaintiff's care, Ms. Chalmers said she felt Ms. Savone would harm herself, rip out her dialysis tubes and haemorrhage. She said she felt her daughter needed someone to look after her who understands her and who she trusts. Ms. Chalmers said she accepted her daughter did not have long to live but she could not accept CLBC making a decision that could harm her daughter. She said that whether or not CLBC likes the plaintiff personally, the plaintiff provided the best place for her daughter to be.

**249**  Ms. Chalmers rejected suggestions on cross-examination she had obstinately refused all options except care administered by the plaintiff, saying she realized that if the plaintiff were to not accept her daughter, CLBC would have to find an alternative. However, she said the psychiatrist at the hospital had recommended the plaintiff to her; and she also had her own long-term positive experiences about the plaintiff's abilities.

**250**  She rejected CLBC's proposal of what she had understood to be a group home, provided through the Mennonite Central Committee, as this form of care had been a dismal failure in the past. She did not feel capable of caring for her daughter with all her dietary and other care needs at home, and was concerned as her neighbours had complained to the police in the past. I accept Ms. Chalmers' self-assessment that she was no longer capable of caring for her daughter. She was elderly, not in good health, and her death before the end of the trial was not surprising. As for the Chilliwack registered nurse the defendant proposed, Ms. Chalmers felt her daughter would not do well in her care because of her behaviour, saying that if five nurses at Royal Columbian Hospital could not handle her daughter and she was kicked out of the hospital because of her behaviour, she could not see how one nurse, without the plaintiff's behavioural management skills, could do so. She testified she felt Mr. Morgan, the defendant's analyst, was pushy and made her feel like she had no say in the decisions, and that she was being manipulated into a situation that was not healthy for her daughter. She strongly felt Mr. Morgan was bent on moving her daughter out of the plaintiff's care. That is Ms. Chalmer's perception. She felt CLBC representatives did not know very much about her daughter, and they only wanted to promote the option of the Chilliwack registered nurse,who I note CLBC did not introduce to Ms. Chalmers or call as a witness.

**251**  As for the decision to move Lydia from the hospital into the plaintiff's home in July 2007, she said she was not clear on the procedures under the *Mental Health Act*, but gave her consent and encouragement that the plaintiff take Lydia into her care. She felt the plaintiff offered the only place Ms. Savone could go to, given the available options.

**252**  Ms. Chalmers testified she had no concerns whatsoever about the quality of care the plaintiff would provide. She believed the setting the Skibinski's provided was "beautiful and had been good for her daughter." She said the farm animals allowed her to keep away from negative involvement with other people, which was always a problem in their neighbourhood. She believed, were Ms. Savone to remain at home, the police would always be picking up Ms. Savone and taking her to the psychiatric ward. She said her daughter was the rare person who cannot go into the community, insisting she knew this as her mother. She testified her daughter was a square peg and not able to function in an apartment or as part of a group. She felt that no one else had ever come close over the years to providing the care the Skibinski's had given. She said she wanted Lydia's last years to be as healthy and happy as possible.

**253**  On cross-examination, she testified she had visited Ms. Savone twice since July 2007, but stopped contacting her in fall of 2008 in order to avoid agitating her daughter and instead kept in touch with cards and notes.

**254**  Counsel cross-examined Ms. Chalmers on a February 17, 2009, meeting with Diane Macrossen, Chris Thomas, Brenda Gillette and Lisa Mitchell, who CLBC presented as alternate caregivers. Ms. Chalmers felt they were capable people, but she was not satisfied they would care for her daughter as well as the plaintiff could, and was not satisfied they had cared for anyone else with problems similar to those of her daughter.

**255**  I found Ms. Chalmers a credible witness. She was not in good health and her recall of dates and the sequence of dates was not always firm. She related some hearsay statements of staff at MSA Hospital, but Mr. Toop, CLBC facilitator confirmed he heard similar remarks, and it accords with my findings that the plaintiff had been able to manage Ms. Savone's behaviour more effectively than anyone else.

1. Bruce Morgan

**256**  Mr. Morgan testified about his discussions with Ms. Chalmers. After Ms. Savone's release from hospital into Ms. Chalmers' care in January 2007, Mr. Morgan said he offered Ms. Chalmers in-home support services, with Ms. Savone continuing in the plaintiff's day program during the week. Mr. Morgan testified he assured Ms. Chalmers he would provide a home share placement later. Those discussions never took place, because, he said, Ms. Chalmers said there would be no home share unless it was with the plaintiff. He said he could not support that because the plaintiff would be in contravention of licensing.

**257**  He also testified about discussions he had with the plaintiff on July 6, 2007, while Ms. Savone was still in hospital. He said he would not support Ms. Savone going into the plaintiff's home because of the licensing issue. He testified the plaintiff became angry with him and said Hilda Kennerly would have to be moved so she would be in compliance. When asked why CLBC was prepared to provide interim compensation for the plaintiff in the form of respite monies, channelled through Pat Chalmers, Mr. Morgan said this was because support is based on need, independent of the licensing authority: He said the CLBC principle is to be helpful to the individual.

1. Jai Birdie

**258**  Questioned about the proposed registered nurse caregiver in Chilliwack, Mr. Birdi testified he did not have specifics about her except that she would be leaving her day job to provide care. He said he had no knowledge about whether the RN had training dealing with autistic people and did not have "lots of information about her" because CLBC first wanted to speak with Ms. Chalmers to see if she were open to this possibility. As mentioned, CLBC did not introduce the proposed care giver to the plaintiff or Ms. Savone, or call her as a witness to explain her experience and training.

1. Brenda Gillette

**259**  Brenda Gillette of the Chilliwack Association for Community Living likewise confirmed she had no knowledge of the RN's skills managing behaviour like Ms. Savone's, although she confirmed some individuals in the society's care exhibited some extreme behaviour associated with Alzheimer's.

1. Paul Toop

**260**  Paul Toop, a CLBC facilitator who prepared the Person Centered Plans (PSP) for Lydia Savone and Brian Brest, testified about his involvement preparing the Person Centred Plan and his January 2007 attendance at MSA hospital when Lydia Savone was a patient. He confirmed Bruce Morgan asked him in May 2007 to prepare a PSP for Lydia Savone. He said the PSP is based on an individual's circumstances, life, and needs, goals and aspirations. He felt the plaintiff had a persuasive case as to why the individuals in her care should remain. He testified that he interviewed staff at the hospital, and the psychiatrist in charge advised him they were impressed with the interaction between Ms. Savone and the plaintiff.

1. Dr. R. Starko

**261**  Dr. Robert Starko is a nephrologist, that is, a kidney specialist. Lydia Savone has been his patient since at least 2000. He saw her mainly in relation to her kidney disease but is also aware of her other medical problems. He wrote two medical reports, one dated September 22, 2008, and the other January 17, 2009.

**262**  In his report dated September 22, 2008, he states:

I have noticed a significant improvement in Lydia's overall condition since being cared for on a full time basis by Ms. Skibinski. When Lydia first started haemodialysis, she was very agitated and restless, and this made her treatments difficult, however Ms. Skibinski has the tremendous ability to calm Lydia down, and Lydia seem [sic] to be content and settled as long as Ms. Skibinski is present, and at her bed side. Ms. Skibinski also monitors her medications very closely, and would adjust doses accordingly. I have had multiple conversations with Ms. Skibinski, and she has tremendous understanding of Lydia's complex medical issues, her medications and dialysis treatment.

Lydia's condition has improved over the last one year compared to previous, and her multiple medical conditions seem to be relatively under control and stabilized. I believe that the care provided by Ms. Skibinski has been excellent and a routine has been worked out which has greatly contributed to Lydia's stability. I believe that a change in this routine and a move into in [sic] another living condition or facility would be detrimental. In particular, a change in routine may result in Lydia becoming agitated or unsettled which would make her dialysis treatments very difficult ...

Therefore, as Lydia's Nephrologist, I support her continuing to live with, and being cared for by Ms. Skibinski. I believe this is in Lydia's best interest, and any change may result in a significant deterioration in her condition.

**263**  In his January 17, 2009, report, he states:

She suffered severe hypoxic brain injury at birth, and as a result has mental disability and behavioural problems. She has diabetes mellitus, hypertension, and congestive heart failure. Her kidney function had been gradually deteriorating, and in December 2007, she progressed to end stage kidney disease (ESRD) and needed to be started on haemodialysis. She was initially receiving her haemodialysis treatments at the Royal Columbian Hospital in New Westminster; however, she was transferred to the new Abbotsford Regional Hospital in August 2008. She has been dialyzing 3 days per week, usually 4 hours per treatment. She has a dialysis perma-catheter in her right internal jugular vein. Dialysis is a life sustaining therapy and an individual would not be able to survive more than 2-3 weeks without the dialysis.

When Beverley Lydia Savone was initially referred to me, she would be accompanied by one of her family members. Lydia tended to be agitated, restless, and would not allow me to examine her and would often leave the office before I could properly assess her. We had difficulty getting her to go to the lab for her blood tests, which were needed to monitor her diabetes and kidney function. When Lydia's condition deteriorated, and she needed to be started on haemodialysis in December 2007, I was very concerned that she would not be able to comply or that she would be very restless and agitated, which would make her dialysis treatments very difficult. She would have to allow the nurses to hook up the catheter in her neck to the dialysis machine, and lie still and quiet for the 4 hour dialysis treatment.

Since starting on haemodialysis Lydia Savone has been accompanied by her care giver Ms. Sheila Skibinski. I have noticed a dramatic improvement in Lydia's behaviour, as she seems to be much calmer. Ms. Skibinski accompanies Ms. Savone to all of her dialysis treatments and sits with her while the nurses are hooking her up to the machine, and is able to keep her calm and settled. Ms. Skibinski will then go to the waiting room or possibly for a walk but always has her cell phone and can be reached if there are any problems. On several occasions, the nurses have had to call Ms. Skibinski back to the renal unit if Lydia was having any difficulties. Again, as long as Ms. Skibinski was at her bedside, then Ms. Savone seemed to be calmer. This has allowed her to complete her 4 hour dialysis treatments with minimal disruption.

**264**  In his oral testimony, Dr. Starko said Lydia's life expectancy on dialysis was about five years. He confirmed the plaintiff required insulin, which requires very close monitoring. If she has too much insulin she will become hypoglycemic, and become very ill from that. If she has too little, this could result in high blood sugars, hyperglycemia, which could result in her feeling unwell. He explained that most patients would normally notice changes in their condition, but because Ms. Savone could not communicate well, it would be difficult for her to notice changes or to communicate them. He felt that high blood sugar would not be noticed right away and it would some time before it would be noticed.

**265**  He explained that if Ms. Savone is agitated, this interferes with the dialysis because staff have to take her blood pressure, glucose readings and connect her to the catheter; so she has to be calm while hooked up. He said it would be very unsafe if Ms. Savone were thrashing around. Her blood passes through a filter and the person has to be calm while that circuit is being completed. If the patient were thrashing around, the machine could be turned off and the system disconnected.

**266**  He testified he did not observe Ms. Savone thrashing around personally (at a time when she was not accompanied by the plaintiff), but was informed by the patient care coordinator that it had become quite a problem. He testified that although he is not present at all times, when he has been present, Ms. Savone seems happy and cooperative and he saw affection between the plaintiff and Ms. Savone. He testified Ms. Savone's overall health is good and physically she looks healthy with good colour and blood pressure.

**267**  Questioned on his stated concerns about any change in routine being detrimental, he explained that any change in Ms. Savone's living condition or caregiver might result in disruption and imperil her medical condition. He said Ms. Savone has required intensive care and monitoring, and he could not see why there is any need to change and felt there might be some risk in changing her living arrangement.

**268**  Dr. Starko was questioned about the catheter permanently inserted. He said if a person pulls it out there would be a lot of bleeding and if not recognized and pressure not applied this could result in heavy bleeding. He felt Ms. Savone would not be able to recognize that. He said he could tell from the catheter that it was well taken care of; the skin around the catheter was in good condition, as was hygiene in general. He explained that a person could pull out the catheter, which can be irritating and the fact there had been no indication of problems or suggestions she had been touching or scratching the area was a positive sign. The area has to be kept clean and dry. He explained the general state of the patient's hygiene has been good when coming for treatments. He testified that if the plaintiff was being showered everyday with no problems; the catheter was obviously being protected very well.

**269**  Dr. Starko explained other complications can develop over time with dialysis. He said it is common for anemia to develop, which may require supplemental medication. Also, the parathyroid gland tends to enlarge and become overactive, which can lead to bone disease, cardiovascular disease and hardening of the arteries, especially in the legs. Dr. Starko testified Ms. Savone already has heart problems and diabetes, which might be affected. He explained that even before commencing dialysis Ms. Savone had problems; what was different about her situation was the addition of her behavioural problems and mental disability.

**270**  When questioned about Ms. Skibinski's depression and internalization of anxiety, he agreed stability was important for Ms. Savone. However, he stated depression is a common condition which occurs in varying degrees and does not necessarily affect the ability of a person to be a caregiver. However, if it were to escalate, that could be a risk to Lydia. He acknowledged he was not an expert in psychology and psychiatry or a behavioural expert, and acknowledged he could not say with certainty Lydia Savone's health would be compromised by a change of caregiver.

**271**  I found Dr. Starko a credible expert witness and accept his opinion, and conclude that the plaintiff's care of Ms. Savone's health care needs has been exemplary and, from the perspective of Ms. Savone's medical condition, there is a realistic risk that a transfer to another caregiver could be detrimental to her health.

1. **Defendant's position on necessitous intervention evidence**

(1) Dr. Starko

**272**  The defendant submits the value of Dr. Starko's testimony is limited by the fact he had never seen Ms. Savone in the care of another professional caregiver. Counsel points out she is given a sedative when undergoing dialysis and the plaintiff is able to go for a walk while she receives it. Counsel also relies on Dr. Starko's testimony that the plaintiff is not the only person capable of properly caring for Ms. Savone.

1. Dr. Lee

**273**  The defendant relies on the evidence of Dr. Lee, a psychologist specializing in behavioural modification and management. He prepared a report dated January 28, 2009, which sets out information he required if he were to properly assess Ms. Savone's behaviour and develop the most effective way to plan for transitions to new caregivers. Before trial, the defendant applied in chambers for an order allowing Dr. Lee access to Ms. Savone in the plaintiff's home so that he could prepare an assessment, but the plaintiff successfully opposed the application. Counsel for the defendant points out Dr. Lee agreed that for any individual with significant developmental disabilities a significant change in circumstance could be challenging; but he maintained that with proper professional planning and the implementation of a transition plan, these can be mitigated. He opined that through behavioural intervention plans and given sufficient resources, such as professional support and materials, almost all behavioural problems can be well managed. He testified his company had successfully accomplished many transition plans for individuals with complex needs.

**274**  The defendant submits, based on the testimony of Dr. Lee and Dr. Starko, it would be wrong to assume Ms. Savone would be unable to transition successfully to another caregiver; therefore, it maintains her intervention was officious.

**275**  Counsel for the defendant also submits that far from being necessitous, the plaintiff has placed her own financial interests ahead of the needs of Ms. Savone, that being the true reason for her intervention. While there is evidence that Ms. Skibinski was resistant to assistance from CLBC, and has opposed the involvement of certain outside caregivers, these actions alone cannot be determinative on the issue of necessity.

**h) Necessitous intervention analysis**

1. Overview

**276**  The parties both rely on *Matheson v. Smiley*, [*[1932] 2 D.L.R. 787*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DK1-JNY7-X268-00000-00&context=) (Man. C.A.) [*Matheson*], discussed earlier, to support its assertion the doctrine of necessitous intervention requires a plaintiff to have acted in an emergency situation where it was impracticable or impossible to obtain the consent or agreement of the other party. Counsel submits that neither when the plaintiff took Ms. Savone into her care, nor any time after, was there any evidence her health or life were in immediate danger.

**277**  The defendant further relies on its offers of alternative placements, which Ms. Chalmers refused; submitting the plaintiff's care was not necessitous because alternatives were available. Thus, counsel argues the plaintiff failed to prove the only way to preserve the life and health of Ms. Savone was or is for her to remain in the plaintiff's care.

**278**  Counsel for the defendant urged that if the court were to accede to the plaintiff's position in the circumstances of this case, it would undermine the defendant's ability to manage its resources as it sees fit, a concern noted by Maddaugh and McCamus, *supra*, at p. 31-32:

A limiting factor in these cases may arise from a concern to discourage intervention by private parties which might impair the ability of public authorities to exercise a discretion to determine the level and timing of their expenditures in light of their own perception of the public interest. Such concerns should not weigh heavily in situations of immediate peril to public health and safety nor should they, we argue, in other situations where prompt intervention is in the public interest, where official intransigence or incapacity has been established, and where the intervener is an appropriate person to discharge the duty in question. In absence of such considerations, however, or in situations where the lack of a clearly defined statutory duty suggests that a broad discretion to determine whether or not to act has been conferred on the public authority, it would be appropriate to discourage intervention and to restrict the aggrieved citizen to such redress as is available through the usual mechanisms of indictment, mandamus, and the political process.

1. Discussion of the law

**279**  Maddaugh and McCamus note that the law of officious and necessitous intervention rarely has been discussed in the law: p. 3-37.

The fact that there are few cases on this point is unsurprising. "In many cases, the "good samaritan" does not attempt to charge for his services. Where he does charge for the services, most people are only too willing to pay a reasonable fee for such services" (Fridman, G.H. L. and McLeod, James , *Restitution* (Toronto: The Carswell Co. Ltd., 1982) at 498).

**280**  Cases of necessitous intervention first appear in maritime shipping cases. The claim then finds mention in cases involving carriage of goods over land (*Falcke v. Scottish Imperial Ins. Co.* (1886), 34 Ch. D. 234 (C.A.); *Great Northern Ry. Co. v. Swaffield* (1874), L.R. 9 Ex. 132). Conceptually, the law developed within the category of pre-existing contracts between parties: in the case at bar, the relationship between the parties began as a contractual one, but manifestly moved beyond its contractual beginnings.

**281**  Finding necessitous circumstances outside existing contractual relationships represents a significant expansion of the law. This seems a response to the perceived presence of overriding moral duties in situations that called for action, clearest in cases where third parties intervene to a preserve an individual's life and health, with no opportunity to contract. In *Hastings v. Seman's Village*, [*[1946] 4 D.L.R. 695*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K731-JS0R-2473-00000-00&context=) (Sask. C.A.), the court found the plaintiff doctor, also the defendant's public health officer, had, in setting the defendant's broken bones after he was struck by a car, acted within the scope of the duties under his office. As duties of public health officers did not reasonably include setting broken bones, the court had to look outside the scope of his duties to justify the necessity of the intervention. This finding suggests that a broad duty to preserve health and life takes precedence over rigid adherence to contractual principles.

**282**  In *Samilo v. Phillips* [*(1968), 69 D.L.R. (2d) 411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S39B-00000-00&context=) (B.C.S.C.) [*Samilo*], the court found that after an incapacitating stroke, the son's paying of his father's tax liabilities to protect him from stress constituted a necessitous intervention.

**283**  But even in extraordinary circumstances, such as urgently discharging another's duty, statutory or otherwise, "the intervenor should only be allowed to claim restitutionary relief where the necessaries are supplied inofficiously" (Fridman and McLeod, p. 509). See also: *Davey v. Cornwallis*, [1931] 2 D.L.R. 80 at 83 (Man. C.A.); *Colbey v. Colbey* (1866), L.R. 2 Eq. 803.

**284**  Counsel for the defendant argues *Matheson* stands for the proposition that the doctrine demands an emergency situation, one where it is impractical or impossible to obtain the consent or agreement of the other party. *Matheson* does not say this. To refresh *Matheson,* the plaintiff was the surgeon who had responded to calls from friends of a man who had suffered a serious shotgun wound. The evidence showed he was in no condition to consent or acquiescence to surgery. The patient died. The executrix refused to pay the surgeon's bill, denying an enforceable contract and arguing there was no request binding on the patient. At paragraph 6, the Court of Appeal noted it was "almost needless to say that all that was done by the two friends and Dr. Condell and plaintiff was done in good judgment in the emergency." The court added, at para. 9, that "the common law takes notice of such emergencies and declares to be a duty what is almost invariably done upon human impulse."

**285**  The court referred to *Metropolitan Asylum Dist. v. Phil* (1881), 6 A.P.P. C.A.S. 193, at 204, and the comments of Blackburn J.:

Those who have the charge of a sick person, if he is helpless (whether the disease be infectious or not) are, at Common Law, under a legal obligation to do, to the best of their ability, what is necessary for the preservation of the sick person. And the sick person, if not helpless, is bound to do so for his own sake.

**286**  The court in *Matheson* also considered, at para. 11, non-medical cases that could not be considered emergencies; and it referred to *Rhodes v. Rhodes* (1890), 44 Ch. D 94, where the court had laid down the general principle:

but whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property [105].

**287**  At paragraph 13, *Matheson* refers to a husband's obligation to provide his wife's necessaries and the liability of parish authorities to provide necessaries of a sick pauper.

**288**  Maddaugh and McCamus also note cases where judges have granted relief where the benefit consists of the fulfilment of a duty owed by the defendant, "whether that duty is one owed by the defendant to a third party or imposed as a matter of public responsibility."

**289**  *The Concise Oxford Dictionary of Current English*, 9th ed., *s.v.* "necessitous", again offers some guidance. It defines 'necessitous' (as an adjective), meaning poor or needy. In sum, the defendant submits the only way for the plaintiff to bring herself within the necessitous intervention principle is to prove an emergency, that the only way to preserve the life and health of Ms. Savone was for the plaintiff to bring Ms. Savone into her care and for her to remain there. In my view, this is a misreading of *Matheson.* It unjustifiably narrows the law's application to emergency situations, such as those found in the fatal 'gunshot wound' facts before that court. The other examples of necessitous intervention mentioned in *Matheson* could not be considered emergencies of such a kind; likewise paying an ailing father's tax account [*Samilo*].

**290**  In a case such as the one at bar, the defendant has not persuaded the plaintiff must demonstrate a pressing emergency of the kind urged. The *Oxford Concise Dictionary* definition of "necessitous" [adj] denotes poverty and neediness. The term 'necessaries,' as used in the cases, suggests necessaries of life and health, such as medical care, food, water and other necessary human sustenance--which in contemporary mores could encompass psychological and other forms of care deemed necessary to preserve mental health. Many cases will involve emergencies. But deciding whether a plaintiff's intervention was necessitous requires a broader view of saving life and limb than just urgent life-saving action. A needy person can die no less certainly from a month's lack of necessary care than from want of an hour's. The court's deciding whether a plaintiff's (non-meddlesome) intervention was necessary to preserve or (maintain) the life and health of an individual facing emergent or existing threats turns on the axis of the nature of the intervention and the medical and other evidence before it. Further, it is noteworthy the case law, most notably *Samilo*, embraces the proposition that necessitous intervention should extend to include "money expended for the necessary protection of the person and the estate of the lunatic" [*Samilo*, para. 53, emphasis added]. While this proposition arose where the family wanted to protect the health of a father after he had suffered a stroke, the protection of the estate was deemed necessitous.

1. Findings on necessitous intervention

**291**  I have already written at length on the exigencies when the plaintiff took Lydia into residential care and the limited care options available at the time.

**292**  In my view, Dr. Starko's report and oral evidence, considered with other witness testimony and the authorities cited, support, on the balance of probabilities, a finding of necessitous intervention.

**293**  As for Dr. Lee's opinion, he has outlined information he would require before he could prepare a proper evaluation of Ms. Savone's behaviour and develop a strategy for dealing with it and the challenges involved in her transitioning a new caregiver would face. Given the defendant lost its application for an order permitting Dr. Lee to assess Ms. Savone, I appreciate he could not testify beyond what he did. But even if he had been able to provide the defendant with a favourable opinion and point to many successful transition plans, his opinion in the context of this case would remain largely hypothetical, particularly measured against the plaintiff's 30 years of experience dealing with Ms. Savone. As defence expert witness David Thomas observed, there is no substitute for practical care experience. Further, the evidence of Ms. McManus and others about the plaintiff's abilities is significant.

**294**  Moreover, based on Dr. Starko's evidence, Ms. Savone has already entered into, if not exceeded the very limited range of her three to five years life expectancy. This should be considered when evaluating the plaintiff's interventions and, to some extent, whether they continue to be necessitous. A concern for individual human dignity informs much of the law and is always relevant. In my view, it would be a gross error to underestimate the strength of the bonds of affection that would have naturally developed in the relationship between the plaintiff and Ms. Savone. I do not think it too much to characterize it as a familial bond. Despite her low intelligence, Ms. Savone can communicate to some extent and clearly feels human bonds and affections. How confidently can one predict the effects on Ms. Savone of a transfer into the care of a stranger? In rhetorically asking this question, I am neither overlooking that sometimes new caregivers become necessary, nor am suggesting the prospect of emotional upset is the axis upon which everything must turn. But as Mr. Thomas stated in his opinion, "if it's working, it makes no sense to change."

**295**  Questions of life and health embrace more than the strength of pulses and levels of kidney functioning. The defendant and its employees know this and impressively incorporate this thinking within own stated commitment to what could be characterized as the dignity of the whole person and the need to treat clients as unique individuals, with their own needs, hopes and aspirations; and, in a case such as this, this becomes a relevant factor on the question of necessitous intervention.

**296**  The counsel for the defendant strongly argued at more than one point of her submissions that it would be particularly unfair to require it to pay the plaintiff in circumstances where it has specifically rejected the plaintiff's services. However, it rejected those services primarily because the parties could not mutually agree on their value; not due to the plaintiff's unsuitability. Additionally, as mentioned, and not yet fully discussed, fairness to the defendant require me to consider the implications of this concern before making a dispositive order.

**297**  The suggestion that the defendant can only stand by helplessly while the plaintiff renders invoices to it, is not necessarily a tenable position. The court's *parens patriae* jurisdiction suggests CLBC was not without some recourse in dealing with Ms. Savone, especially if it were concerned about the nature and quality of her care. The court's *parens patriae* power over born children permits the court to override the liberty of parents to make decisions on behalf of their children where a parental choice might result in harm to a child: *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [*[1995] 1 S.C.R. 315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CK-00000-00&context=). CLBC. The defendant conceivably could have sought a court order to assist it and remedy the situation if it believed Ms. Skibinski's care posed a risk to Ms. Savone. But this issue was only touched on and not fully argued. I make no findings on this point and do not find it essential to my final reasons.

**298**  Further, allowing for the sense such interventions should usually be discouraged, I find the plaintiff's prompt intervention in July 2007 is in the public interest. All depends on exigent circumstances. In this case, Ms. Savone needs were great, the plaintiff ready, willing and able and suitable alternatives not readily available at that time. Given the increasingly strained relationship between the parties at the time, the defendant might not have looked on Ms. Skibinski as their ideal partner in July 2007. But her skills were excellent, there was some anticipation, at least, of a contract; and differences between the defendant and the plaintiff should be set aside in view of Ms. Savone needs at the time and, on balance, the public interest values at stake.

**G. Summary of findings on necessitous intervention**

**299**  Considering all Ms. Savone's exigent needs, especially her need of careful oversight of her diet and medications, the plaintiff's skills and experience, the close relationship between Ms. Savone and the plaintiff and the lack of ready suitable alternatives, I find the plaintiff's actions on July 11, 2007, constituted a necessitous intervention. What remains uncertain is how long Ms. Savone's necessitous circumstances, viewed from the law's perspective, lasted. Of course, the fragile state of Ms. Savone's health and her care needs continued unabated as time went on and, given the plaintiff's abilities and the bonds between her and Ms. Savone, the plaintiff's care was a continuing life and health sustaining benefit to Ms. Savone. Nonetheless, the law of necessitous intervention affirms assistance in pressing circumstances. It was not conceived to govern situations spanning years. Sometimes an extended period of critical medical care, for example after a serious accident, might extend for months. But the law of necessitous intervention cannot encompass the three year time period in the case at bar. While CLBC's duty to provide funding for Ms. Savone's care, combined with the lengthy history of its provisioning of funds for Ms. Savone's care and other considerations renders the cost of Ms. Savone's care needs an inevitable expense and the plaintiff's care, if unofficious, an incontrovertible benefit, the plaintiff cannot base a claim for unjust enrichment for the entire period of her care on the fact that her care for a time can be characterized as a necessitous intervention.

**300**  In such factual situations as these, bright lines cannot be drawn from ink distilled from precise calculations. I find a period of 8 months would be generous. This encompasses the fact the parties were either anticipating or had entered into negotiations that started in December 2007, and collapsed in January 2008. Thus, the issue of whether the plaintiff's intervention was a necessitous one becomes somewhat secondary for much of that period as the parties were anticipating formation of a contract. This time period also allows for the fact it required the defendant approximately 4 months to find an alternative care placement for Hilda Kennerly: given Ms. Savone's challenging combination of care needs and behavioural problems, it would likely take at least that time to place Ms. Savone with another care giver.

**301**  To this point in my reasons then, this is a cumulative summary of my findings:

1. The plaintiff provided necessary services and incurred expenses of a kind the defendant was obligated to fund.
2. The defendant likely would have had to pay someone for those expenses and for performance of those necessary expenses and incurred services.
3. There was a reasonable expectation she would receive something for her services despite the absence of agreement. Donative (or gratuitous) intent cannot be inferred.
4. Her conduct was not officious, for the reasons given, most notably the finding that to the extent the plaintiff's conduct deprived the defendant of a significant interest, it can be restored by taking these interests into account when ordering compensation. Accordingly, the plaintiff's conduct was not offensive to the degree recovery is completely barred.
5. Therefore, analysis based on the reasonable expectations of the parties does not provide a juristic reason to allow it to retain whatever benefit it has received, with the exception of the day program in effect until January 1, 2007.
6. Considering fairness to both parties, it is fair and just for the defendant to disgorge the benefit it has received. *Peel* [para. 61]. Fairness encompasses the defendant's legitimate concerns about its need to exercise its discretion, taking into account its fiscal limits, statutory and policy guidelines and obligation to the community to distribute its resources in an equitable way. This must be considered when assessing compensation, as discussed in these reasons.

**H. Compensation introduction**

**302**  The defendant's cornerstone position on compensation is that the plaintiff's claim places CLBC in what it calls the untenable position where it can use only the plaintiff's services at the remuneration she sets for them. Counsel referred to *Inglis v. TD Securities Inc.* [*(2006), 50 C.C.E.L. (3d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JCJ5-24NN-00000-00&context=) (Sup. Ct.) in support of the principle that "it is not the function of the court to rewrite a contract for the parties:" para. 28, citing *Pacific National Investments Ltd. v. Victoria (City)*, [*[2004] 3 S.C.R. 575*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12T-00000-00&context=), at para. 31. Counsel submits the court should not force unwilling parties into a contract. This is settled law.

**303**  However, *Inglis* dealt with a wholly different fact pattern, where a plaintiff sued a defendant for her use of a client list the court found was wholly protected by a restrictive covenant the plaintiff employee had signed. This contract constituted a juristic reason for the court to deny the plaintiff had been unjustly enriched by its retention of a certain portion of the client list. It was in this context that the court referred to the principle against courts rewriting of contracts, namely the terms of the restrictive covenant. In the case at bar there was no contract.

**304**  In its further submissions on compensation, CLBC emphasised its limited resources, the demands placed on it and its obligation to allocate what resources it has for the overall good of the community. To meet its community obligation, it says it is imperative that it retain its discretion how to best allocate its limited resources. I have already agreed the defendant's limited resources and wider community obligations are an important factor when it comes to the question of compensation; but the mere existence of the obligation, in and of itself, does not defeat the plaintiff's claim. As discussed, the court's obligation to consider fairly the defendant's interests as well as fairness to the plaintiff and the parties' realistic expectations require factoring in of the defendant's concerns when assessing compensation. If it is not possible to do so, this argues for barring the plaintiff's claim. Finally, concerns about such matters should not be blown out of proportion either.

**305**  The defendant's community obligations already encompass its obligations to Ms. Savone, a long time client of the defendant and previous government ministries: her needs and entitlements are undoubted. Her circumstances, which include her long term relationship with the plaintiff and her challenging care needs, are factors the defendant was obligated to consider. Further, the defendant was obligated to consider the wishes of Ms. Savone's mother. The duty of the defendant to ensure it does not unduly fetter the exercise of its discretion extends to these and other considerations extensively discussed in these reasons: *Fahlman - see para. 108 of the reasons herein*. On the other hand, the plaintiff's reasonable compensation expectations must encompass the defendant's wider community obligations and the discretion it owns to determine what reasonable amount it is able and ready to pay for her services.

**306**  In *Thomas v. Fenton*, [*2006 BCCA 299*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1N8-00000-00&context=), [*Thomas*] the BC Court of Appeal held that consideration of unjust enrichment requires a "global analysis of the circumstances of [the] parties" [para. 25]. I have attempted to follow that direction in the case at bar.

**I. Factors considered when valuing services for unjust enrichment**

**1. Introduction**

**307**  In assessing the appropriate value of the plaintiff's services, I have considered:

1. the Guide to Support Allocation used by the defendant to determine what it considers the appropriate level of funding;
2. the nature and extent of the care the plaintiff provided to Ms. Savone;
3. the plaintiff's skill and expertise in relation to Ms. Savone's needs;
4. negotiations between the parties and their at-rest positions before they ended;
5. the defendant's evidence it was expecting a counter-offer from the plaintiff it would have considered; and that additional funding for certain items, such as respite, had not yet been discussed when negotiations ended;
6. expert testimony called by the defendant about amounts other expert caregivers would expect to be paid for their caring of Ms. Savone;
7. fairness to both parties, as discussed in these reasons and in accordance with *Peel* and considering all the circumstances in their totality: *Thomas.*

**308**  The main operative premise for compensation is that it should reflect amounts which, based on the evidence and the above factors, can be reasonably inferred the defendant would agree to pay for services provided by the plaintiff. This operative premise is necessary to ensure the compensation ordered reasonably restores the defendant's interests it was deprived of by the plaintiff's conduct, as discussed; notably its discretion to decide what services it will pay for and the level of remuneration it is able and ready to pay for services--the defendant's having agreed the plaintiff was a suitable care giver for Ms. Savone.

**a) Guide to support allocation**

**309**  On December 13, 2007, the defendant made its first offer to the plaintiff for residential care of $4,500 a month. This figure did not include the cost of the residential day program, which the parties had not discussed initially; but which the defendant valued at $1,922.43--and both parties eventually agreed on.

**310**  The defendant's initial offer made no provision for transportation, respite care or other special medical expenses, as I understand the evidence of Mr. Morgan and Mr. Birdi; but the defendant was not opposed to paying reasonable amounts for those items.

**311**  The plaintiff felt the defendant's offers totally lacking. She had offered to accept $8,000 for combined residential and day care, plus $2,733.58 for expenses and $2,100 for respite. These latter items would have been in addition to her combined 'wage' of $96,000 annually.

**312**  Several further offers and counter-offers ensued. I will not recount those here.

**313**  The plaintiff's position is that she has been providing Ms. Savone intensive 24 hour critical care. She maintained the defendant's offer failed to recognize the level of skill and care she was providing and the challenging dynamics created by Ms. Savone's complex combination of behavioural problems, dietary needs, care and protection of indwelling tubes, as well as thrice weekly trips for dialysis and Ms. Savone's need for constant supervision. The plaintiff says the defendant remained "irrationally fixated" on the level of funding available for residential homecare, which she insisted did not accurately reflect the level of care she was providing.

**314**  The Guide to Support Allocation used by the defendant describes these two types of care, Types D and E as follows:

Type D

Resource: The Resource provides all basic components of care: meals, space, personal care, medical and dental care and access to community resources and activities.

Individual Needs and Responsibility: Individuals require considerable support, training and supervision related to behavioural and physical needs, but may take responsibility for some self care and activities of daily living. Individuals are never left alone. Programming is structure and goal-oriented with a high-level of training.

Staffing: The resource has sufficient trained staff with specialized expertise on site to manage crises or ongoing health care or behaviour management problems. Qualified staff are on duty at all times to provide constant supervision. The night shift is awake. Access to professional consultation is an integral aspect of planning and service delivery.

Type E

Resource: The resource provides all basic components of care: meals, space, personal care, medical and dental care and access to community resources and activities

Individual Needs and Responsibility: Individuals have severe emotional, behavioural or physical needs. Training and behavioural or physical management are key aspects of resource programming. Individuals are never left alone and need intensive training possibly requiring extra staff. Programs and activities are structured and use ongoing assessment and modification. Residents are dependent on staff for self-care, etc.

Staffing: The home provides constant supervision by qualified staff. Specialized support or expertise is available for individuals' exceptional needs or difficulties. Staff have specialized expertise or immediate access to professional personnel. One or more qualified staff are aware on the night shift. Staffing ratios allow for constant supervision and intensive involvement with residents. Professional consultation is an integral component of plan development and implementation.

**315**  The three experts the defendant called as witnesses to testify about the appropriate level of funding agreed the home share model was appropriate, even preferable, for Ms. Savone, despite the high level of care required. I find Ms. Savone's care needs reflected significant elements founds in Type E (full time staffed residential care), such as the level of Ms. Savone's emotional, behavioural and physical needs. Further, her renal care program requires ongoing assessment and modification, and the plaintiff has developed considerable technical expertise in its maintenance. Still, I find the plaintiff's characterization of her care of Ms. Savone as "24/7 critical intensive care" is not apt. She testified Ms. Savone gets out of bed on her own two to three times nightly to go to the bathroom but does not require the plaintiff's help. The plaintiff monitors Ms. Savone with a baby monitor. In effect, the plaintiff is on standby at night.

**316**  While it is true Ms. Savone's diabetic condition requires close monitoring and scrupulous attention to the details and timing of her diet, medication and insulin schedule, these, along with her thrice weekly visits to the dialysis clinic, follow an established pattern with no indication of periodic emergency situations. Ms. Savone does require a constant level of supervision. She cannot be left unattended or there must, at least, be someone nearby. If she were to pull out her tubes or fail to follow her dietary and medication regimen, the consequences for her health would be serious.

**317**  Although I heard considerable debate about whether the base Type D or E was most appropriate, in my opinion too much emphasis was placed on this aspect of the funding analysis. Analysts' flagging of special care needs and their assigning of an appropriate level for additional support provides sufficient flexibility to bridge gaps lying between Type D and Type E in order to find an appropriate level of funding.

1. **Expert testimony**

**318**  The defendant placed great emphasis on testimony of experts it called, submitting that any compensation awarded should be based on what the defendant would pay other qualified caregivers for services the plaintiff has been providing: see *Blake v. Wells Estate* [*(2007), 75 B.C.L.R. (4th) 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21YW-00000-00&context=).

**319**  The plaintiff called three experts: Mr. Chris Thomas, Executive Director of Pacific Coast Community Resources [Pacific Coast]; Brenda Gillette, Executive Director of Chilliwack Society for Community Living [Chilliwack Association]; and Daniel Collins, Executive Director of Langley Association for Community Living [Langley Association]. I found all three qualified to express opinions on the appropriate level of funding. They based their opinions on their experience and the documentation provided them. Mr. Thomas testified Pacific Coast is one of the few agencies that serve clients with medically fragile conditions; one Pacific Cost client had been receiving dialysis until he died not long before Mr. Thomas testified.

1. Mr. Thomas quoted $5,916.67, monthly, excluding administration and coordinating fees of $350 a month. Additional amounts included":Bi-weekly respite (based on 26 weekends at $200 per day) $866.67
2. Respite vacation (based on 3 weeks per year at $200 per day) $350
3. Recreation and travel for caregivers $150
4. Training for caregivers $50

**320**  Mr. Thomas's quote did not include amounts for a day program. He confirmed the host family payment was intended to pay the host family for their services. They would not be expected to pay expenses out of that amount. He did not include any amounts for non-prescription supplies, which he said should be included as a separate line item.

**321**  When he prepared his quote, Mr. Thomas was not aware Ms. Savone was attending dialysis treatments three times per week. He said he would increase the family wage to reflect that. Mr. Thomas agreed on cross-examination that upon reviewing the plaintiff's health and emotional problems, he would not move the client "if it was working."

**322**  Ms. Gillette explained the Chilliwack Association had experience in placing physically aggressive clients, some with special needs such as dialysis. She quoted $4,460 for residential care, exclusive of agency fees, plus $360 for additional hourly supports, total $4,800. Also included was $600 monthly for respite support.

**323**  Additionally, she explained if Ms. Savone had special dietary needs that were health related, money should be available for them. Likewise, medication and supplies for catheters etc. should be paid as a separate item. Her review of the information available did not tell her Ms. Savone required extra support or attention during the evening or that the plaintiff was up every night attending to her. She said housekeeping assistance was available but was payable under a separate fund that was not well explained.

**324**  She agreed on cross-examination it would be a "real challenge" placing the plaintiff, who she thought had benefitted from a homecare provider who recognized she is unique. Ms. Gillette thought this would be one of the better options for Ms. Savone.

**325**  In cross-examination, Ms. Gillette agreed she had not reviewed school records, older day program records, or prior caregiver records and she was unfamiliar with the plaintiff's "skill set." She acknowledged that no caregivers registered with the Chilliwack Association had the same health and behavioural pattern as Ms. Savone. As for the day program, she said the annual cost for this would be $31,339, or $602 a week. She did not factor in transportation for dialysis treatment three times per week, but as noted earlier, *B.C. Ambulance* drove Ms. Savone for her treatment.

**326**  Mr. Collins of the Langley Association explained he had been involved for 30 years, and had worked for 18 years, with the Langley Association, with myriad children and adults who had a variety of challenges and capacities. He and his wife had, for 12 years, personally cared for a young man with complex developmental, behavioural and aggression problems as well as eating problems until he was placed in home sharing at age 20.

**327**  Mr. Collins quoted $4,954.58 for residential care, exclusive of agency fees. He set respite at $650 monthly.

**328**  He assumed a day program in addition to the residential program but did not cost that. Mr. Collins assumed the day service provider would attend to the dialysis treatments three days per week. He said he would not support home sharing in a situation that required persistent overnight support. In that case, a home share arrangement was not appropriate.

**329**  Mr. Collins did not conclude Ms. Savone needed a twenty-four hour caregiver but acknowledged that, with the combination of her sleep apnoea and risk of her raiding the fridge and of running away, someone needed to be there at all times. He was aware the plaintiff monitored Ms. Savone's insulin and said that the Langley Association did not have anyone who received insulin.

**330**  With respect to the plaintiff's behaviour management skills he agreed if the client did not cooperate and this could endanger her life, this was an important factor to consider.

**J. Calculating compensation**

**331**  While all the experts provided useful insights, of the three, I found Mr. Thomas somewhat more qualified to provide an opinion of the appropriate level of funding for residential care. His agency has more experience funding and overseeing home sharing contractors for clients with complex medical needs and behavioural problems.

**332**  I note all the experts considered the residential caregiver payment was intended for the caregiver's family as compensation, and should not be used to cover expenses related to the medical care or other special needs of the client. Ordinary costs relating to shelter, food and clothing for the client would be payable out of the client's 'person's with disability' funding from the Ministry of Employment and Income Assistance. Therefore, extraordinary costs such as transportation, special diet considerations, non-prescription supplies or other incidental expenses should not be included as part of the care giver's payment.

**333**  Considering the evidence of the experts and the way the parties had hither thereto structured their offers, I find it is not standard practice to include special expenses in the $3,000 monthly allowance as Mr. Birdi had at one point of the negotiations. He referred to them as extraordinary costs, whereas the parties up to that point had been identifying the $3,000 as 'additional support funding,' a reference to analysts' flagging of special care needs.

**334**  The plaintiff therefore objected to Mr. Birdi's including such expenses as diet, transportation and other incidental expenses as part of the 'wage' as the experts referred to it, for residential care.' However, for purposes of fairly assessing compensation, nothing turns on this. There is plentiful evidence available of appropriate funding levels the defendant ultimately would have been reasonably prepared to offer, including potential funding for proper extraordinary expenses. I understand that in some cases a caregiver can seek additional coverage for some expenses from the Ministry of Employment and Income Assistance, although apparently this had never been explained to the plaintiff.

**335**  I heard considerable evidence about the importance of respite funding. Respite encourages long term relationships between the caregiver and the client a benefit to the client and prevents caregiver burnout. The preference of both the experts who testified and the defendant is that both the respite and day program be administered by another care provider to introduce additional people into the life of the client. This introduces "another set of eyes" and provides a broader experience for the client. Involvement of other caregivers can ease transitions should the residential care giver be unable to continue for some reason.

**336**  I acknowledge the benefits of outside caregiver involvement in Ms. Savone's care and respite being paid to another care provider. However, from a practical point of view this is not always possible. In the case at bar, there are other family members involved in Ms. Savone's care. She attends the dialysis clinic three times a week and sees staff and other patients on a regular basis. I accept Ms. Savone also has a certain level of community inclusion as she sometimes accompanies the plaintiff. I note some agencies arrange respite for the regular caregivers, and such might have been the case had a contract been completed under the agency of the Mission Association for Community Living, as was planned during negotiations. Although respite is usually paid to a separate respite caregiver, I understand that is not always the case. The defendant would have incurred the cost of respite care irrespective of whether the plaintiff paid outside caregivers to make their own respite arrangements.

**337**  I find the plaintiff should receive compensation for respite care as incorporated in the quotes provided by the experts. I note, however, the parties never discussed a respite plan during negotiations and given the fact the plaintiff likely would have used the funds for other forms of respite, such as homemaking help, the amount should not exceed the $600 quoted by Brenda Gillette.

**338**  At one point the parties had settled on $1,922.43 monthly for the day program, as set out in the plaintiff's December 21, 2007, offer and the defendant's December 24, 2007, offer. However, the plaintiff withdrew that offer in her January 10, 2008, final offer. I note the Chilliwack Association's figure for a day program was approximately $31,000 annually.

**339**  Considering all the evidence before the court and having regard to the defendant's financial limitations and wider community obligations, I find the following is a fair assessment of the defendant's enrichment from the plaintiff's discharge of an inevitable expense and the plaintiff's resulting deprivation.

**1. Retroactive payment from July 11, 2007**

**340**  The plaintiff should receive retroactive compensation for the period from July 11, 2007, to the date this judgment is handed down, calculated on the basis of the award that follows below. I reject the defendant's position that it should not have to pay any retroactive compensation to the plaintiff for that period on the basis she was not in compliance with the municipal bylaws. I note the defendant was willing to provide interim respite payments to the plaintiff via Ms. Chalmers. It expected Ms. Chalmers to pass this on this to the plaintiff. This was whilst the plaintiff was in contravention of the municipal bylaws. I accept some delays came from finding accommodation for Hilda Kennerly. This required time and care and it would be wrong to set Ms. Kennerly's needs aside because the plaintiff had decided to focus on Ms. Savone's care. A temporary breach of the bylaw was unavoidable in the circumstances.

**341**  Further, I find the defendant had offered to negotiate retroactive compensation when the time eventually came to conclude a contract. But when negotiations started, it refused to negotiate retroactive compensation. I find the plaintiff is entitled to retroactive compensation from July 11, 2007 the date this judgment is handed down.

**2. Day program**

**342**  I award $1,922 a month for the day program. The defendant is not obligated to pay any court order interest on this amount as the plaintiff failed to mitigate her damages by renewing the day program contract with the defendant.

**3. Residential program**

**343**  I assess the value of the plaintiff's residential services, inclusive of additional supports that include consideration for a night-time stand-by fee, at $5,900 a month. This is approximately $400 more than CLBC's last monthly offer for residential care, $900 less than Ms. Skibinski's December 21, 2007 offer, about $16 less than Mr. Thomas's quote, $1,100 more than Ms. Gillette's and $900 more than Mr. Collins's quote. In setting this amount, I note Mr. Thomas said he would have increased the residential care component because he had been unaware of the plaintiff's attendances for Ms. Savone's dialysis treatments and would increase the amount for residential care to reflect that. He did not say by how much. Further, the $5,900 makes some allowance for a night-time standby fee. I find that some allowance for a night-time standby fee was reasonable in the circumstances. Mr. Collins noted Ms. Savone's sleep apnoea, risks associated with her raiding the fridge and habit of running away. I also note that CLBC was open to increasing remuneration to some extent when the plaintiff had withdrawn from further negotiations.

**344**  In my view, this amount reasonably reflects the operative premise for awarding compensation in this case.

**345**  This does not include $1,922 for the day program or the $716.13 portion of Ms. Savone's Persons with Disability benefit the plaintiff is entitled to retain to cover ordinary expenses such as food, shelter and clothing.

**4. Transportation**

**346**  Ms. Savone is transported to her dialysis treatments by ambulance. However, in addition to that there are other transportation needs, for medical appointments and hospital visits, among other responsibilities. The defendant was prepared to allow $600 a month for transportation, but this did not assume Ms. Savone would be transported by ambulance for dialysis. I allow $150 a month for transportation expenses.

**5. Medical and non-prescription supplies and special dietary needs**

**347**  I find the plaintiff is entitled to compensation for non-prescription expenses and supplies, and any other unpaid medical expenses directly related to Ms. Savone's medical needs and not covered by MEIA or other government agency. If the parties cannot agree on the appropriate amount, I refer assessment of those amounts to the Registrar under what was Rule 57(7) of the *Supreme Court Rules*, *B.C. Reg 221/90*, and is now Rule 14-1(7) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*.

**348**  The evidence was not specific enough to assess extraordinary expenses related to Ms. Savone's special dietary needs, though I accept she did have some special needs in that area. I do not see the defendant agreeing to paying more than $100 monthly, but also that it would likely have incorporated that amount in the amount it was prepared to pay for residential care. Therefore, I have not included a separate amount for that.

**6. Respite**

**349**  The plaintiff is entitled to compensation for respite at $600 a month.

**350**  I note that the defendant included respite in the plaintiff's base rate and additional supports, which is not standard practice, but as Mr. Birdie and Mr. Morgan explained, this was only temporary as a respite plan had been completed.

**7. Calculation of award**

**351**  The Defendant is liable to pay restitution to the plaintiff of $8,572 a month for the period between July 11, 2007, and the date this judgment is handed down. The total compensation to the plaintiff between July 11, 2007, and October 11, 2010, is $334,308. I do not include a cost of living increase in this award. As mentioned earlier, CLBC contracts for one year periods only and it rejected the plaintiff's request for a contract for the life of Ms. Savone. Adding a cost of living increase would deprive CLBC of the opportunity to negotiate cost of living increases on a renewal of the contract.

**352**  The calculations extend to October 11, 2010. Past October 11, 2010 to the date the order is entered, the parties should calculate the remaining ordered compensation based on the monthly compensation amount.

**353**  In summary, I order the defendant to pay restitution to the plaintiff for the period of July 11, 2007 to the date this judgment is handed down as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Item, monthly amount** | **Total Amount** |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Residential program: $5,900 | $230,100 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Day program: $1,922 | $74,958 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Respite: $600 | $23,400 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Transportation: $150 | $5,850 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Medication and other medical expenses |  | Reference ordered pursuant to Rule 14-1(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, if the parties cannot agree on the correct amount. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $334,308 |  |

**354**  The plaintiff is entitled to court ordered interest.

**355**  The parties may speak to significant arithmetic errors or oversights that do not disturb essential elements of the judgment.

**8. Future considerations**

**356**  At the commencement of trial, the parties knew any compensation award extended only to the date of judgment. The plaintiff's expectation was that the defendant would respect the tenor of the court's decision and continue to fund Ms. Savone's care in accordance with it. That may be. Given Ms. Savone's life expectancy, one would hope the parties could set aside past differences and agree on an arrangement that allowed Ms. Savone to remain in residential care with the plaintiff. Any such arrangement would encompass the plaintiff's cooperating with the defendant's reporting and other requirements, enabling CLBC access to Ms. Savone to assess her. In any case, the effective application of this award extends no further than the day it is handed down.

**V Damages for mental distress**

**A. Law**

**357**  To recover damages for the intentional infliction of mental suffering, the plaintiff must prove the defendant's conduct was flagrant and extreme, must have been plainly calculated to produce the harm that was produced and that it resulted in a visible and provable injury: *Rahemtulla v. Vanfed Credit Union (1984)*, [*29 C.C.L.T. 78*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2M6-00000-00&context=) [*Rahemtulla*].

**358**  The plaintiff must also prove the defendant's conduct caused a medically recognized form of mental illness. Emotional stress or mental anguish and despair are not generally accepted as amounting to a "visible and provable illness" for this tort: *Young v. Borzoni et al.*, [*2007 BCCA 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61VX-00000-00&context=), [*Young*] at para. 37, citing *Mustapha v. Culligan of Canada Ltd.* [*(2006), 84 O.R. (3d) 457*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1TP-00000-00&context=) (C.A.) at para. 30:

In Canadian Law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions - first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see Lynden, *Canadian Tort Law*, at pp. 389 - 92.

**359**  In her statement of claim and reply, the plaintiff claimed the defendant's conduct had deprived her of relaxation, peace of mind and freedom from molestation, thereby causing her to suffer emotional distress, physical inconvenience and discomfort, resulting in mental suffering directly related to the aforesaid emotional distress, physical inconvenience and discomfort.

**360**  In para. 33 of her reply, the plaintiff said she has suffered "mental distress, physical inconvenience and discomfort."

**361**  Counsel for the defendant points out that the plaintiff's pleadings mirror those found in *Young*, and that mental suffering resulting from litigation is not compensable: *Greenwood v. Dietz*, [*2005 SKQB 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-JJ6S-6288-00000-00&context=) [*Greenwood*]; *Leblanc v. London Life Insurance Co.* [*(1999), 102 O.T.C. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SD81-JJ6S-64ST-00000-00&context=) (Sup. Ct. J.) [*Leblanc*].

**362**  The impugned conduct of the defendant and its employees encompasses actions related to the way they engaged in contract negotiations, a lack of due diligence in moving forward in negotiations, a sharing of confidential information with Steven Laurie, a lawyer in the Office of the Public Trustee, allegedly derogatory and untrue statements made by Mr. Morgan to executives of the defendant, and also to remarks Mr. Morgan made directly to the plaintiff herself.

**363**  Another category of impugned conduct relates to the defendant's failure to acknowledge the plaintiff's concerns about the potential affect of the provisions of the *Privacy Act* on the plaintiff's obligations to submit monthly reports to the defendant. Another category relates to the actions of the defendant in deciding not to renew the residential care contract for Brian Brest.

**364**  I have reviewed and considered the conduct of the defendant and its employees which the plaintiff relies on to support its claim for damages under this heading. I am not satisfied by the evidence that the defendant's conduct was flagrant and extreme, or was plainly calculated to produce the harm the plaintiff claimed. While several of the plaintiff's concerns are not without some foundation, such as certain statements made in emails to Mr. Laurie, in my view, the defendant's conduct falls short of what the plaintiff must prove. It is also difficult to understand why Mr. Morgan found it necessary to report the plaintiff's contravention to the City of Mission after the parties had agreed on a solution, or why it took so long for him to order preparation of a Health Care Plan so negotiations could commence. However, I found no basis for finding ill-intent on his part.

**B. Did the conduct result in a visible and provable injury?**

**365**  In the event I have erred in my conclusions on the first two parts of the test set out in *Rahemtulla,* I will briefly discuss the next part of the test: whether the plaintiff has demonstrated a visible and provable injury. The plaintiff relies on the psychological report of Dr. G. Koe, dated April 21, 2008, to establish that she suffers from a reactive form of depression, which she claims is caused by the actions of the defendant.

**366**  I am satisfied that in the course of dealing with the defendant on the matters pertaining to this lawsuit, the plaintiff suffered a reaction of depression. However, the evidence reveals the presence of other outside stressors, such as marital conflict and the challenges she faced related to caring for clients with severe mental and physical disabilities. However, more notable still, in my view, are the effects of this litigation, which as noted in *Greenwood* and *Leblanc*, cannot be recovered.

**367**  Counsel for the defendant referred to the plaintiff's testimony that the litigation has caused her symptoms of nausea; and likewise has deprived her of relaxation and freedom from molestation and caused physical symptoms such as heart palpations.

**368**  At p. 3 of his report Dr. Koe summarizes:

In summary, Sheila feels totally betrayed by, amongst others, MCFD and CLBC. Sheila has made the care of autistic individuals her "life work" and feels she has done, and is doing now, an exemplary job. Sheila is angry with CLBC, and believes it has acted with extreme prejudice and without just cause in withdrawing funding for her Clients ...

**369**  At p. 5 of his report he notes:

I am also confident that, once Sheila's labour dispute with CLBC has been settled and she is receiving appropriate funding for the levels of services she is providing to her Individuals, all the symptoms I have noted will be diminished to be within normal levels [sic].

**370**  To some extent, the plaintiff's choices in the way she chose to respond to her differences with the defendant appears partially responsible for the stress she has been experiencing. Conflict could have been avoided by a less combative and more collaborative approach, particularly in the area of the defendant's reporting requirements and her concern these would violate the privacy provisions of the *Privacy Act.* Further, I note the defendant attempted at times to resolve differences with the plaintiff. Given her expertise and experience it would have been made sense for the defendant to try to maintain its contractual relationship with the plaintiff. At the same time, the defendant was not blameless. It realized the plaintiff's financial security was in its hands, yet it failed to explain its funding methodology from the outset. It was notable as well that the defendant never mentioned to the plaintiff the review process available to caregivers disagreeing with decisions made by analysts. Counsel for the defendant responded to this concern by remarking that the plaintiff was represented by counsel. However, I did not find that a response to the point.

**371**  Ultimately, however, the plaintiff's claim for intentional infliction of mental suffering must also fail on the third requirement of the test. While I am satisfied the plaintiff has suffered a recognizable psychiatric condition, I am not satisfied it resulted from the defendant's conduct, but rather from a combination of outside stressors: stress related to her work, her frustration with the protracted contract negotiations, the failure to conclude a contract for an amount she felt was her due and from the litigation process itself, the latter being the primary cause. Further, I find none of the conduct of the defendant the plaintiff has complained of was intentional. Therefore I dismiss the plaintiff's case for intentional infliction of mental suffering.

**372**  Given dismissal of the plaintiff's claim for intentional infliction of mental suffering, I need not address the question of whether I ought to dismiss the claim based on deficiencies in the pleadings.

**C. Aggravated damages arising from a breach of contract**

**1. Law**

**373**  Where a party breaches a contract, the court may, under the principles of *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, award aggravated damages arising from the breach, where they are within the reasonable contemplation of the parties when they made the contract: *Fidler v. Sunlife 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=) [*Fidler*].

**374**  The court in *Fidler* explains at para. 45 that in commercial contracts:

[T]he likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made.

**375**  The plaintiff's claim for aggravated damages must be dismissed because no contract for peace of mind was made; and the parties did not hold the securing of a particular psychological benefit to Ms. Skibinski in reasonable contemplation at the time of negotiations. I agree with the defendant that it did not agree to provide the plaintiff mental security, satisfaction or to improve her psychological well being. Counsel for the defendant points out as well that the defendant did not specifically breach the contract between the plaintiff and defendant, in that all contracts in existence when the plaintiff took Ms. Savone into residential care were completed. The plaintiff terminated the contract for care of Hilda Kennerly; and the defendant gave the plaintiff and Mr. Skibinski, Brian Brest's primary caregiver, almost three months notice that CLBC did not intend to renew the care contract for him after its December 31, 2008, renewal date.

**376**  I appreciate the plaintiff's submission the defendant did not renew Brian Brest's contract knowing the financial distress it would cause. However, even if the defendant was aware of that consequence, it was acting within the terms of the existing contract and, at any rate; its decision not to renew does not constitute a breach of contract.

**377**  I dismiss the claim for aggravated damages.

**VI Mitigation of Damages**

**378**  The defendant submits the plaintiff failed to mitigate her damages by failing to renew the day program contract for Ms. Savone after it expired. I agree with this submission, I find any adjustment for this lies in declining any court order interest award on principal amounts owing for that portion of the contract.

**379**  I see no merit in other arguments advanced by the defendant on mitigation of damages. For example, I cannot see how the plaintiff can be said to have failed to have mitigated his damages for failing to follow the administrative option of a review after negotiations had failed when the defendant itself did not present this option to her.

**VII Summary**

**380**  The defendant is ordered to pay restitution, as set out in para. 353, totalling $334,308. This represents restitution from July 11, 2007 until October 11, 2010. The parties can calculate compensation falling after October 11, 2010 to the date of judgment accordingly. All other claims are dismissed.

N. BROWN J.

\* \* \* \* \*

Correction

Released: October 29, 2010

Please be advised that the attached Reasons for Judgment of Mr. Justice N. Brown dated October 26, 2010 have been edited as follows:

1. In the third line of paragraph [226], the word "restores" has been replaced with "remedies".

N. BROWN J.

**End of Document**

[***Strilec v. Leila, [2015] B.C.J. No. 1831***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GW7-N221-JW5H-X0MT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

J.M.I. Duncan J. (In Chambers)

Heard: June 17-19, 2015.

Oral judgment: July 3, 2015.

Docket: M156596

Registry: New Westminster

**[2015] B.C.J. No. 1831** | 2015 BCSC 1515

Between Joshua Strilec, Plaintiff, and Guisela L. Leila, Claudia Mahovlich and Johnny Mahovlich, Defendants

(101 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Psychological injuries — Depression — Considerations impacting on award — Degree of impairment — Permanent total or partial disability — Action by plaintiff for personal injury damages allowed — Plaintiff, age 32, was involved in accidents in 2012 and 2013 — Injuries from first accident resolved within four months — Injuries from second accident included lower back pain that was permanent and chronic — Symptoms affected all aspects of plaintiff's life and contributed to depression — Plaintiff awarded non-pecuniary damages of $7,500 for first accident and $75,000 for second — Plaintiff also awarded $1,500 for past wage loss, $25,000 for loss of future earning capacity, $5,000 for costs of future care, and $2,749 for special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Employment status — Extent of incapacity — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Non-pecuniary loss — Action by plaintiff for personal injury damages allowed — Plaintiff, age 32, was involved in accidents in 2012 and 2013 — Injuries from first accident resolved within four months — Injuries from second accident included lower back pain that was permanent and chronic — Symptoms affected all aspects of plaintiff's life and contributed to depression — Plaintiff awarded non-pecuniary damages of $7,500 for first accident and $75,000 for second — Plaintiff also awarded $1,500 for past wage loss, $25,000 for loss of future earning capacity, $5,000 for costs of future care, and $2,749 for special damages.**

|  |
| --- |
| Action by the plaintiff, Strilec, against two sets of defendants for damages to compensate for personal injuries. The plaintiff was involved in two motor vehicle accidents. In December 2012, the plaintiff had backed out of a driveway into the roadway and put his vehicle in drive when he was struck by another vehicle backing out of a driveway. Liability was not admitted. Within an hour, the plaintiff became sore and experienced sharp pains in his neck. He saw a doctor, eventually receiving freezing and steroid injections. The plaintiff returned to light work duties within a few weeks. In October 2013, the plaintiff was rear-ended while stopped in traffic. He became light-headed and dizzy and experienced neck and shoulder pain. He attended hospital and was given pain killers. He subsequently developed lower back pain. Despite painkillers and physiotherapy, the plaintiff's symptoms worsened. He returned to work after five months, but struggled with physical duties. The plaintiff, age 32, had a grade ten education. He worked in the construction industry and as a bartender. His symptoms did not appreciably improve prior to trial and he remained on modified duties.  HELD: Action allowed.  The defendant was 100 per liable for the first accident. The plaintiff did not see the defendant, as she was backing up after he had already executed his reversal from the driveway. After the first accident, the plaintiff worked diligently to recover from his injuries, and was substantially recovered within four months. In respect of the second accident, the medical evidence established that the plaintiff had low back pain and sacroiliac joint dysfunction that was effectively permanent and chronic. His symptoms affected every aspect of his life and contributed to depression. The plaintiff was awarded non-pecuniary damages of $7,500 for the first accident, and $75,000 for the second accident. The plaintiff was also awarded $1,500 for past wage loss, $25,000 for loss of future earning capacity, $5,000 for costs of future care, and $2,749 for special damages. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, Rule 15-1

**Counsel**

Counsel for the Plaintiff: J. Woods.

Counsel for the Defendants: C. McKechnie.

**Oral Reasons for Judgment**

|  |
| --- |
| **J.M.I. DUNCAN J. (orally)** |

**Introduction**

**1**  The plaintiff, Joshua Strilec, was involved in two motor vehicles accidents. The first occurred on December 26, 2012. The driver of the other vehicle was the defendant, Guisela Leila. Liability and damages are in dispute. The second accident occurred on October 8, 2013. Liability is admitted. This action was brought pursuant to Rule 15-1, the Fast Track Litigation Rule.

**The Plaintiff's Background**

**2**  The plaintiff is 32 years of age. He has a Grade 10 education. After he left school, he worked as a house framer in the Mission area. He developed substance abuse issues and moved to Surrey in 2006 to attend treatment and get his life together. The plaintiff has always worked in the construction industry, apart from some recent part-time work as a bartender. He started working for Bruce Paetkau four years ago. Mr. Paetkau's company does remediation work on leaky buildings, often through another company, Centra Restorations ("Centra"). The plaintiff has worked directly for Centra since September 2013.

**3**  In the six months before the first accident, the plaintiff lived with his common law spouse, Breanne Benitz, and their daughter, Sierra, who is now seven. He described his daughter as high energy and his activities with her reflected this. The plaintiff spent a lot of time with Sierra, engaged in activities such as swimming, bike riding and playing at the park. He attended the gym on his own once or twice per week.

**4**  The plaintiff did most of the cooking and cleaning because his spouse had health problems. He also did about 60 percent of the yard work on the property they shared with their landlord.

**5**  The plaintiff enjoyed working on his vehicle, changing the oil and doing other routine maintenance. He says he generally loves working with his hands. He described himself as in good health before the first accident, apart from nagging issues with his left knee and right arm. His daughter jumped onto his knee in 2012, causing a partial tear to his MCL. His elbow was affected by tennis or carpenter's elbow. In October 2012, the plaintiff saw a chiropractor three or four times for treatment of the elbow.

**The First Accident**

**6**  The first accident happened in the early afternoon of December 26, 2013. The plaintiff, his spouse and daughter were in their mini-van on their way to Valu Village to drop off some things. The plaintiff realized he had forgotten his wallet. He pulled into a driveway a couple of blocks from home and stopped. He checked his side and rear view mirrors "real quick", looked out the back window, saw the road was clear, and pulled out of the driveway. Once he pulled out the plaintiff brought his van to a complete stop, put it into drive and was hit from behind. There was a Christmas tree in the back of the van but he could see out the top half of the window. He did not see the other vehicle before impact, which he described as a "pretty good bang". The rear window exploded. The plaintiff had his right arm on the steering wheel, half cocked. He moved forward in his seat then back again.

**7**  The plaintiff got out of his car. The other driver moved her vehicle and said something about being late for work. The plaintiff's daughter was screaming so he turned his attention to her. He asked his spouse to get his wallet from their residence. It took her about five or ten minutes and then he exchanged information with the other driver.

**8**  The defendant, Ms. Leila, did not testify. Counsel for the plaintiff read in some of her examination for discovery evidence taken on September 23, 2014. Ms. Leila acknowledged she got in her car and put it in reverse. She stopped twice as she was backing up. Ms. Leila said she was moving at the time she felt the hit. She did not see the other vehicle in the driveway across the street. When plaintiff's counsel asked Ms. Leila if she was leaving her house later than she normally did, she responded "Maybe. Yeah." Ms. Leila confirmed she did not see the other vehicle moving at all before the collision.

**Liability for the First Accident**

**9**  The plaintiff argues the defendant is 100 percent liable for the first accident. He looked in his mirrors and behind him before he backed up, did not see the defendant's vehicle, backed up, stopped completely, and then put his vehicle in drive a couple of seconds later. That is when the impact occurred.

**10**  Defence counsel argued that the plaintiff was 50 percent at fault for the accident because the two drivers were backing up simultaneously and each should have seen the other. Counsel concedes Ms. Leila may have been backing up fractionally later than the plaintiff but in any event, he should have seen her.

**11**  Counsel for the defendant cites *Swartz Brothers Ltd. v. Wills*, [*[1935] S.C.R. 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1BS-00000-00&context=) where the Court endorsed the proposition that "Where there is nothing to obstruct the vision and there is a duty to look, it is ***negligence*** not to see what is clearly visible." Counsel argues in this case each party had a duty to look and both must have been clearly visible to the other. The defendant did not advance the argument that because the plaintiff was a new driver and/or had a Christmas tree in the rear of the van, his visibility or lack thereof, was a factor in the collision.

**12**  I find on a balance of probabilities that the plaintiff looked before he backed out of the driveway and did not see Ms. Leila because she was backing up a few seconds later than him and was not there to be seen. The defendant has not proven on a balance of probabilities that liability for the first accident should be divided evenly between the two drivers. I find the defendant Ms. Leila 100 percent at fault for the first accident.

**The Plaintiff's Symptoms after the First Accident**

**13**  The plaintiff drove his van back to his home. After an hour, he got achy and sore, his right elbow and right shoulder began to hurt, and he had sharp pains in his neck. He was in a lot more pain than he had been a month before the accident.

**14**  The plaintiff went to see his family doctor, Dr. Manchanda, who recommended he go to a chiropractor. He did this for a few weeks until ICBC cut off his funding. He could not afford to see a chiropractor on his own.

**15**  For the first few weeks after the accident, the plaintiff said everything hurt. He returned to work on light duties and stayed away from heavy lifting and hammering for two weeks. Since there was not a lot of light duty work, he went back to his doctor and they discussed injections to alleviate the pain. He is not a big fan of needles but he underwent freezing injections in his right elbow and shoulder. They gave him relief for a short period of time and then he had a steroid injection which helped for a few weeks.

**The First Six Months after the First Accident**

**16**  At the time of the first accident, the plaintiff was working for Bruce Paetkau. He took on a second job in February 2013 at the North Delta Inn doing bartending and security. His spouse was struggling with work and their finances were not very good. He wanted extra money for his daughter's activities. While he had some pain while working on his construction job, he was no longer on modified duties by this time.

**17**  The plaintiff did not do as much around the house for the first couple of months after the first accident. He struggled to play with his daughter some days which bothered him, and he "slacked off" his chores, particularly laundry, as their portable machine weighed 60 pounds and was hard to move. Since it was wintertime, there was not much yard work to do so that was not a difficulty for him. He stopped going to the gym but eased back into it slowly in around April 2013.

**18**  By six months after the first accident, he was back to all of his regular activities, although his elbow still hurt a little.

**The Six Months before the Second Accident**

**19**  Things were going well for the plaintiff in this timeframe. In September 2013, Centra hired him directly and gave him his own job site in North Vancouver to oversee as a superintendent. He dealt with ordering material, paperwork, engineers, and generally ensuring the job was done right. There was still a lot of physical work because the crew was small, usually three to five carpenters, plus occasionally some subcontractors.

**The Second Accident**

**20**  The second accident occurred around 6:30 or 7:00 a.m. on October 8, 2013. The plaintiff was driving to the job site in North Vancouver. Just west of the Port Mann Bridge, the traffic in the HOV lane came to a stop. The plaintiff stopped and was hit from behind and pushed forward. The plaintiff described the collision as much more severe than the first accident. His whole body pitched forward then back. His seatbelt locked leaving a strap mark on his left shoulder.

**21**  The plaintiff got out of his vehicle and exchanged information with the drivers of the vehicles ahead of him and behind him. His vehicle was not driveable so he waited for a tow truck. He got a ride from the tow truck driver to Surrey. The plaintiff felt light-headed and dizzy, and experienced pain on the left side of his neck and shoulder. His spouse and her mother took him to Surrey Memorial Hospital. He was placed in a spine splint and a doctor checked him over for fractures. The plaintiff was given Ibuprofen pills and sent home. Once home, the plaintiff's lower back felt stiff and sore, and his left shoulder and neck were very achy. He felt no pain on his right side. He did not go to work that day.

**22**  For the first week after the accident, the plaintiff had lower back pain, shoulder, and shooting pains in his neck. He was overall very stiff and sore but despite his condition he went to work. He was afraid not to, because the North Vancouver project was his responsibility. The plaintiff described work as horrible. He struggled with most of the physical tasks and had to get the other workers on site to help him. The plaintiff could no longer lift concrete pavers, which weighed 80 to 100 pounds.

**23**  The plaintiff went to his doctor a few days after the accident. His doctor gave him Naproxen and then Toradol and recommended he attend physiotherapy. The plaintiff started physiotherapy a day or two later. It helped a bit with temporary relief but overall his symptoms were getting worse.

**24**  The plaintiff's boss, Jeff Foster, the vice president of Centra, attended the North Vancouver job site and told the plaintiff to take a week off. The plaintiff had to use vacation days to cover the wage loss. He was still bartending at the North Delta Inn and he took a week off that job as well.

**The First Six Months after the Second Accident**

**25**  The plaintiff could not do much around the house after the second accident. He felt exhausted after work and spent most of the weekend resting for the coming week. The plaintiff's daughter was diagnosed with Oppositional Defiant Disorder. He used to take her out to do things and keep her active but he could no longer do that.

**26**  The plaintiff went to physiotherapy, chiropractic therapy and massage therapy. At one point, he had more injections into the left side of his shoulder and neck. He continued to take Toradol, Naproxen and possibly muscle relaxants as well.

**27**  By March or April, the plaintiff told his doctor he was feeling better and the doctor suggested he return to full duties at his construction job. It was around this time that the plaintiff reported to his physiotherapist that he had lifted 60-pound sheets of plywood at work. The plaintiff said he did okay for a while on full duties but while helping to move a sliding door his back, neck and shoulder tweaked. His whole body seized up, everything ached, and his back hurt.

**28**  Around this time, the plaintiff described his mood as low. He was struggling physically with work, the job he was working on went over budget, and he fell into a bit of a depression. His relationship had always been rocky, but the accident made things worse. He could not help with Sierra as much, and physical intimacy with his spouse languished. In April he found out his spouse was having an affair with a friend of his and he moved out.

**29**  The plaintiff moved in with his friend David Benedict. He slept in Mr. Benedict's basement on a spare bed, which was hard on his back, although his friend provided him a better mattress after a few weeks.

**30**  From May to December of 2014, the plaintiff's work situation was not good. The North Vancouver job ended up $30,000 over budget. Some of it was labour costs for which he felt responsible because he could not do as much intensive labour as before.

**31**  Centra is still the plaintiff's employer. He feels they have been very good to him in light of his limitations. He has worked on a bigger job site than the North Vancouver one as a foreman. This is still a hands-on job involving all the tasks a carpenter would do with some oversight concerning whether things are done properly. He has not returned to full duties.

**32**  The plaintiff is not doing any heaving lifting, although, as noted earlier, he had been lifting sheets of plywood and a sliding door, but that caused him pain. He gets other carpenters to help him or he sticks to lighter jobs. The plaintiff struggles with scaffolding and cannot climb it, instead he has to go into the building and take the stairs.

**33**  The plaintiff's condition did not improve much between May and December 2014. He would have a couple of good days in a row and then something simple like picking up his keys on the floor would aggravate his back and cause constant pressure on the left side which took a few weeks to calm down. He continued with physiotherapy, chiropractic therapy and massage. Some of those treatments provided temporary relief but some made him worse afterwards. The plaintiff took Toradol and muscle relaxants. He stopped attending physiotherapy in October due to strained finances.

**34**  The plaintiff quit his part-time job at the North Delta Inn in November because he could not take the long days any more. He would work for Centra from 7:00 a.m. to 4:00 p.m. and then work at the North Delta Inn from 6:00 p.m. to 2:30 a.m. There were physical aspects to that job, such as moving beer kegs. He had to get the cook and server to help him with that task.

**35**  The plaintiff met Amanda Piron in the spring of 2014. They now live together in Mr. Benedict's basement. He describes the relationship as "decent" but there are problems with sexual intimacy. The plaintiff describes his mood as constantly up and down since the accident. He has struggled with stress and is worried about losing his job. He has taken counselling through work and once through a private therapist. He found counselling helpful.

**36**  The plaintiff's finances are not in good shape. He pays only child support in the range of $400.00 per month. He had about $40,000 in debt after his relationship ended. Most of it was his and it included truck payments. While the plaintiff wanted to hold on to the truck because it made him more valuable to Centra as an employee who could transport tools and material, he asked the financing company to repossess it because he could not make the payments any more.

**37**  In September 2014, the plaintiff's employer encouraged him to take an occupational first aid course. The plaintiff took Level II First Aid which involved a five- day practicum and a one-day test at the end. While the plaintiff struggled a bit with CPR on the dummy and rolling people to treat them, he passed the course.

**The Six Months Leading up to Trial**

**38**  In the past six months, the plaintiff has not felt significant improvement in his symptoms. He feels pain on a daily basis in his lower back as well as his neck and shoulders at times, but not to the degree his lower back bothers him. He has continued with medication and has seen Dr. Foley, a physiatrist. She recommended muscle relaxants and a cream or gel with lidocaine in it. He has had injections into the left side of his lower back by specialists. The plaintiff takes hot showers or baths with Epsom salts, sometimes during the night when he cannot sleep. He stretches at home and work on a daily basis, sometimes more than once per day, and uses a TENS machine at home for muscle massage. He still takes Toradol and Tylenol.

**39**  The plaintiff tried jogging at the suggestion of the physiatrist but that did not work for him. He told Dr. Foley how much walking and stair climbing he did at work and she advised him this was sufficient cardiovascular exercise. Dr. Foley recommended he try Yin Yoga but since he cannot afford to attend classes, he did some internet research and has incorporated some yoga poses into his stretching routine. The plaintiff hopes to see a kinesiologist through Dr. Foley or the doctor replacing her while she is on maternity leave. Dr. Foley suggested he take 10 or 12 sessions. He has tried to go to the gym in the past but it aggravated his condition and he would be interested in seeing a professional to get on the right track with exercise. Dr. Foley did not testify and her report is not before me in evidence.

**40**  The plaintiff has felt irritable and restless for the past six months as he had not been getting proper sleep. He wakes up his girlfriend when he is restless and she does not get a good sleep either. He feels it affects his relationship a bit and he is still having some difficulties with sexual intimacy. He does not do yard work and has his girlfriend help him take the laundry upstairs. He sweeps and vacuums and he still cooks.

**41**  The plaintiff still does routine maintenance on his car, but not as frequently as before the second accident. The work aggravates his back and the jobs take two or three times longer than they used to.

**42**  The plaintiff sees his daughter when she comes down from Powell River on long weekends and school holidays. This is about every two months. He cannot roughhouse with her like he used to and has to explain his limitations to her.

**43**  The plaintiff still works for Centra but he is on somewhat modified duties. He misses work two or three days per month, mostly due to back pain, although on one occasion he had car trouble. He is not paid for missed days and has used vacation days to make up for the lost pay or else he will fall behind in his finances. He gets 10 vacation days per year and thinks he can buy them back from the company. He wants to continue working for Centra as they have been very good to him and provided excellent support. The plaintiff has talked to them about his limitations, but about six or eight weeks prior to trial the Vice President, Jeff Foster, told him he needed to be "on the tools" more. Mr. Paetkau was present for that discussion.

**44**  That conversation made the plaintiff feel like he is walking a fine line. People are laid off all the time and he has no guarantee of continued employment. Layoffs occur just before payday so when the first and fifteenth of the month roll around he gets edgy. Other people he works with make the same or less money and they can do more than he can. He cannot move lumber, concrete pavers, windows, scaffolding or compressors, which weigh between 40 and 150 pounds. If he lost his job, he would hope to continue working in construction because he does not know any other field. He loves carpentry and building things.

**45**  The plaintiff agreed that when he visited Dr. Manchanda on August 12, 2014 he felt quite stressed due to his separation, but his biggest stress was poor finances. He was still stressed on September 17, 2014 when he saw Dr. Manchanda. On November 16, 2014, his mood was stable but he was still worried about debt. He agreed this block of time was particularly difficult for him. Late last year, he filed a consumer proposal and turned in his truck. He is now making fixed debt payments for the next four or five years and feels this has taken some stress off him.

**46**  Bruce Paetkau is a site supervisor for Centra and also has his own company which supplies manpower to Centra. He has been in construction over 30 years and has had his own company for just over 10 years. He hired the plaintiff as a carpenter in October 2012 and made him carpenter/foreman in late 2012. That job entails all the work a carpenter does as well as ensuring work continues when the supervisor is off site.

**47**  Centra hired the plaintiff directly in the fall of 2013. The plaintiff works for Centra on sites supervised by Mr. Paetkau. On a restoration site, a carpenter will do anything from installing siding, soffits and windows to framing, roof repairs, and anything else required to repair a building. It is all physical labour. You have to move and carry things weighing up to and over 100 pounds as well as build and swing a hammer.

**48**  Mr. Paetkau was aware of the plaintiff's accident in December 2012. He recalls the plaintiff was off work for a little while, then on light duties. For a few months prior to the second accident on October 8, 2013, the plaintiff was having no difficulties with his job duties. Now he has some difficulties and is off work occasionally. The plaintiff complains about his back and Mr. Paetkau can see it in the way he moves. The injuries have limited the plaintiff a little bit. He chooses not to do the heavy lifting. Right now as carpenter/foreman he can direct someone else to do that but it impacts his efficiency. Mr. Paetkau says the plaintiff is not as quick as he used to be.

**49**  In the last six months before trial, Mr. Paetkau is aware the plaintiff has taken days off work due to back pain. He cannot remember the plaintiff receiving a full pay cheque since the last job started in September so he is losing a day or two every pay period.

**50**  The plaintiff has 10 holidays per year and has used seven of them so far.

**51**  Jeff Foster, the Vice President of Centra, laid out job expectations for the plaintiff in Mr. Paetkau's presence about two months ago. Mr. Foster told the plaintiff to wear his belt more and pull up his socks. He remarked that he was spending too much time in the office as opposed to working. Centra agreed that Mr. Paetkau lays off people all the time and the plaintiff does not have a guaranteed job going forward.

**52**  When Mr. Paetkau hires people he looks for work ethic, talent, ability, strength. He would take into account absences from work as to him, it indicates a lack of work ethic. Mr. Paetkau said it would be questionable for him to retain the plaintiff if he was on a probationary period as a new worker because of the loss of time. It is important for a foreman to be there every day as the supervisor cannot always be on site.

**53**  Centra does keep their best people but lays off when they need to. Last fall work was slow for Centra with only one project on the go at Northern Way. Things have changed since then. There were layoffs during the Northern Way project but the plaintiff was not affected.

**54**  The plaintiff's girlfriend, Amanda Piron, testified. She described the plaintiff as someone who is in pain quite a bit and not nearly as active as most guys his age would be. Ms. Piron testified the plaintiff cannot do many activities with his daughter, such as taking her down slides at the water park. Sierra is active and hyper and runs around and he cannot keep up with her. Since the plaintiff does not see his daughter much he pushes himself when she is with him but ends up regretting it the next day.

**55**  Ms. Piron said the plaintiff wakes up a couple of times during the night and tosses and turns. She is a heavy sleeper and does not wake up as much as he does. As for the division of labour, he does most of the cleaning and cooking but Ms. Piron helps him with moving heavy things as she does not want to deal with the consequences of him being in pain and up all night. She says he has been irritable and their intimate life has been affected by his pain levels.

**56**  Ms. Piron and the plaintiff have conflicting schedules but when they have time together they go to movies or walks or to downtown Vancouver. They recently spent a day at Stanley Park and Granville Island. While they had a good time, the plaintiff was uncomfortable on the bus and Skytrain. It bothered his back.

**57**  David Benedict has been friends with the plaintiff for about six years. Between June and December 2012, he would see the plaintiff a couple of times per month. The two men worked on their cars together. The plaintiff did not complain of neck or back pain at that time. Mr. Benedict learned about the first accident from the plaintiff a few weeks after it happened. He did not form the impression that it had been a serious accident.

**58**  In the summer of 2013, Mr. Benedict saw the plaintiff two or three times a month. Their children played together. The plaintiff had no difficulty lifting a compressor weighting 50 or 60 pounds when he worked on his car.

**59**  Mr. Benedict talked to the plaintiff the day after the second accident. The plaintiff was not the same. He spent more time "on the couch not doing anything" Going under a car to do repairs, for example, was hard for him. He was "off", "not his usual self", and it took him a long time to respond to Mr. Benedict's phone calls, which was out of character. The plaintiff said he had a lot going on and did not want to talk to anybody. Mr. Benedict observed the plaintiff and his spouse fighting a lot over nonsense things. The plaintiff ended up moving in with Mr. Benedict after he left his spouse. Mr. Benedict said the plaintiff was not his usual self and seemed down. He did some work around the house but not yard work. They still work on cars together but the plaintiff takes two or three times as long to do stuff and takes a lot of breaks. He also cannot pick up his daughter or roughhouse with her.

**60**  Mr. Benedict lets the plaintiff use his TENS machine for his back pain. The plaintiff uses it every second day. He also frequently takes showers or baths in the middle of the night. There is only one bathroom in the house so Mr. Benedict is aware when it is being used. A couple of times a month the plaintiff does not go to work because of back pain. Mr. Benedict has to move the plaintiff's car out of the way so he can get his own vehicle out because the plaintiff is in pain.

**Credibility**

**61**  The defence did not take issue with the plaintiff's credibility, or that of his lay witnesses. Overall I found the plaintiff gave his evidence in a straightforward fashion that was in harmony with the observations of others. The evidence of the plaintiff and his lay witnesses did not sound rehearsed or calculated to bolster his case.

**The Medical Evidence**

**62**  The plaintiff relied on the report of Dr. Faraday, who also testified. Dr. Faraday's background is as a family doctor, but for the past 15 years a substantial part of his practice has been focussed on patients with musculoskeletal injuries. I found he was qualified to give expert opinion evidence in musculoskeletal injuries and disability management. He gave his evidence in a fair and balanced manner. While Dr. Faraday has more experience than the average family doctor in managing patients with these types of injuries, I found overall his evidence was no more than what a family doctor could give. Despite this, Dr. Faraday's evidence was not diminished and most importantly, it did not conflict in any material way with the defence expert's report.

**63**  Dr. Faraday diagnosed Mr. Strilec with myofascial pain in his left neck and upper back that was likely caused by soft tissue injuries from the second accident. He was aware of the injuries pre-dating and post-dating the second accident. He is of the opinion that the plaintiff continues to have low back pain and left sacroiliac joint dysfunction which is now effectively permanent. Dr. Faraday explained that when symptoms persist beyond the expected recovery period they are considered chronic.

**64**  While Dr. Faraday accepted that the plaintiff was diagnosed with depression by his family doctor and that this was linked to the accident, he agreed on cross-examination he did not have the whole picture about the stressors in the plaintiff's life. He did not see any clinical records from a counsellor the plaintiff saw and he was not aware of the details of why the plaintiff's relationship with Breanne ended, the relocation of his daughter to Powell River, or the financial stressors the plaintiff was experiencing. Dr. Faraday also was not aware the plaintiff had done some heavy lifting at work, as reported to the physiotherapist. He accepted the plaintiff's report that he avoided heavy lifting.

**65**  Dr. Faraday agreed that the presence of pain from the injuries did not mean the plaintiff was disabled because people can have pain but no disability. On the other hand, some pain can be disabling and/or can reduce employment options, although Dr. Faraday agreed he did not conduct a functional capacity evaluation. Dr. Faraday said capacity is the ability to do something and tolerance is the willingness to do it for a sustained time, notwithstanding pain.

**66**  Dr. Bishop's report for the defence referred to the plaintiff suffering from lower back and buttock pain as well as pain in his neck and left trapezius. Dr. Bishop did not address causation and he queried left sacroiliac joint dysfunction. He did not address prognosis.

**The Defence Argument about the Medical Evidence**

**67**  The defendant sought an adverse inference because the plaintiff did not call his family doctor. The defence argued the family doctor would have been helpful on the issues of the diagnosis of depression and the degree it was attributable to the second accident versus other factors.

**68**  Since depression or psychological effects of the second accident is but one facet of the plaintiff's claims, I decline to draw the adverse inference sought. Dr. Manchanda's clinical records were available to the defence and were used effectively in cross-examination of the plaintiff's expert. I do not find Dr. Manchanda's evidence was necessary in light of those circumstances.

**69**  The defence also seeks an adverse inference for failing to call the treating physiatrist, Dr. Foley. I think that evidence would have been helpful in terms of potential for treatment of the plaintiff's symptoms and possible improvement. I appreciate this would have extended the length of this trial, possibly taking it beyond the Fast Track Rule, but the lack of focussed expert evidence was somewhat telling in this case particularly with respect to treatment modalities and how they may affect prognosis and/or function at work. Dr. Faraday's prognosis was negative, but someone with the expertise a physiatrist has might well have shed more light on treatment and outcomes from treatment.

**Divisibility of Damages**

**70**  There was no issue that the damages from the first accident resolved prior to the second accident. As a result, I will assess them separately.

**Damages for the First Accident**

**71**  The plaintiff felt pain in his right shoulder and neck after the accident. He also felt significantly more pain in his previously injured right elbow. He was on modified duties at work for a few weeks and underwent painful and unpleasant injections in his elbow and shoulder to assist him. He did not help around the house as much as he did before the accident. By about three or four months after the first accident the plaintiff began working out at the gym again.

**72**  The plaintiff seeks non-pecuniary damages in the range of $10,000 to $15,000 based on two roughly similar cases, *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=) and *Johannson v. National Car Rental (Canada) Inc.*, [*2008 BCSC 1873*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62G8-00000-00&context=).

**73**  The defendant submits the plaintiff recovered from the effects of the first accident within two or three months and suggests a range of non-pecuniary damages between $7,000 and $12,000 based on *Ayers v. John Doe,* [*2008 CarswellBC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207C-00000-00&context=), *Ostovic v. Foggin*, [*2009 CarswellBC 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B10T-00000-00&context=), and *Bae v. Vasquez*, [*2013 CarswellBC 802*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G2BP-00000-00&context=).

**74**  The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities flowing from the injury. While the cases cited by counsel were helpful, the facts before me must be assessed individually.

**75**  I find the plaintiff worked diligently to recover from his injuries, underwent unpleasant injections to alleviate his discomfort, and had substantially recovered about four months after the first accident. By then he was easing into his former recreational activities and he did not miss any time from work. On balance, I find an award of $7,500 in non-pecuniary damages for the first accident is appropriate in this case.

**Damages for the Second Accident**

**76**  The defendant does not dispute that the plaintiff suffered much more serious and long-lasting injuries in the second accident. The plaintiff seeks an award in the range of $75,000 to $85,000 based on *Preece v. Leonard*, [*2014 BCSC 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1P2-00000-00&context=), *Pilfold v. Jaswal*, [*2014 BCSC 719*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2CM-00000-00&context=) and *McKenzie v. Sidhu*, [*2013 BCSC 925*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M0MH-00000-00&context=).

**77**  Counsel for the plaintiff places particular emphasis on *Preece, supra*. The plaintiff in *Preece* was 35 years old and suffered a moderate strain to the lumbar and sacroiliac area of his spine that was likely permanent. He went back to work on modified duties but eventually moved to a less physical job. The back pain limited his leisure activities and his intimate relations with his wife.

**78**  The defendant relies on *Ludwig v. Frighetto*, [*2012 CarswellBC 3626*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2NX-00000-00&context=), *Mothe v. Silva*, [*2015 CarswellBC 210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GBN-M0T1-JC5P-G4BC-00000-00&context=) and *Travelbea v. Henrie*, [*2012 CarswellBC 3215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2C6-00000-00&context=) as some indication of a range of $30,000 to $50,000 for similar injuries to those the plaintiff suffered.

**79**  The plaintiff is only 32 years of age. The second accident caused him injuries which are chronic and likely to be permanent, although as I noted earlier in these reasons the report of a physiatrist would have been helpful in shedding light on treatment options that might assist in alleviation of his symptoms. The injuries from the second accident, and more specifically the pain and discomfort caused by the injuries, restrict the plaintiff's leisure activities, affect his new relationship, disrupt his sleep, affect the quality of his relationship with his daughter, and contributed to the emotional difficulties he suffered from in 2014, though I accept they were not the sole or major cause of his depression. The injuries had an impact on the plaintiff's relationship with his former spouse, although he candidly agreed that relationship was rocky. The plaintiff is willing to try different things to make himself feel better instead of lying around feeling sorry for himself.

**80**  In all the circumstances, I agree the plaintiff's case is quite similar to the circumstances in *Preece, supra*, and I award $75,000 in non-pecuniary damages.

**Past Loss of Income**

**81**  The plaintiff seeks an award of $2,500 based on him having missed a minimum of 20 days of work in the past 10 months. The defence agrees the plaintiff lost some days of work as a result of the accident, but submits the evidence to quantify this loss is vague. I find a fair and reasonable amount to award under this head of damage is $1,500.

**Loss of Earning Capacity**

**82**  This was by far the most contentious issue at trial. The plaintiff acknowledges, pursuant to *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=), that he must prove there is a real and substantial possibility of a future event leading to an income loss.

**83**  Counsel for the plaintiff posits two scenarios. One, the plaintiff may continue to miss work on days when he has back pain. The evidence of Mr. Paetkau demonstrates this is a consistent pattern since September of 2014 and that it will continue and cause him ongoing income loss.

**84**  The second scenario is that Centra may lay the plaintiff off. Layoffs happen and the plaintiff does not have a guaranteed position. The plaintiff also says his recent conversation with Mr. Foster about doing more work and less sitting in the office suggests his employer's patience may be wearing thin. If that is the case, the plaintiff's lack of formal education and physical difficulties will put him at a competitive disadvantage.

**85**  The defence suggests the evidence concerning the loss of earning capacity is thin. Dr. Faraday said the presence of pain does not imply a disability, there is no evidence of the extent to which the plaintiff's pain is actually disabling, and there is no functional capacity test before the court to provide evidence about the extent of any disability. The plaintiff has continued to work at his physically demanding job for the past two years without taking any significant time off work. He has not entirely avoided heavy lifting so he is not unable to do it, so Dr. Faraday's belief that the plaintiff is unable to do heavy lifting is in error.

**86**  Defence counsel submits the plaintiff has failed to show a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. There is no evidence of the extent of his impairment and there is no evidence of what jobs he would be foreclosed from as a result of the impairment. While acknowledging the plaintiff has limited education, the defence says he is clearly intelligent and motivated.

**87**  Finally, the defence points out that notwithstanding the plaintiff's perceived inability to do the heavy lifting at work, he was not laid off last year when others at Centra were. That indicates the plaintiff is a valued employee and not realistically at risk of losing his employment due to his injury.

**88**  While I acknowledge there is no functional capacity evaluation for me to consider, I find the evidence of the plaintiff and Mr. Paetkau, as well as peripherally the evidence of Mr. Benedict, establish on a balance of probabilities that the plaintiff has lost work because of pain from the second accident and will continue to miss work for the same reason. This is consistent with the tenor of Dr. Faraday's opinion. I find the plaintiff has established a real and substantial possibility that he will continue to miss work because of the injuries to his back caused by the second accident.

**89**  As to the second scenario posited by the plaintiff, I do not find the evidence establishes his job is at risk because of his back injuries. He has survived layoffs despite his employer's awareness of his back issues and he has been accommodated with mostly light duties. I accept he was worried when his employer told him to spend less time in the office and more time with a tool belt on, but I cannot necessarily connect this to the injuries from the accident.

**90**  In analyzing the plaintiff's income loss arising from missing several days of work each month due to injuries from the second accident, the capital asset approach is apt. Barrow J. summarized the capital asset approach in *Preece*:

[68] The next issue how that loss is to be quantified, that is, whether the earnings approach or capital asset approach is most appropriate in the circumstances. In *Kwei v. Boisclair*, [*[1991] B.C.J. No. 3344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X30K-00000-00&context=) the court adopted the considerations noted by Finch J. (as he then was) 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=). Those factors are whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and in a competitive labour market.

**91**  I accept the plaintiff has proven his back injury has rendered him less capable of earning income from jobs for which he is realistically qualified, that being carpentry and physical work. Education or retraining for less physical work as posited by the defence may be possible but is speculative and would likely involve income loss during education or retraining. The plaintiff is less marketable or attractive to potential employers in his line of work because of his back injury. This is evident from the testimony of Mr. Paetkau. It is unlikely he can take advantage of all job opportunities which might otherwise have been open to him because, as described by Mr. Paetkau, jobs in the construction industry engage physical labour.

**92**  The plaintiff seeks the equivalent of two years' salary at $50,000 per year under the capital asset approach. As I found he established a reasonable possibility of a loss of income arising from lost days at work due to the injuries, rather than a reasonable possibility of a job loss, I decline to compensate the plaintiff for two years' salary. I also note that this is an area where a functional capacity evaluation would have been helpful to assist with what the plaintiff is capable of doing, other than the job he has been doing.

**93**  On balance, I find an award of $25,000 representing one year in salary to compensate the plaintiff for ongoing missed days of work due to pain from the second accident is fair and reasonable on the basis of the evidentiary record adduced. Over the course of the plaintiff's working life to age 65, which I assume will be the date of his retirement though it was not specifically addressed in evidence, he will continue to experience periodic flare ups from his injuries and will need to take days off work because of back pain. Given his young age, the equivalent of six months' salary compensates the plaintiff in current dollars for a conservative loss of income in this regard.

**Cost of Future Care.**

**94**  The plaintiff seeks $10,000 for the cost of future care to cover treatment during phases of acute symptom flare ups which Dr. Faraday predicts might happen twice a year on average. The treatments suggested by Dr. Faraday amount to eight treatments of physiotherapy or other passive therapy over a four week period. The plaintiff paid $25.00 per session of physiotherapy in the past and submits a figure of $400.00 per year is fair, along with an allowance for an active rehabilitation program and a continuation of his regular medication.

**95**  The defence does not take issue with the need for an award for the cost of future care, but quite fairly points out that there is no reliable evidence of the cost of the treatments suggested. The treating physiatrist had made a suggestion about a particular kind of yoga, for example, but that is not before the Court.

**96**  I am left to assess a reasonable amount for the cost of future care without a great deal of guidance on the issue. Taking into account the plaintiff's young age, his need for pain medication and his demonstrated willingness to undertake whatever reasonable treatments and activities will make him feel better, including working with a kinesiologist or taking yoga, I find a fair and reasonable award for the cost of future care is $5,000.

**Special Damages**

**97**  The parties are largely agreed on special damages, with one exception. The plaintiff added a claim during the trial for the $180.00 paid to Dr. Manchanda to fill out a report about his physical condition so he could take the first aid course his employer suggested. While I agree with the defence that the plaintiff's employer, and by extension the plaintiff himself, got good value for the $180.00 because the plaintiff became a trained first aid attendant, there would have been no need for the plaintiff to take first aid training but for the accident. As a result, I award the plaintiff $180.00 for the medical report in addition to the other special damages agreed on for a total of $2,749.

**Summary**

1. The defendant is 100% at fault for the first accident;
2. Non-pecuniary damages related to the first accident: $7,500;
3. Non-pecuniary damages related to the second accident: $75,000;
4. Past wage loss: $1,500;
5. Loss of future income earning capacity: $25,000;
6. Cost of future care: $5,000;
7. Special damages: $2,749

**98**  Unless there are matters of which I am not aware, the plaintiff is entitled to his costs at the usual scale.

**99**  Those are my reasons. Counsel, I will leave you to discuss the issue of costs as I have another matter that is starting shortly.

**100**  **MR. WOODS:** Thank you, My Lady.

**101**  **MR. MCKECHNIE:** Thank you.

J.M.I. DUNCAN J.

**End of Document**

[***Suthakar v. Humble, [2016] B.C.J. No. 172***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J3K-3591-F956-S3CM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.K. Ballance J.

Heard: March 30 and 31, April 1, 2 and 7, 2015.

Judgment: February 2, 2016.

Docket: M134350

Registry: Vancouver

**[2016] B.C.J. No. 172** | 2016 BCSC 155

Between Thaneswary Suthakar, Plaintiff, and Robert Humble and Sarah Natalie Afful, Defendants

(138 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Action by 31-year-old plaintiff for damages for personal injuries suffered in rear-end collision in 2011 allowed — Plaintiff suffered soft tissue injuries to neck, low back and left shoulder — Missed three months of work as production worker and baker — Quit baker position because of ongoing pain — Gross past loss of earning capacity set at $32,000 — Loss of future income-earning capacity fixed at $120,000 — Non-pecuniary damages of $70,000, loss of housekeeping capacity of $35,000, $9,984 for costs of future care, and $1,322 for special damages were awarded.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Loss of housekeeping ability — Special damages — Past loss of income — Employment income — Expenses and expenditures — Transportation — Non-pecuniary loss — Pain and suffering — Action by 31-year-old plaintiff for damages for personal injuries suffered in rear-end collision in 2011 allowed — Plaintiff suffered soft tissue injuries to neck, low back and left shoulder — Missed three months of work as production worker and baker — Quit baker position because of ongoing pain — Gross past loss of earning capacity set at $32,000 — Loss of future income-earning capacity fixed at $120,000 — Non-pecuniary damages of $70,000, loss of housekeeping capacity of $35,000, $9,984 for costs of future care, and $1,322 for special damages were awarded.**

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| Action by the 31-year-old plaintiff for damages for personal injuries suffered in a rear-end collision in 2011. Liability was admitted. The plaintiff, an immigrant without her grade 12 equivalency, suffered soft tissue injuries to her neck, low back and left shoulder. She had no pre-existing conditions. At the time of the accident, the plaintiff worked two jobs as a production worker and baker and completed the majority of her family's housekeeping tasks. Her average annualized income was $35,828. Her husband also worked two jobs so that they could send their children to private school. The plaintiff took three and a half months off work after the accident before resuming full-time hours. She eventually quit her position as a baker in 2012 given her continuing pain at work. She received physiotherapy for her injuries. An occupational assessment concluded the plaintiff had the capacity to work in her current position although her tolerance had been affected.  HELD: Action allowed in part.  There was no real and substantial possibility the plaintiff would have quit one of her jobs prior to trial but for the accident. After assessing the plaintiff's actual income compared to her pre-accident annualized income, her gross past loss of earning capacity was set at $32,000. It was a real and substantial possibility that the accident had foreclosed the opportunity for the plaintiff to take on a second job again. There was little prospect the plaintiff's injuries would resolve completely. The plaintiff's future loss of earning capacity was assessed on a capital asset basis. It was highly likely the plaintiff would not have been able to maintain her pre-accident work pace until her children were grown. A present value of $120,000 was a fair and reasonable measure of the plaintiff's loss of future income-earning capacity. The nature and extent of the plaintiff's diminished housekeeping capacity would not be fairly compensated by encompassing it within the damages awarded for her non-pecuniary loss. Her loss of housekeeping capacity was set at $35,000. Non-pecuniary damages of $70,000 were fair and reasonable. The plaintiff was entitled to $9,984 for costs of future care, including Tylenol, an active rehabilitation program, an annual gym pass, a vocational assessment, and an occupational therapy assessment. Special damages were fixed at $1,322, including $58 for the bus ride to attend an independent medical examination instead of the $350 claimed for her taxi ride. |

**Counsel**

Counsel for Plaintiff: P. Bisbicis.

Counsel for Defendants: A. Watchorn.

**Reasons for Judgment**

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

**INTRODUCTION**

**1**  On July 15, 2011, the vehicle driven by Thaneswary Suthakar, which was also occupied by her two sons, her mother and her friend, was struck twice in the rear while stopped at a red light at a major intersection (the "Accident"). Ambulance and police attended at the scene. Ms. Suthakar was taken to the hospital by ambulance where she was assessed and discharged.

**2**  Liability for the Accident has been admitted. There is no dispute that the Accident caused soft tissue injuries to Ms. Suthakar's neck, low back and left shoulder region. The contentious issues are the severity of her injuries and their impact on her functional abilities and work capacity.

**BACKGROUND SUMMARY**

**3**  The following summary reflects evidence that was either not in dispute or, where it was in dispute, the factual findings I have made based on a consideration of the evidence as a whole. I have explained the reasoning underlying my findings where the evidence conflicted in a significant way on material points or a party has urged that a particular inference be drawn from the evidence.

**4**  In June 2004, Ms. Suthakar immigrated to Canada from Sri Lanka to join her husband, Suthakar Jeyerrasa, who had relocated here some years earlier. She immersed herself in English lessons and, in 2005, secured a minimum wage, full-time job as a cashier at Tim Hortons. Later that year, Ms. Suthakar became pregnant with the couple's first child, who was born in July 2006. After taking a 12-month maternity leave, she returned to Tim Hortons in May 2007, working full-time, primarily as a baker. Her duties included lifting heavy trays of doughnuts, bagels and muffins, taking out the garbage, mopping the floors, washing the dishes and sometimes serving customers.

**5**  Ms. Suthakar went on a second maternity leave in November 2008. Her mother had arrived from Sri Lanka approximately two months beforehand to reside with the young family and provide child care to enable her daughter to return to work after her leave. In exchange, Ms. Suthakar and her husband supplied her mother with food, accommodation and clothing, and covered her medical expenses.

**6**  When Ms. Suthakar's maternity leave finished in December 2009, she did not immediately return to Tim Hortons. Rather, she obtained a new job as a production line worker for Frankly Fresh Salads ("Frankly Fresh"). Her initial hourly wage at Frankly Fresh was $8.50 and increased to $10 the following month.

**7**  Franca Berardi is the owner and general manager of Frankly Fresh, which employs about 18 people. Ms. Berardi is on the plant site about 30 hours each week where she interacts regularly with Ms. Suthakar. She described Ms. Suthakar as a responsible and diligent worker who has distinguished herself as one of the best employees she has ever had.

**8**  Ms. Berardi explained that as a production worker, Ms. Suthakar is responsible for lifting boxes and containers weighing between 25 and 40 pounds, hosing down the produce containers and sweeping the floor. Her duties further require that she stand at an elevated workstation for between one and two hours at a time, looking down at the table as she peels, chops and packages the fruit. Another of her routine tasks is to load the containers of fruit into boxes for delivery to customers.

**9**  In around the last week of September 2010, being approximately nine months after she started with Frankly Fresh, Ms. Suthakar resumed her job as a baker for Tim Hortons. Teuta Isaraj was Ms. Suthakar's manager at the time. She regarded Ms. Suthakar as a reliable and good worker who never complained or called in sick.

**10**  Ms. Suthakar testified that, at the time of the Accident, she was working full time at both Frankly Fresh and Tim Hortons. She stated that she worked from 9:30 a.m. until 5:30 p.m., Monday through Thursday, as well as Sunday, at Frankly Fresh; at Tim Hortons, her shift went from 11 p.m. to 7 a.m. Monday through Thursday and Saturday. Fridays were her only day off. Ms. Suthakar said that she would occasionally work at Tim Hortons on her day off to cover a shift for an ill or otherwise absent staff member. Ms. Suthakar's evidence concerning the extent of her hours of work at Frankly Fresh prior to the Accident, which was echoed by her husband, was not accurate.

**11**  In 2010, Ms. Suthakar's monthly income from Frankly Fresh fluctuated from a low of $895 in June, to a high of $2,065 in May, with weekly average earnings of $324. At her applicable hourly rate, her earnings correspond to roughly 32 hours of work per week. In 2011, her average weekly pre-Accident earnings at Frankly Fresh declined to $242, reflecting an average of 24 hours of work per week.

**12**  As Ms. Suthakar did not get rehired at Tim Hortons after her second maternity leave until late September 2010, she had only held two jobs for a period of 42 weeks before the Accident.

**13**  The probabilities of the evidence as a whole, including Ms. Berardi's evidence and Ms. Suthakar's income tax information, demonstrate that before the Accident, Ms. Suthakar worked at Frankly Fresh an average of between 24 and 32 hours per week. Even allowing for two weeks of vacation (which the evidence indicates she did not take in those years), Ms. Suthakar's pre-Accident earnings at Frankly Fresh, especially those in the 28-week period in 2011 immediately preceding the Accident, reflect a pace that is substantially less than the full-time hours she claims to have worked.

**14**  Ms. Suthakar's husband, Mr. Jeyerrasa, who was 39 years old at the time of trial, came to Vancouver from Sri Lanka in 1994. From the start, he proved to be an extremely hard-working and industrious man able to hold two jobs, mainly in the restaurant business, and survive with a minimum of sleep.

**15**  Shortly after the birth of the couple's first child, Mr. Jeyerrasa was promoted to the position of chef at a high-end restaurant in the downtown area. Since then, he ordinarily works from 9:00 a.m. until 11 p.m. or midnight, five days per week, and more during the busy season which spans from October until December. Given his gruelling work schedule, he has not held a second job since becoming a chef. Instead, several years ago he established a separate janitorial business with his brother. Because Mr. Jeyerrasa was concerned that his reputation as a chef might be sullied if it were known in the industry that he was associated with a "cleaner" job, he registered the business under his wife's name in order to "keep it in the family". Mr. Jeyerrasa's share of the business income was reported in Ms. Suthakar's income tax return. She has no involvement in the business other than signing cheques at her husband's direction.

**16**  Ms. Suthakar explained that she was committed to working two jobs for financial reasons. She expounded that she and her husband each planned to work at a demanding pace for 20 years or so with the main objective of being able to cover the expenses of their children's education at private school and through university. Mr. Jeyerrasa credibly supported his wife's testimony on this matter. He also noted that through their hard work they had been able to acquire an apartment and, with the financial assistance of his uncle, had purchased a home which they hoped to eventually renovate and move into from their cramped apartment.

**17**  Also as a result of the couple's efforts, they have proudly managed to enroll both children in private school. The combined monthly tuition cost is between $1,300 and $1,500, plus administration fees, and is expected to increase in the future. The parents also make a sizeable annual charitable donation to the school, which the school encourages, and they incur expenses for private tutoring of about $300 per month.

**18**  Before the Accident, Ms. Suthakar did not partake in any hobbies or recreational activities beyond taking her children to the park and watching movies and television. When she was not at work or sleeping, her time was largely taken up with cooking, which she enjoyed, cleaning and other domestic responsibilities. She indicated that her husband only occasionally assisted her with those chores. According to him, however, he frequently did household chores in order to allow his wife to catch some sleep before she headed off to one job or the other. He added that his mother-in-law also pitched in and performed light housework such as sweeping, and that all three of them participated to one extent or another in meal preparation. The probabilities of the evidence satisfy me that before Ms. Suthakar assumed two jobs, she carried the lion's share of the domestic load and that even when she began her second job before the Accident, although she had assistance from her husband and, to a lesser extent, from her mother, the majority of the domestic tasks continued to fall to her.

**AFTERMATH OF THE ACCIDENT**

**19**  Approximately one week after the Accident, Ms. Suthakar saw Dr. Karim Harjee, who has been her family physician since May 2005. At that time, she complained of persistent neck and back pain as well as headaches. Dr. Harjee diagnosed soft tissue injuries to Ms. Suthakar's neck and back. He recommended that she take time off from work, apply heat to the affected areas, perform exercises, take Advil and Tylenol #3 as required, and be reviewed in two weeks' time.

**20**  On Dr. Harjee's recommendation, Ms. Suthakar attended approximately 32 physiotherapy sessions between July 2011 and January 2012. They provided her with significant therapeutic benefit, however, the beneficial effects dissipated considerably after the treatments came to an end. The physiotherapist taught Ms. Suthakar to do certain exercises to relieve her symptoms and address her injuries. Since that time, she has performed them reasonably regularly.

**21**  During Ms. Suthakar's visit to Dr. Harjee on October 25, 2011, he charted "some improvement (approx. 50%)" in respect of her Accident-related symptoms. Dr. Harjee was not able to confirm whether his recorded quantification of 50% improvement had been relayed by Ms. Suthakar or was a number that he had used to characterize her degree of improvement. In either case, I find that it accurately describes the extent of Ms. Suthakar's improvement at that point in time.

**22**  Ms. Suthakar took between three and four months off from work immediately after the Accident. At the end of October or in early November 2011, she resumed her position at Frankly Fresh. She initially worked on a part-time basis but very quickly assumed full-time hours. Both Ms. Suthakar and her husband were worried about the financial repercussions of Ms. Suthakar having missed several months of work, which prompted her to return to work sooner than she felt ready. Her husband subsequently took it upon himself to speak to Ms. Isaraj at Tim Hortons about rehiring his wife. It was indicated to Ms. Isaraj, either by Ms. Suthakar or her husband, that Ms. Suthakar did not feel able to perform the duties required of a baker and was instead seeking work in the less physically demanding capacity of a front-end cashier. Ms. Isaraj confirmed that in January 2012 she rehired Ms. Suthakar on the understanding that she was only able to work as a cashier two to three days a week.

**23**  Before the Accident, Ms. Berardi encountered no performance issues with respect to Ms. Suthakar, did not observe her to exhibit behaviour consistent with experiencing pain and was not aware of her having any health conditions whatsoever. However, Ms. Berardi did notice changes after the Accident. In its aftermath, Ms. Suthakar, whom Ms. Berardi regards as a stoic person who does not complain, appeared to be in pain on the job and complained of pain, at times declaring that her back, neck and shoulders were "killing me". Ms. Berardi has seen Ms. Suthakar take Tylenol at work on a few occasions and often hears her mention that she needs to take one.

**24**  Ms. Berardi confirmed that, despite Ms. Suthakar's pain, she remains a diligent and hard-working employee and has recently assumed supervisory duties on a temporary basis. In addition to her usual pre-Accident duties, Ms. Suthakar now also manually mixes the contents of dips and salsas by leaning over large vats and using her shoulders and arms to mix the ingredients for approximately 30 minutes for each batch.

**25**  Regarding Ms. Suthakar's post-Accident work at Tim Hortons, Ms. Isaraj testified that, although Ms. Suthakar sometimes complained about her back hurting, the quality of her work did not decline and she continued to do a good job.

**26**  Ms. Suthakar testified that in 2012 she worked full-time hours, four days a week at Tim Hortons. A careful reading of the evidence reveals that, once again, she overstated the hours she worked. From January until May 2012, Ms. Suthakar worked approximately 16 hours a week at Tim Hortons. That is plainly not the equivalent of full-time hours, four days a week. Thereafter, however, her weekly hours climbed to between 26 and 30, with two exceptions where her weekly hours in two separate intervals averaged 36 to 40.

**27**  Despite the fact that Ms. Suthakar was eventually able to return to both jobs after the Accident, she regularly experienced bouts of symptom exacerbation and pain in performing her employment duties. Standing for prolonged periods of time, particularly on the days where she worked for both employers, was especially aggravating to her injuries. Ms. Suthakar was prescribed various anti-inflammatory and pain medications, however, she found that they often caused her stomach to be upset and therefore she opted to rely mainly on over-the-counter Tylenol and Advil to try to control her symptoms.

**28**  Ms. Suthakar came to feel as though she was harming herself by continuing to work in pain and by regularly ingesting medication over a protracted period of time. Her husband could see the toll that working two jobs was taking on his wife and supported her leaving Tim Hortons. She quit there for good in December 2012. At that time, her hourly wage was $10.25, with an additional $1.00 per hour when she worked the graveyard shift.

**29**  Since leaving Tim Hortons in December 2012, Ms. Suthakar has continued to work at Frankly Fresh. At some point after the Accident, her hourly rate increased to $12 and since assuming some supervisory duties, (on a date that was not made clear in the evidence), her hourly wage rose to $15.

**30**  Ms. Suthakar's evidence concerning the extent of her Tylenol usage was inconsistent. She testified that she was able to manage her symptoms without Tylenol on the days that she was not working both jobs in 2012, but typically took eight tablets on the days that she worked two shifts. At another point in her direct examination, Ms. Suthakar clarified that her pain usually increased after about six hours into her shift at Frankly Fresh and that she would take Tylenol at that juncture, even on days where she was not working the graveyard shift at Tim Hortons. In cross-examination, she testified that she took Tylenol every day of the week while she held down two jobs in 2012. She also testified that since quitting Tim Hortons, she has taken six Tylenol per day on her four most demanding work days of the week.

**31**  I accept that Ms. Suthakar continues to regularly experience pain in her neck and back, and to a lesser extent in her left shoulder region, in performing certain of her work responsibilities at Frankly Fresh, especially those requiring her to stand for sustained periods. Mr. Jeyerrasa testified that on the occasions when he is able to take a break from his job to collect his wife after work, she appears to be visibly depleted and in pain to the point where she wants to lay down in the car on the drive home. Upon arriving home, her pattern is to take a hot shower and then rest on the couch with a hot pack (both of which help to temporarily soothe her symptoms), and watch television. At the end of her work day, Ms. Suthakar is usually too tired to play with the children and relies on her mother to tend to them. As her husband put it, "she doesn't do anything anymore".

**32**  Mr. Jeyerrasa's tireless work ethic is shared by his brother, whose testimony assisted the Court in relation to the effect of the Accident upon Ms. Suthakar. For the past eight or nine years, he has worked at a foundry 40 hours a week and, over the last six years or so, has worked an additional four hours every day at the janitorial business that he owns with Mr. Jeyerrasa.

**33**  Before the Accident, Mr. Jeyerrasa's brother ordinarily saw his sister-in-law two or three times a week. He testified that she was a healthy woman who cooked, cleaned the house and enjoyed the children. She liked to watch movies and listen to music, and never complained. Mr. Jeyerrasa's brother has tended to visit more frequently after the Accident and makes a point of joining the family each Sunday night in order to spend time with his young nephews. He testified that Ms. Suthakar is often sleeping on the couch when he arrives. He has not noticed her cooking or cleaning at all anymore. His observation is that when Ms. Suthakar is awake, she is frequently stretching and/or rubbing her neck and back. It is his impression that she is often in pain, particularly in her neck area. He also testified that she can be quick to anger and becomes irritable with the children, which was never the case before the Accident.

**EXPERT EVIDENCE**

**\* Ms. Suthakar's Medical Experts**

**34**  Ms. Suthakar tendered expert reports from Dr. Harjee and from Dr. John Fuller, an orthopedic specialist, dated February 2, 2015 and May 28, 2014, respectively.

**35**  Dr. Harjee diagnosed soft tissue, musculoligamentous strain-type injuries involving Ms. Suthakar's cervical spine, lumbar spine and left shoulder area. He opined that her injuries contributed to her headaches and poor sleep, and that her related inactivity contributed to some weight gain.

**36**  Dr. Harjee stated that Ms. Suthakar had not achieved complete recovery as her symptoms were ongoing. He singled out her sustained standing while at work as being especially aggravating to her soft tissue symptoms. He considered her symptoms to be chronic in nature and prognosticated they would likely persist and continue to impact her function.

**37**  Dr. Harjee recommended that Ms. Suthakar attend an active rehabilitation program that focused on strengthening and stabilizing her core and which required her direct participation in exercises much like having a personal trainer. He also recommended that she have a pass to a gym and a pool to enable her to continue with an independent recovery program. Dr. Harjee planned to continue to offer gentle analgesics and night time medications aimed at settling some of her chronic pain and facilitating restful and restorative sleep which, he opined would improve her daytime function. He believes that the physical rehabilitation he recommends, coupled with modifications to her workplace, will be beneficial to Ms. Suthakar**.**

**38**  Dr. Harjee holds the view that Ms. Suthakar may no longer be suited to her current employment. He thinks that alternate or more sedentary work that does not require standing for long periods at a time, awkward positions or repetitive and forceful arm and shoulder activities may be a better match. He recommended engaging the services of a vocational counsellor to explore Ms. Suthakar's options.

**39**  Dr. Harjee testified that the acute phase of Ms. Suthakar's injuries came to an end four to five months after the Accident. Thereafter, there are increasingly fewer references to her injuries in her medical chart. The defendants emphasize the lengthy gap between May 1, 2012 and June 20, 2014 where, with one or two exceptions, Ms. Suthakar did not complain about her injuries during her appointments with Dr. Harjee. They urge that this gap supports the inference that by May 2012, Ms. Suthakar's symptoms had settled down considerably and no longer required medical attention. When cross-examined about this matter, Dr. Harjee responded that some of his patients like to come in every two weeks to discuss their pain, whereas others do not want to talk about things they cannot do anything about. As well, his records indicate that as of October 2014, Ms. Suthakar continued to report persistent neck and back pain, and that she had been sleeping poorly and taking Tylenol frequently.

**40**  In *Edmondson v. Payer*, [*2011 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XC-00000-00&context=), aff'd [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=), N. Smith J. provided instructive commentary on the evidentiary use of clinical records including the relevance of their absence. At paragraph 37 he remarked:

[37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the Accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

**41**  I have concluded that nothing of importance turns on the absences in Ms. Suthakar's medical chart of complaints to Dr. Harjee about her ongoing symptoms.

**42**  Dr. Fuller assessed Ms. Suthakar on May 7, 2014. His clinical diagnoses of her injuries caused by the Accident aligned with those made by Dr. Harjee. Specifically, he opined that her musculoskeletal symptoms included musculoligamentous injury to her neck, headaches secondary to her neck injuries, and low back pain involving the sacroiliac complex secondary to sacroiliac dysfunction, with displacement and restriction of passive motion to her sacroiliac joint.

**43**  Dr. Fuller helpfully discussed a reasonable analysis of the mechanics of the Accident (assuming a rear-end collision with two impacts) and the resultant forces endured by Ms. Suthakar. He explained that her neck and back would likely have been subjected to a physical load, initially in the form of backward bending, and perhaps followed by more significant forward bending. He pointed out that the seatbelt would not have protected Ms. Suthakar's cervical spine from the type of overload that he believes she sustained.

**44**  Dr. Fuller expounded that the sacroiliac complex is below the spine and above the tailbone and is inherently unstable. He explained that an individual's entire body weight sits on the tailbone and the sacroiliac joint supports that weight. In his experience, rotation in the sacroiliac complex is very common in motor vehicle accidents and is essentially untreatable because the joint remains permanently unstable.

**45**  Although Dr. Fuller offered a guarded, if not poor, prognosis for any further spontaneous recovery of Ms. Suthakar's neck, he did not exclude entirely the possibility for some additional marginal improvement in the future. With reference to her low back/sacroiliac system, he concluded there was a persistence of displacement stemming from the Accident, which would cause some persistent dysfunctional loading of the ligaments supporting her sacroiliac joints. His prognosis for Ms. Suthakar's low back symptoms was similarly guarded, if not poor. In Dr. Fuller's view, modalities of treatment such as sacroiliac support or remedial exercise tended to be of limited benefit and he recommended they be used as an adjunct to manual therapy only.

**46**  To Dr. Fuller's mind, treatments, such as acupuncture, chiropractic and physiotherapy would likely be ineffective for Ms. Suthakar's type of soft tissue injuries or effective only to relieve her symptoms temporarily and would not cure her chronic condition. He added that the long-term use of Tylenol was not ideal because its effectiveness dissipates over time and it is very toxic to the liver.

**47**  Dr. Fuller considered it noteworthy that Ms. Suthakar had been relatively functional after the Accident, although he observed that her ability to manage her home was markedly restricted. That being said, he noted that she had remained employed at considerable personal cost in light of her ongoing exacerbation of symptoms which eventually resulted in her leaving her job at Tim Hortons as she was unable to tolerate the long periods of standing. He continued that Ms. Suthakar's symptoms were similarly exacerbated by her employment at Frankly Fresh and that given the status of her compromised musculoskeletal system, those exacerbations would probably persist.

**48**  Dr. Fuller believes that Ms. Suthakar is ill-suited to any occupation requiring significant lifting, repetitive lifting, rapid movement, or working in an awkward or confined space. Given that her sitting tolerance is compromised, Dr. Fuller, unlike Dr. Harjee, does not consider her a good candidate for a sedentary occupation either. He also endorses the carrying out of a vocational assessment.

**49**  When Dr. Fuller assessed Ms. Suthakar on May 7, 2014, she reported that her symptoms had become worse and more significant in the months leading up to his assessment. In cross-examination, Dr. Fuller was questioned about whether it was unusual or illogical for her symptoms to increase after Ms. Suthakar had given up her second job and was, therefore, no longer doing as much prolonged standing as in 2012. Dr. Fuller agreed that may be unusual, but added that people with soft tissue injuries do not necessarily follow stipulated recovery patterns and that each injury is unique. He would not agree with the proposition that, in light of Ms. Suthakar's complaints, it was "strange" that she had been able to work two jobs that primarily involved standing. He testified that she had simply been physically capable of doing so in pain for a finite period of time. He also observed that it was normal for people to become fatigued with chronic injury and face increased difficulties with their symptoms over time.

**50**  To my mind, Dr. Fuller's responses satisfactorily addressed the defendants' line of inquiry and neutralized the cogency of any submissions flowing from it.

**\* The Defendants' Medical Expert - Dr. Kenneth Kousaie, Orthopedic Surgeon**

**51**  Dr. Kousaie performed an independent medical assessment of Ms. Suthakar on December 9, 2014. She told him that she was currently experiencing a 50% improvement in her symptoms as compared to the time of the Accident, and that she had an even greater improvement (closer to 90%) during the period she was undergoing physiotherapy. It would seem from Ms. Suthakar's self-reports to Dr. Kousaie that her symptoms had improved since being assessed by Dr. Fuller some six months earlier, or at least were no longer worsening.

**52**  Dr. Kousaie diagnosed moderate soft tissue injury to the left side of Ms. Suthakar's neck area including her paravertebral muscles and trapezius (shoulder area) muscle, and to her left lower back in consequence of the Accident. He shared the view of the other medical experts to the effect that her headaches were more than likely related to the soft tissue injury to her neck area. Dr. Kousaie concurred with Dr. Fuller's opinion that there is no evidence of any previous symptomology or pre-existing condition that would have led to Ms. Suthakar's current complaints.

**53**  Despite the fact that Dr. Kousaie's clinical examination of Ms. Suthakar proved to be normal, he confirmed he had no reason to doubt that her symptoms eventually prevented her from working the long days she endured while employed at two jobs in 2012. He reported there were no positive findings to suggest that the symptoms she described were "anything but true".

**54**  Apparently on the footing that Ms. Suthakar was able to perform her pre-Accident duties at Frankly Fresh since returning to that position late in 2011, Dr. Kousaie reasoned there was no total or partial disability for that type of work at the time of his assessment. He expressed this view while, at the same time, acknowledging that Ms. Suthakar experienced pain at the end of each workday at Frankly Fresh and opining that it was unlikely she would be able to return to her second job or resume housework or the cooking and shopping chores that she had performed prior to the Accident. The concept of "disability" that Dr. Kousaie applied in this context was not explained in his report and he did not testify at trial. The only reasonable interpretation is that he construed the term "disability" in the narrow sense to mean that Ms. Suthakar's injuries did not preclude her from doing her job at Frankly Fresh. To interpret his statement otherwise would place it in conflict with his acknowledgement of the adverse impact her symptoms have had and will continue to have on her employment at Frankly Fresh and with respect to holding a second job.

**55**  From Dr. Kousaie's standpoint, the sole means available to Ms. Suthakar to improve her symptomology is for her to participate in an exercise program. He noted that she may require physiotherapy on a very short-term basis to reinforce the physical exercise that will be required to decrease her symptomology. Dr. Kousaie thinks that participation in such a program may improve Ms. Suthakar's tolerance to physical activities at work and at home. However, he cautioned that, in light of the length of time that had now passed since she sustained her injuries, it was also possible that she would not enjoy any further improvement.

**\* Expert Evidence of Occupational Therapists/Certified Work Capacity Evaluators**

**56**  Ms. Suthakar tendered the report of Edgar Emnacen, a senior consultant occupational therapist and certified work capacity evaluator, containing his evaluation of her functional abilities and limitations conducted in October 2014.

**57**  Mr. Emnacen appeared to have a thorough appreciation of Ms. Suthakar's current work responsibilities at Frankly Fresh. He concluded that a comparison of her demonstrated level of functioning in relation to her job demands indicated that her abilities closely matched the physical demands of her work. His testing confirmed that Ms. Suthakar has the reaching, handling and standing capacities to do her job; however, he found that her tolerances for those demands were negatively impacted by her symptom reactivity. More specifically, he found limitations with regard to her sustained neck flexion and extension positioning, left side forward and overhead reaching tolerances, and her sustained sitting, standing, crouching and kneeling tolerances.

**58**  In Mr. Emnacen's opinion, the pain in Ms. Suthakar's neck, left shoulder and left low back would likely be aggravated by certain movements and postures required by her employment at Frankly Fresh. Additionally, he noted that her global strength capacity fell below the 25 pound lifting demands of her work. He stated that lifting 25 pounds or more on a repeated basis would likely exacerbate her symptoms, as well as potentially compromise her safety in the workplace.

**59**  Mr. Emnacen's understanding was that Ms. Suthakar currently performs a mix of supervisory duties with production line tasks at Frankly Fresh. He commented that the task rotation between supervisory duties and production line work may provide her with some symptom relief. Even with the benefit of that relief, his view is that she will likely continue to experience increasing symptom levels with the continued exposure to functional stressors over the course of her shift. It would seem that Mr. Emnacen was not aware that Ms. Suthakar's supervisory duties were temporary in nature. Thus, his opinion is formulated, in part, on his understanding that her job would continue to encompass the supervisory elements that allowed her to take breaks from the fast-paced production line work. It was not clear on the evidence just how much longer Ms. Suthakar would be carrying out supervisory tasks.

**60**  In the end, Mr. Emnacen concluded that Ms. Suthakar has the capacity to work in her current position at Frankly Fresh, although he predicts that her overall tolerance will likely be affected by her symptom reactivity. He expressed concern about her ability to remain performing her work on a full-time basis, noting that it would depend on how much longer she is able to tolerate pushing through her shift while experiencing pain. Mr. Emnacen also opined that the accumulation of Ms. Suthakar's symptoms would likely place limitations on her tolerance for working additional or longer hours on a regular basis. In his opinion, in the event that she has to seek alternative employment, her employability has been reduced.

**61**  To assist Ms. Suthakar in maintaining and possibly improving her tolerances and maximizing her durability for her current work, Mr. Emnacen recommended that she undergo a course of active rehabilitation with a physiotherapist or kinesiologist. He shared Dr. Harjee's view that the program should focus on core strengthening, as well as improving her reaching and sustained neck and back postural tolerances.

**62**  Mr. Emnacen also:

1. concurred with Dr. Harjee's recommendation that Ms. Suthakar have a personal trainer and a gym pass;
2. recommended that she participate in ten to 12 kinesiology sessions to establish a new exercise program that she can complete independently, along with an annual gym pass;
3. believed she would benefit from a job site visit/ ergonomic analysis of her work by an occupational therapist to determine whether there were any strategies in work style and/or work station adaptations that could be implemented to minimize aggravation of her symptoms. He envisioned that the occupational therapist would also discuss strategies that Ms. Suthakar could use at home to re-engage in activities of daily living; and
4. endorsed her receiving education about active pain management principles such as pacing her work and home activities.

**63**  At the outset of Mr. Emnacen's approximate eight-hour assessment, he identified that Ms. Suthakar exhibited a low effort during her initial first grip test. After confronting her with the inconsistencies related to that test, he concluded that her subsequent level of effort on testing was high overall. That said, Mr. Emnacen did find it unusual that on testing of her repetitive movements, Ms. Suthakar's performance at the end of the day was superior to her performance at the beginning, despite significant increases in her reported pain levels. He commented that her symptom reports at the close of the day did not correlate well with some aspects of her demonstrated function. He also concluded that Ms. Suthakar both reasonably estimated and underestimated her global strength capacity.

**64**  In Mr. Emnacen's words:

Overall, Ms. Suthakar's presentation suggests reasonably accurate disability reports in the presence of lower symptom levels; with increasing perceived symptoms and disability reports towards end of day testing, the reliability of her reports diminished.

Please note that the aforementioned statements are in no manner meant to imply intent. Rather, it is simply being stated that Ms. Suthakar is capable of greater than she states or proceeds at times.

**65**  The defendants rely on the responsive report of their expert, Paul Pakulak, who is also an occupational therapist and a certified work/functional capacity evaluator. Mr. Pakulak did not conduct an independent assessment of Ms. Suthakar. His report took the form of a critique of certain features of Mr. Emnacen's opinion.

**66**  The thrust of Mr. Pakulak's opinion is that, relying as he did on Ms. Suthakar's symptomatic reports, Mr. Emnacen could not accurately gauge her level of capacity in light of:

1. the low effort demonstrated by Ms. Suthakar in her initial grip test;
2. the variable levels of effort recorded by Mr. Emnacen throughout the testing; and
3. the inconsistent and/or unreliable reported levels of symptoms and degree of disability documented by Mr. Emnacen.

**67**  According to Mr. Pakulak, when self-reports of symptoms and reported levels of disability are found to be unreliable, which he urges is the case here, opinions concerning an individual's physical abilities and limitations ought to be based primarily on objective test data, which was not adequately done in Ms. Suthakar 's case.

**68**  In responding to Mr. Pakulak's report, Mr. Emnacen emphasized that the grip test, on which Ms. Suthakar exhibited low effort, was merely one of a number of metrics that he administered to assess her effort and that, except for her flawed effort on that initial test, she demonstrated a reasonably high effort throughout testing. He also explained that his handwritten notes, which recorded the placebo tests he had carried out on Ms. Suthakar, were consistent with her demonstrating a reasonable or high effort on testing and had been overlooked by Mr. Pakulak.

**69**  As to the fact that Ms. Suthakar was better able to perform repetitive movement tests later in the day even though she reported heightened pain when doing so, Mr. Emnacen speculated that her poor baseline results at the start of the day might have been due to factors such as pain early in the day and/or performance anxiety, but agreed he was simply not able to say one way or the other. His reasoning does not adequately address the fact that Ms. Suthakar reported pain at lower levels -- not higher ones -- on her baseline testing.

**70**  I am not prepared to conclude that Mr. Pakulak's criticisms call into question the reliability of the entirety of Mr. Emnacen's conclusions concerning Ms. Suthakar's abilities and limitations. However, the Court cannot disregard his opinion that some of his own testing showed that Ms. Suthakar's symptom reports appeared to be high, or that her symptoms are not as disabling as she perceives and reports her function to be. Attention must likewise be paid to his view that the reliability of her reports was diminished by the disjuncture between her improved performance towards the end of the testing day and her concurrent reports of heightened pain and disability. Mr. Emnacen's own findings decrease to some extent the weight the Court can confidently place on his opinion concerning Ms. Suthakar's abilities and limitations and the effect they may have on her current and future employment and general function.

**71**  The probabilities of the evidence taken as a whole indicate that Ms. Suthakar is capable of somewhat greater function and higher tolerances with respect to certain movements, and possibly with respect to her global strength, than she portrayed to Mr. Emnacen on testing or perceives that she possesses, or both.

**MS. SUTHAKAR'S CREDIBILITY**

**72**  Although Ms. Suthakar was a credible witness on most issues, there were some notable exceptions in addition to the concerns raised by Mr. Emnacen's findings. Most troubling was that both she and her husband exaggerated the hours she worked at Frankly Fresh before the Accident and overstated those that she worked at Tim Hortons afterward. In addition, her evidence concerning her Tylenol usage was unreliable which, in turn, raised concerns about the key issues of the frequency and intensity of her residual symptoms and their functional impact upon her. In my view, her testimonial shortcomings were not the result of being a sincere but poor historian or due to any problems stemming from the fact that her evidence was given through an interpreter.

**73**  While I do not consider these deficiencies to justify an outright rejection of Ms. Suthakar's evidence in the absence of independent corroboration, they are of sufficient concern to require that her evidence be assessed with extra caution.

**CAUSATION**

**74**  As mentioned, there is consensus among the medical experts that the Accident caused Ms. Suthakar headaches and soft tissue injuries primarily to her low back, neck and left shoulder area.

**75**  The *but for* test of causation articulated in *Athey v. Leonati,* [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) and its lineage does not require the court to accept or find a particular medical diagnosis. Even so, I accept Dr. Fuller's more fulsome opinion as it concerns Ms. Suthakar's low back injury, which was not contradicted by Dr. Kousaie, to the effect that she probably sustained an injury to her sacroiliac complex as a result of the Accident.

**DAMAGES**

**\* Loss of Income-Earning Capacity**

**76**  The legal framework that informs an award for loss of earning capacity was instructively summarized by Dardi J. in *Midgley*, [*[2013] B.C.J. No. 805*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-206B-00000-00&context=) at paras. 236-240:

[236] The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=) at para. 19; *X. v. Y*, [*[2011] B.C.J. No. 1378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=) at para. 183.

[237] As enumerated by the court in *Falati v. Smith*, [*2010 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62PC-00000-00&context=) at para. 41, aff'd [*2011 BCCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KT-00000-00&context=), the principles which inform the assessment of loss of earning capacity include the following:

1. The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
2. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 79 (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* [*(1990), 75 O.R. (2d) 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) at 636 (C.A.).
3. The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11.

[238] Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at paras. 31-32; *X. v. Y* at para. 185.

[239] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[240] This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

[40] the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. As stated by Rowles J.A. in *Smith v. Knudsen*, [*2004 BCCA 613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=), at para. 29,

"What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

**77**  In advancing a claim for the loss of income-earning capacity, the plaintiff must prove a real and substantial possibility of such loss, as opposed to a theoretical one. In other words, the award cannot be based on speculation: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) [*Rosvold*]; *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=). Where a real and substantial possibility of loss has been established, compensation is awarded based on an estimation of the chance that the event leading to such loss will occur: *Steward v. Berezan*, [*2007 BCCA 150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=). As was recently observed by the Court of Appeal in *Kim v. Morier*, [*2014 BCCA 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1MC-00000-00&context=) at para. 7, the onus on the plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award.

**78**  Quantification of loss is an assessment meant to reflect the non-speculative positive and negative contingencies at play. As quantification is not a strict mathematical calculation, there is no particular formula or methodology to be employed: *Rosvold* at para. 11; *Jurczak v. Mauro*, [*2013 BCCA 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S46D-00000-00&context=) at para. 36.

**79**  Evidence of ongoing pain may be sufficient to ground a substantial possibility that a plaintiff's pain will adversely affect his or her future ability to work. This may hold true even where, at the time of trial, the plaintiff has not missed work due to the injury: *Clark v. Kouba*, [*2014 BCCA 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1F1-00000-00&context=) at para. 33; see generally, *Williamson v. Suna*, [*2009 BCSC 576*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M26V-00000-00&context=) at paras. 52, 55 and 62.

1. ***Ms. Suthakar's Past Loss***

**80**  Ms. Suthakar contends that, due to her injuries, she lost 3.5 months of work from Frankly Fresh and slightly more from Tim Hortons, curtailed her hours at Frankly Fresh in December 2011 and worked fewer hours than she otherwise would have when she resumed employment with Tim Hortons in 2012. She also attributes the loss of her job at Tim Hortons to her Accident-induced injuries.

**81**  The defendants concede that Ms. Suthakar incurred some pre-trial wage loss as a result of the Accident. In terms of quantifying her loss, they assert it should be determined by reference solely to her 2011 annualized pre-Accident earnings from Frankly Fresh and Tim Hortons, which they calculate to be $33,696, less her actual earnings in any given year during the pre-trial period. Ms. Suthakar counters that the losses she sustained should be quantified in relation to each employer separately and compared against her corresponding actual earnings from each such employer.

**82**  There is more than one way to fairly assess Ms. Suthakar's pre-trial loss. In my view, the model of assessment she advocates poses too great a danger of overstating her loss. The problem inherent in her approach is that it does not adequately balance the loss she incurred in relation to Tim Hortons against her significant upswing in hours and earnings at Frankly Fresh during the same period. In the result, her analysis produces a pre-trial loss that is unfairly skewed to her advantage. In the circumstances, I prefer an analysis that calculates Ms. Suthakar's global earnings within the 42-week period immediately before the Accident during which she held both jobs, and uses that figure as a comparative benchmark.

**83**  Ms. Suthakar's average combined weekly earnings from Tim Hortons and Frankly Fresh during the 42 weeks immediately preceding the Accident, which is the only pre-Accident period in which she held two jobs, was $689. That corresponds to an annualized income of $35,828. In 2011, Ms. Suthakar's total earnings of $22,420 fell $13,408 short of the annualized amount she was on track to achieve from both jobs. A comparison of her actual employment earnings in 2012 ($34,537) against the projected benchmark of $35,828 results in the significantly smaller discrepancy of $1,291.

**84**  In 2013, Ms. Suthakar's employment income was $30,128, yielding a negative difference of $5,700 when measured against the benchmark. In 2014, the difference was $6,485 ($35,828 - $29,343) and for the three months prior to trial in 2015, the difference was $670 ($8,957 - $8,287).

**85**  The foregoing calculations result in an arithmetical calculation of loss in the amount of $27,554. A considerable upward adjustment ought to be made to reflect the fact that Ms. Suthakar's hourly wage at Frankly Fresh increased to $12 and then to $15 at certain points after the Accident, as those raises are not encompassed in the benchmark. Here, I would add, that although Ms. Berardi testified that Ms. Suthakar was performing supervisory duties on a temporary basis, there was no suggestion that when she is no longer responsible for those duties, her current hourly wage of $15 will decrease. Additionally, very minor adjustments should be taken into account for the two weeks of work that Ms. Suthakar missed in 2012 and was not paid for while convalescing from her carpal tunnel surgery unconnected to the Accident, and to address the two- or three-week vacation to Sri Lanka she took in 2014 that was not entirely covered by her holiday pay.

**86**  The defendants challenge Ms. Suthakar's assertion that had the Accident not happened, she would have continued to work two jobs until her sons had completed university. Their argument is tied to Ms. Suthakar's evidence given in cross-examination that it was a "financial necessity" for her to have two jobs. Building on that theme, the defendants elicited evidence pertaining to the couples' combined income and the family expenses. The defendants contend that the family's expenses would be adequately covered by Mr. Jeyerrasa's income, the income from his janitorial business and Ms. Suthakar's income from Frankly Fresh alone. They estimate the aggregate income from those sources to be approximately $120,000 in 2013, and between $122,343 and $131,343 in 2014 and 2015. This evidence, say the defendants, shows that the family would be financially comfortable without Ms. Suthakar carrying a second job, and thus there is no financial need *per se* for her to hold down two jobs.

**87**  The defendants' line of argument on this issue founders on their unduly narrow interpretation of the evidence about the financial rationale driving the couple's strong work ethic and their common intention that Ms. Suthakar would contribute to the family's resources by working two jobs long into the future. Although Ms. Suthakar agreed in cross-examination that having two jobs was a "financial necessity", when she used her own words to describe her motivation, she repeatedly said it was for "financial reasons". As noted previously, she elaborated that those financial reasons were primarily that she and her husband were determined to provide their sons with a superior education by sending them to private school and continuing to support them financially through university. Mr. Jeyerrasa credibly corroborated his wife's evidence and expanded upon it by speaking about their desire to raise their sons in a nice home and detailing the concrete steps they had taken in that regard. The tenor of the whole of the evidence on the issue was not that Ms. Suthakar was driven to obtain a second job due to financial necessity in the sense that the family would not be able to afford basic necessities or to meet their current ongoing annual expenses if she did not do so. Rather, the evidence persuasively establishes that before the Accident, Ms. Suthakar had implemented and was committed to following, as best she was able, the intense work ethic exemplified by her husband and brother-in-law to ensure that her sons received the most privileged education and best lifestyle that she and her husband were able to supply. For her, that commitment meant that she would work two jobs into the foreseeable future.

**88**  What Ms. Suthakar's life held in store had the Accident not happened can never be precisely known. At the time of the Accident, she was 27 years old and had the Canadian equivalent of a grade 11 education. She was in good health and determined to work to the limits of her capacity. I find a strong chance of a real and substantial possibility that she would have continued to hold two jobs in the pre-trial period, with a relatively low likelihood that within that timeline, she may have found the pace to be too much, and dropped a shift or two at one of her jobs. There is no real and substantial possibility that Ms. Suthakar would have quit one of her jobs entirely in the pre-trial scenario. I also find no real and substantial possibility that she would have augmented her total weekly work hours had the Accident not happened.

**89**  Assessing, in the context of the whole of the evidence, the relative chances of the real and substantial possibilities of what would have happened in the past but for the Accident, together with the pertinent contingencies, there can be no doubt but that Ms. Suthakar's diminished capacity from the Accident has resulted in a pecuniary loss.

**90**  Aiming for overall fairness between the parties, I quantify Ms. Suthakar's loss to trial as **$32,000** (gross).

**91**  Counsel are directed to make the necessary calculations to determine Ms. Suthakar's net loss, with liberty to apply if they are unable to reach agreement.

***(ii) Ms. Suthakar's Future Loss***

**92**  In a nutshell, my task is to compare the likely future of Ms. Suthakar's working life if the Accident had not happened, to her likely future working life in light of its occurrence: *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=) [*Gregory*] at para. 32.

**93**  Many of my findings that bear on Ms. Suthakar's loss before trial also have application to the assessment of her future loss.

**94**  The defendants assert that Ms. Suthakar has failed to prove a real and substantial possibility of a future event leading to an income loss and, consequently, is not entitled to an award under this head. That is a puzzling assertion in light of the opinion of the defendants' own medical expert, Dr. Kousaie, and the preponderance of the balance of the evidence, all of which cogently points the other way.

**95**  Ms. Suthakar is in her prime working years. The expert medical evidence, including that of Dr. Kousaie, establishes that the lingering after-effects of the Accident will likely continue to pose a barrier to Ms. Suthakar's capacity to return to Tim Hortons or take on a second job into the future. I find a likelihood of a real and substantial possibility that the Accident has foreclosed those opportunities altogether and that Ms. Suthakar will not be able to manage an additional job, even on a part-time basis, in the food service or preparation industry or in any occupation that requires her to stand or sit for sustained periods of time or assume the relatively innocuous postures or movements that exacerbate her symptoms.

**96**  Through sheer grit and determination and to her credit, Ms. Suthakar has continued to work at Frankly Fresh largely on a full-time basis, except for taking time off from work in the immediate aftermath of the Accident when her injuries were especially acute. Many of her compulsory work tasks and activities aggravate her symptoms. During the majority of her shifts those setbacks cause her pain that can become intense and functionally limiting -- yet still she pushes through.

**97**  Ms. Suthakar's injuries have improved considerably since the Accident. I accept the medical evidence that indicates further improvement is possible and note in this regard that, despite experiencing a worsening of symptoms for a time prior to her appointment with Dr. Fuller, her condition improved when she subsequently saw Dr. Kousaie. I accept the expert evidence that indicates there is some prospect that the rehabilitation exercise program, followed by a consistent independent gym program along with ergonomic improvements in her workplace, may help Ms. Suthakar better manage her symptoms and could improve her condition overall. Although the potential for additional improvement may be on the horizon, there is also a likelihood that the degree of any further improvement would be relatively marginal. There is little prospect of Ms. Suthakar's injuries resolving completely, and I accept that her prognosis is guarded.

**98**  The evidence supports the finding of a strong chance of a real and substantial possibility that Ms. Suthakar will regularly be confronted by episodic flares of her symptoms throughout her future tenure with Frankly Fresh, and in any similar position she may obtain. It is a matter of common experience that, over time, ongoing pain can have a detrimental effect on a person's ability to work. This holds true even in circumstances where the employer is prepared to make accommodations that may help to ameliorate the pain: *Morlan v. Barrett*, [*2012 BCCA 66*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1TW-00000-00&context=) at para. 41. The logical extension of that common experience is that the detrimental effect may be accelerated or more profound where an employer is not prepared to make workplace accommodations, or the accommodations do not provide the beneficial effects to the extent expected.

**99**  The Accident is plainly responsible for an impairment of Ms. Suthakar's future earning capacity, with a good chance of a real and substantial possibility that her diminished capacity will continue to manifest into the future indefinitely. That being said, for the reasons already given, I am not prepared to accept that Ms. Suthakar's physical tolerances and capacity are as compromised as Mr. Emnacen's report would suggest.

**100**  The evidence also amply demonstrates a real and substantial possibility that Ms. Suthakar's impaired earning capacity, caused by the Accident, will generate a pecuniary loss into the future. How then to fairly quantify her loss?

**101**  I share Ms. Suthakar's view that this is not an appropriate case to engage the "earnings approach" to assess her damages. It is instead preferable to quantify her loss by taking into account the factors that inform the capital asset approach laid out in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.) [*Brown*]. That assessment involves considering factors such as whether she: (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 to her; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market. All of these factors have application to Ms. Suthakar.

**102**  Ms. Suthakar does not have her grade 12 equivalency and her only work experience in Canada has been in the food preparation/service industry. It is therefore reasonable to predict a good chance that her future employment opportunities will entail some physical elements. As a result of her residual symptoms from the Accident, she has become less marketable and less attractive as an employee in that industry, and has lost the ability to avail herself of all job opportunities that might otherwise have been open to her.

**103**  As was noted in *Sevinski v. Vance*, [*2011 BCSC 892*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22GR-00000-00&context=) at para. 105 it is reasonable to infer that:

[105] ...an employer who is aware that an employee suffers from some level of chronic pain may be less likely to employ that person. This is particularly so... when that employment is likely to have some physical component attached to it.

**104**  As a person who had previously succeeded in holding two jobs based on her admirable work ethic and lack of any physical limitations, the Accident has rendered Ms. Suthakar less capable overall of earning income from all types of employment and less valuable to herself in a competitive market.

**105**  When I assessed Ms. Suthakar's pre-trial loss, I estimated a low likelihood that she would have scaled back her work hours at the second job in the absence of the Accident. However, even if the Accident had not occurred, as time marched on and she aged, the chances of that real and substantial possibility coming to pass would have risen appreciably. In my view, it is highly likely that Ms. Suthakar would not have been able to maintain her demanding pre-Accident work pace for 20 years, as she and her husband intended. It is also worth noting in this regard that she had only endured working two jobs for 42 weeks and was in her 20's at that time. There is a high chance of a real and substantial possibility that she would have chosen to work less or given up her second job altogether for any number of reasons.

**106**  On the other hand, however, Ms. Suthakar's track record as a driven, stand-out employee supports a likelihood that she may have received promotions at one or both jobs and enjoyed higher earnings, employment benefits and further employment opportunities as a result.

**107**  Bearing in mind the applicable legal principles, including the *Brown* criteria, in light of the evidence and weighing the pertinent contingencies, I conclude that the sum of **$120,000** is the present value of a fair and reasonable measure of Ms. Suthakar's loss of future income-earning capacity.

**\* Loss of Housekeeping Capacity**

**108**  In *McTavish v. MacGillivray*, [*2000 BCCA 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=), Huddart J.A. comprehensively surveyed the majority and minority decisions in *Kroeker v. Jansen* [*(1995), 4 B.C.L.R. (3d) 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (C.A.), a decision of a five-member panel of the Court of Appeal, as well as other pertinent jurisprudence, and summarized the essential principles in relation to claims for past and future loss of housekeeping capacity. At para. 43, her Ladyship emphasized the vital point that claims for loss of housekeeping capacity are distinct from claims respecting the plaintiff's future cost of care:

[43] As I have noted, the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely.

**109**  Because an award for the loss of housekeeping capacity reflects the loss of personal capacity, which is an asset, the issue of whether the plaintiff had used replacement services or is likely to hire such assistance in the future does not inform the analysis. That is a crucial distinction between those damages and awards for a plaintiff's future cost of care as affirmed in *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at para. 67:

[67] Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). Determining the amount of a reasonable cost of future care award entails a unique set of considerations, as Professor Cooper-Stephenson explains at 416:

It is clear that both the *need* and the *opportunity* for the expenditure of moneys is relevant to the assessment. Therefore, if the plaintiff's medical condition may require care of a less expensive nature -- such as institutional care -- then the award for future cost of care should reflect that possibility. Equally, it would seem, if the evidence is not conclusive that more expensive care will be available, or that the plaintiff will find such care to be physically and emotionally satisfactory, then the award should reflect those possibilities; the reduced award will then reflect the best estimate of what will be reasonably necessary to provide optimum care. In this sense, the court is bound to look to the actual spending potential of the plaintiff. [Emphasis by Professor Cooper-Stephenson]

**110**  Relying principally on the approach of assessment adopted by this Court in *Yip v. Saran*, [*2014 BCSC 1283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B15W-00000-00&context=), Ms. Suthakar seeks an award of $13,500 for her pre-trial loss of housekeeping capacity. That sum is calculated on the footing of 20 hours of housekeeping per month at a cost of $15 per hour. She requests an additional $76,143.60, representing the present value of an amount tabulated on a similar premise, which extends 20 years into the future as she raises her sons through university.

**111**  While her husband and mother helped with the domestic chores before the Accident, Ms. Suthakar performed the majority of the laundry, cooking and heavy cleaning. While the Accident has not incapacitated her from carrying out domestic chores, her residual injuries have placed real limitations on her ability to continue to perform them, either entirely (e.g. vacuuming and scrubbing/mopping the floors) or to the same extent or with the same efficiency that she was able to prior to the Accident (e.g. meal preparation and laundry). Although certain of Ms. Suthakar's physical limitations are likely not quite as impairing as she believes or as she portrayed them to be to Mr. Emnacen, the evidence nonetheless demonstrates that in the foreseeable future it is unlikely that she will be able to perform household chores on the physically demanding end of the spectrum, or to do all of the less demanding domestic tasks with the regularity that they require. This is particularly so if the family moves into their larger home as is intended. On the other hand, Ms. Suthakar may experience additional improvement, whether spontaneously or as a result of the future care items I have ordered.

**112**  All things considered, the nature and extent of Ms. Suthakar's diminished housekeeping capacity would not be fairly compensated by encompassing it within the damages awarded for her non-pecuniary loss. It is worthy of a stand-alone award.

**113**  An award for the loss of housekeeping capacity is meant to compensate Ms. Suthakar for her diminished loss of capacity -- the loss of her asset. The award is not a precise mathematical calculation, although the approach adopted by Ms. Suthakar is effectively that. Bearing in mind the animating principles and taking into account the relevant contingencies supported by the evidence as best I am able, I conclude that the sum of **$35,000** is a fair award to reflect the entirety of Ms. Suthakar's loss of housekeeping capacity.

**\* Non-Pecuniary Damages**

**114**  Ms. Suthakar seeks an award for non-pecuniary damages in the range of $75,000 to $85,000. The defendants counter that a non-pecuniary award of between $40,000 and $45,000 would be fair in the circumstances.

**115**  Non-pecuniary damages are intended to compensate a plaintiff for the pain, suffering and loss of enjoyment of life and of amenities experienced as a result of the defendant's ***negligence***. They are meant to encompass such damages suffered up to the date of trial and those that the plaintiff will suffer into the future.

**116**  The award should be fair and reasonable for both parties, as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, [*2012 BCSC 1704*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2MS-00000-00&context=) at para. 176. While fairness is assessed by reference to awards made in comparable cases, because each case is decided on its own unique facts and calls for an individualized assessment, it is neither possible nor desirable to develop a "tariff": *Lindal v. Lindal*, [*[1981] 2 S.C.R. 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-234V-00000-00&context=) at 637; *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at paras. 39-43. The process is one of assessment and is not amenable to mathematical precision: *Miller v. Brian Ross Motorsports Corp.,* [*2015 BCSC 1381*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GPJ-8SK1-F30T-B06F-00000-00&context=).

**117**  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=) [*Stapley*] at para. 46, Kirkpatrick J.A. set out a non-exhaustive list of factors to be considered in awarding damages under this head. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

**118**  For several years now Ms. Suthakar has struggled with residual symptoms in her neck, left shoulder and low back. Although her symptoms have improved over time and she may enjoy some modest additional improvement in the next while, they have nonetheless persisted and are susceptible to being exacerbated as a result of her work activities and daily domestic duties. Her nagging pain leaves her exhausted at the end of her work shift. When she arrives home, she is usually not able to do much of anything beyond taking a hot shower and resting on the couch with a hot pack. Fortunately for Ms. Suthakar, her symptoms are manageable without medication on her days off.

**119**  The ill-effects of the Accident have adversely impacted the quality and enjoyment of Ms. Suthakar's interactions with her sons. She is not able to play with them in the same way as before and is quick to anger. Also of significance for this young woman is that her injuries have interfered with her intimate relationship with her husband.

**120**  In prior cases, I have observed that enduring pain, even when it is intermittent and mostly low-grade, can compel unwelcome adjustments to one's work life and lifestyle and cloud the pleasures of life, as it has in Ms. Suthakar's case. Working in pain during the majority of her shifts has become part of Ms. Suthakar's everyday work life and is likely to continue for many years to come, if not indefinitely.

**121**  I have reviewed the authorities placed before me by counsel. The cases submitted by Ms. Suthakar's counsel are more instructive than those relied on by the defendants. In any event, the case law only provides general guidelines for what is, at its core, a highly individualized assessment.

**122**  Having regard to the *Stapley* factors and the other case authorities in the context of the evidence in the case at hand, in my opinion, a fair and reasonable award for Ms. Suthakar's non-pecuniary damages is **$70,000**.

**\* Cost of Future Care**

**123**  The approach to be taken in assessing future care costs was settled by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, [*2002 SCC 9*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=) at paras. 21-22:

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

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

**124**  Damages for the cost of future care are meant to compensate for the financial loss to be reasonably incurred by an injured plaintiff to sustain or promote his or her mental and physical health: *Bystedt (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=), aff'd [*2004 BCCA 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3NW-00000-00&context=); *Gignac v. Insurance Corporation of British Columbia,* [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at para. 30 [*Gignac*]. The claimed services and items must be medically justified. Being medically justified is not synonymous with the more stringent requirement of being medically necessary: *Aberdeen v. Township of Langley,* [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=) *at 198,* rev'd on other grounds *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=); *Chow v. Nolan*, [*2013 BCSC 1383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B268-00000-00&context=) at para. 71: *Lane v. Pedersen*, [*2014 BCSC 1302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16R-00000-00&context=) at para. 397.

**125**  Recommendations made by physicians and other health care professionals such as an occupational therapist, are relevant in determining whether an item or service is medically justified: *Gregory* at para. 38; *Jacobsen v. Nike Canada Ltd.* [*(1996), 19 B.C.L.R. (3d) 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G26C-00000-00&context=) (S.C.), quoted with approval in *Gregory* at para. 38. However, to successfully advance a future cost of care claim it is not necessary that the health care provider testify to the medical justification of each and every item of care being claimed. What is required is some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory* at para. 39; *Gignac* at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where and as appropriate: *Gignac* at para. 52. The amount of the award is necessarily affected by the nature of the future care and its anticipated duration.

**126**  The standard of proof for an award for future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, [*2015 BCSC 2349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HR4-FPP1-JG02-S2B3-00000-00&context=) at para. 209.

**127**  Whether a plaintiff is prepared to accept care that is in his or her best interests is a relevant factor. Where the plaintiff testifies that he or she will not submit to the recommended treatment, even though it is medically justified on the evidence, the court may decide that an award ought not to be made or may discount the quantum of it: *Coulter (Guardian ad litem) v. Leduc*, [*2005 BCCA 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0DR-00000-00&context=) [*Coulter*]; *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=) [*O'Connell*]. Additional material considerations would include: (i) whether the plaintiff's judgment on the question of whether he or she will adhere to the recommendation has been impaired by the injuries inflicted by the tortfeasor; and, (ii) whether the evidence establishes that the plaintiff may ultimately be forced by circumstances to participate in treatment that he or she has expressed a desire to avoid, especially if the injuries are grave: *O'Connell* at paras. 61-62; *Van v. Howlett*, [*2014 BCSC 1404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B1CJ-00000-00&context=) at paras. 78-79.

**128**  There is a distinction between a case where there is evidence that the plaintiff will not follow the recommended treatment (as in *O'Connell* and *Coulter*) and a case where no evidence has been led one way or the other. The Court of Appeal recently addressed this nuanced point in *Lo v. Matsumoto*, [*2015 BCCA 84*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4Y6-00000-00&context=), at paras. 20-21:

[20] I agree with counsel for the plaintiff that there is no hard and fast rule that requires a plaintiff to testify that he intends to use every item in the "wish list" of an occupational therapist in order to justify some award. On the other hand, a plaintiff must prove his case, both in terms of need and the likely utility of the item sought: see *O'Connell v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=) at para. 68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners. Unfortunately in this case, Mr. Lo was not closely examined in chief or cross-examined on every item in the therapist's report or on any discrepancies between his own testimony and what he had told the therapist.

[21] Considering, however, the seriousness of Mr. Lo's back injury and the fact that it is expected to cause him pain or discomfort indefinitely, I believe that the trial judge should have made some allowance for physical therapy sessions (costed at $600 per year) in the long term; a facility fee to pursue an exercise program (costed at $357 per year until age 65 when it would drop to $250); some yard maintenance (costed at $100 per year); non-prescription medications for back pain ($400-$500 per year); and something for the possibility that he would use the "Intimate Rider" equipment that might assist with his sexual function. Doing the best that I can with the evidence to which we were referred, I would increase the award for future care costs by $7,000.

**129**  The court, therefore, should be cautious about reducing or eliminating altogether an award for the cost of future care simply on the basis that the injured plaintiff has not confirmed a willingness to participate in a medically justified course of care, or currently says that he or she will not follow the recommended treatment. The court should act with similar circumspection where the plaintiff has not previously used the recommended type of treatment. This is because fairness requires that the court be alive to the prospect that an injured person's disposition may change, or that he or she may not have had the means or ability to follow certain courses of treatment in the past**.**

**130**  The defendants assert that the evidence supports a modest award for the cost of Tylenol over the short term and to cover ten kinesiology sessions. My understanding of defence counsel's oral closing submissions was that the defendants also support a one-time gym pass for Ms. Suthakar. A fair assessment of the evidence as a whole and the proper application of the law warrants a considerably more expansive award.

**131**  In evidence were Mr. Emnacen's separate report summarizing the cost of the care recommendations and an economist's report setting out the process for calculating the net present values of such costs.

**132**  Applying the applicable principles in light of my findings of fact pertinent to the issue, I conclude that Ms. Suthakar is entitled to an award for the cost of her future care (expressed in present value dollars, as applicable), comprised of the treatments and medications referred to below:

1. Tylenol. As a matter of common sense, it is apparent that Mr. Emnacen's cost of care report contains an error in the costing of Tylenol. Ms. Suthakar seems content with recovery of the costs of a generic brand of acetaminophen. As well, Mr. Emnacen calculated Ms. Suthakar's usage on the basis of six tablets every day of the week, whereas she testified that she takes Tylenol about four days a week. An award of **$1,800** is fair and reasonable.
2. Active rehabilitation program with a kinesiologist or physiotherapist. Except for the quantum, this care item is agreed to by the defendants. I award **$1,260**.
3. Annual gym pass. Ms. Suthakar has carried out the exercises she learned from her physiotherapist with reasonable diligence. I am confident that she will make good use of an annual gym pass as recommended by Dr. Harjee and Mr. Emnacen, and that her attendance will enhance her exercise regime and be of benefit. Indeed, the beneficial value of her adherence to an appropriate exercise regime is considered to be crucial by Dr. Kousaie. However, a lifetime award for that item would be excessive. An award of **$4,000** is fair and reasonable.
4. Vocational Assessment. A vocational assessment as recommended by Dr. Harjee and Dr. Fuller is reasonable. An award of **$2,000** is granted.
5. Ergonomic Analysis/Occupational Therapist. The evidence also supports the reasonableness of: (1) an on-site ergonomic analysis of Ms. Suthakar's workplace completed by an occupational therapist; and (2) intervention by an occupational therapist to inform her of the various strategies to employ at home to re-engage her in her activities of daily living. The sum of **$924** is awarded.

**\* Special Damages**

**133**  The defendants agree that Ms. Suthakar is entitled to reimbursement of her physiotherapy sessions in the amount of **$825**. That is ordered.

**134**  The parties disagree on the amount she is entitled to be reimbursed for the Tylenol purchased before the trial. As best as I can discern, Ms. Suthakar's calculation is based on the ingestion of 12 pills per day, four days per week. That high a dosage is not supported on the evidence. I conclude that Ms. Suthakar is entitled to reimbursement in the amount of **$300** for this item.

**135**  The chief point of contention under this head is whether Ms. Suthakar ought to be reimbursed the sum of $350, representing the cost of the taxi ride (including a $50 tip) she took to Chilliwack to attend Dr. Kousaie's office in order to undergo an independent medical evaluation. The defendants assert that it was unreasonable for Ms. Suthakar to take a taxi on such a long trip and suggest that she should have arranged for her husband to drive her (evidently the appointment was scheduled on his day off) or taken a bus to Chilliwack and a taxi from the bus depot to and from Dr. Kousaie's office. Had she travelled that way, the total cost of the trip would have been about $58.

**136**  I would not endorse, as a general proposition, that a plaintiff's choice to take a taxi for a long-distance trip to facilitate attendance on an independent medical appointment is necessarily unreasonable on its face. After all, the defendants chose to retain a medical expert whose practice is located in Chilliwack to examine a plaintiff whom they knew lived in Vancouver and did not herself own a vehicle. The difficulty I have in the case at hand is that the evidence on this subject was not sufficiently developed at trial to explain Ms. Suthakar's rationale beyond saying she did not 'know Chilliwack" so as to satisfy me of the reasonableness of her course of action. In light of the paucity of evidence, I am only prepared to grant compensation to Ms. Suthakar in the amount of **$58** to reflect the modes of transportation suggested by the defendants.

**137**  The defendants agree to Ms. Suthakar being reimbursed for the towing charges in the amount of **$139**, to remove the rental car she was driving at the time of the Accident from the scene. I make that order.

**COSTs**

**138**  If the parties are unable to agree about costs, they may file written submissions implementing a timetable of their choosing that incorporates a final deadline of March 25, 2016.

S.K. BALLANCE J.

**End of Document**

[***Angus v. Transnational Automotive Group Inc., [2010] B.C.J. No. 752***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62XN-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

V. Gray J.

Heard: March 8 and 9, 2010.

Oral judgment: March 9, 2010.

Docket: S097839

Registry: Vancouver

**[2010] B.C.J. No. 752** | 2010 BCSC 576 | 188 A.C.W.S. (3d) 406 | 2010 CarswellBC 1012

Between Hamish Angus, Petitioner, and Transnational Automotive Group Inc., Holladay Stock Transfer Inc., Stephen Wilshinsky, Christine Cerisse, Lorenzo Oliva and Davlaur Equities, A.G., Respondents

(105 paras.)

**Case Summary**

**International law — Proceedings — Practice and procedure — Evidence — Letters rogatory or letters of request — Petition by Angus for an order declaring that Christine Cerisse be examined at a deposition in B.C. as requested by the U.S. District Court for the Central District of California in its letter of request issued Oct. 7, 2009, granted — As Angus alleged he had entrusted Cerisse with the share certificates at the centre or his action in conversion, tortious interference, wrongful transfer of security and *negligence*, and because she was the securities compliance officer, she was a central party — The evidence might be used at trial and it was otherwise unobtainable.**

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| Petition by Angus for an order declaring that Christine Cerisse be examined at a deposition in B.C. as requested by the U.S. District Court for the Central District of California in its letter of request issued Oct. 7, 2009. In the underlying action, Angus sued in conversion, tortious interference, wrongful transfer of security and ***negligence***. Cerisse was the corporate secretary for the respondent Transnational Automotive Group Inc. Angus alleged that 2.65 million of his shares in TAG were transferred without his knowledge, authorization or approval, and that Cerisse was the effective cause of the transfers. In 2009, he commenced a lawsuit in California, suing three defendants, including TAG. Cerisse opposed the motion, arguing (a) that Angus failed to serve all the respondents and the application was premature; and (b) that the order was not appropriate on the merits, as Angus failed to show Cerisse had relevant evidence or that any evidence she might have would not be available in other ways.  HELD: Petition granted.  The California respondents had received the necessary information about the proceeding, and it was not necessary to adjourn it for the failure to serve the first three named respondents in the action. As for the last two named respondents, whether there was no order that Cerisse be deposed or not had no effect on their legal interests, and it was not necessary to serve them for the purposes of the motion. Angus' claim in the U.S. raised relatively straightforward questions, including: whether his shares were transferred, and if so, why and under what authority. Because he alleged he entrusted Cerisse with the share certificates and because she was the securities compliance officer, she was a central party. He had established Cerisse might have evidence relevant to his claim in the California proceeding. The evidence might be used at trial, as it would be admissible if Cerisse was not available to testify at the trial. There was some potential evidence from Cerisse that might not be otherwise obtainable. Considering all the factors, it was appropriate to make an order that Cerisse be examined in B.C. The court then examined the proposed terms, and made various rulings, including that Angus was not required to provide a list of the documents he had to avoid duplication, that the court reporter would act as commissioner, etc. An appropriate amount was $2,500 to enable Cerisse to properly prepare for and attend the deposition. |

**Statutes, Regulations and Rules Cited:**

Canada Evidence Act, [*R.S.C. 1985, c. C-5, s. 46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BD51-JB7K-2120-00000-00&context=)

Evidence Act, [*RSBC 1996, CHAPTER 124, s. 53*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FCK4-G01W-00000-00&context=)

**Counsel**

Counsel for the Petitioner: M. Parrish.

Counsel for the Respondents: T.A. Hakemi.

**Oral Reasons for Judgment**

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| **V. GRAY J. (orally)** |

**1**   These are my oral reasons for judgment. I will reserve the right to edit them if a copy is requested. The result would be the same, but I may make editorial changes which would include matters such as citations or other matters to clarify the reasons.

**2**  The petitioner, Hamish Angus, seeks an order from this court that the individual named Christine Cerisse be examined at a deposition in British Columbia as requested by the US District Court for the Central District of California in its letter of request issued October 7, 2009. Such letters of request are sometimes referred to as letters rogatory.

**3**  Ms. Cerisse was represented by counsel at this hearing, who opposed such an order on three main grounds. First, that the petitioner, Mr. Angus, had failed to serve all the respondents, and that the application was therefore premature.

**4**  Secondly, that such an order was not appropriate on the merits, and in particular that Mr. Angus had failed to establish that Ms. Cerisse has relevant evidence, and has failed to establish that any evidence Ms. Cerisse might have would not be available in other ways.

**5**  The third area of opposition is really an alternative. If an order is made, what terms should be included in the order, and there are about a dozen contentious terms. So I will deal with those, should that arise, later in these reasons.

**6**  First, the facts. Mr. Hamish Angus is a British Columbia resident. He is described in some of the material as a corporate development consultant assisting start-up companies with hiring personnel, forming business alliances and initiating start-up operations.

**7**  The documentation refers to the respondent to this petition, Transnational Automotive Group Inc., as a company providing public transportation assistance in developing countries. Mr. Angus says he provided services to Transnational Automotive Group, also referred to in the documentation as "TAG", with respect to finding management personnel for TAG's operations in Cameroon, among other things.

**8**  It appears that on March 20, 2006, TAG issued shares to Mr. Angus. Some documentation suggests it was 3.15 million shares, of which 2.65 million were issued in three separate share certificates. Mr. Angus alleges that he instructed Ms. Cerisse to hold his share certificates for safekeeping.

**9**  Mr. Angus says that in October 2006, TAG's transfer agent was the respondent, Holladay Stock Transfer Inc., a Nebraska company; that TAG's controlling shareholder was the respondent, Stephen Wilshinsky; and that TAG's securities compliance officer and corporate secretary was Ms. Cerisse. She agrees that she was the securities compliance officer. I will be reading excerpts from her affidavit shortly.

**10**  Mr. Angus alleges that on or about October 31, 2006, 2.65 million of his shares were transferred through the transfer agent Holladay to two entities. First, Moshe Wilshinsky, the brother of Stephen Wilshinsky; and secondly, Mazel Trust, apparently organized by Stephen Wilshinsky to benefit his children.

**11**  Mr. Angus says that was done without his knowledge, authorization, or approval. He says that at that time, the shares were worth about $2.25 million in US funds. It is alleged that Stephen Wilshinsky instructed Ms. Cerisse to make the transfer and that she was the effective cause of the transfers. There is also a suggestion that this was part of a larger transaction involving a recapitalization of TAG.

**12**  On January 8, 2009, Mr. Angus started a lawsuit in California. He sued three defendants: TAG, which is a Nevada company, and he alleged its principal business is in Los Angeles, California; Holladay, which as I have said is allegedly a Nebraska company, its principal business, however, being in Scottsdale, Arizona; and Mr. Stephen Wilshinsky, allegedly a resident of California.

**13**  The claims Mr. Angus has made in his court documents, his complaint and amended complaint, are for conversion, tortious interference, wrongful transfer of security, and ***negligence***. The first amended complaint is dated January 27, 2009, and then there is the defendants' answer filed on behalf of all three defendants. It is dated July 28, 2009. The attorney for all defendants is Mr. Eade.

**14**  In their answer, the three defendants generally deny all the allegations. They make a number of other allegations, including challenging the jurisdiction of the court, alleging there is no basis for the claim, alleging that Mr. Angus consented to possession of the certificates, that a limitations period applies and that there are equitable defences of laches, unclean hands, and also waiver.

**15**  July 27, 2009 is the date of documentation by counsel for Mr. Angus listing witnesses likely to have discoverable information and documents. The documents listed by Mr. Angus include TAG's stock transfer records and cancelled share certificates, including the numbers of Mr. Angus's share certificates.

**16**  On October 29, 2009, counsel in British Columbia for the petitioner, Mr. Angus, apparently sent the petition in this proceeding and the related documentation to Mr. Eade, California counsel for the three defendants.

**17**  It appears that on January 29, 2010, petitioner's counsel sent a courier letter to Mr. Eade in California. The documentation includes petitioner's counsel writing advising that they assumed that Mr. Eade would not be opposing the application for deposition of Ms. Cerisse. One letter advised of the hearing date of March 8, 2010, and advice was requested if Mr. Eade was intending to oppose.

**18**  Mr. Eade provided an email dated December 10, 2009, to Mr. Hill, counsel assisting Ms. Cerisse, which includes these paragraphs. I am going to read 11, 12 and 13 from Mr. Eade's email:

1. I do not believe that any of the defendants have been directly served with the papers in support of the petition. On October 29th, 2009, I received an email from counsel for the plaintiff that had, as an attachment to the e-mail, papers in support of the petition. I do not know whether such delivery constitutes service under the laws of British Columbia.
2. As I understand the case against the defendants, I do not know what, if any, relevant documents or testimony Christine Cerisse could provide that is not available from other sources.
3. If Ms. Cerisse were to provide testimony, however, I, as counsel for the defendants, would want to attend in person any such deposition. There are issues of attorney/client privilege that need to be protected and would best be served by my personal attendance as I am the current general counsel for Transnational and Christine Cerisse is a former officer whom I believe will be questioned about communications with several different company attorneys. I would not be able to attend such a deposition until at least after January 8th, 2009.

**19**  I am now going to read most of the affidavit of Ms. Cerisse. It is dated December 11, 2009:

1. From approximately January 2006 until approximately January 2007, I was corporate secretary for the respondent Transnational Automotive Group Inc. (TAG), which is now a defendant in an action pending in the United States district court for the central district of California, Hamish Angus versus Transnational Automotive Group Inc., a Nevada corporation, Holladay Stock Transfer Inc., a Nebraska corporation, and Stephen Wilshinsky (2:09-CV-00143MM, the "California action"). From approximately the spring until October 2006, I also provided services to TAG with respects to securities compliance.
2. It has been over three years since the events which are apparently the basis of the California action. I do not know what evidence I could provide which could not come from the parties to the litigation or from the non-parties, whom I understand have already provided evidence or are anticipated to do so.
3. Much of my work involved taking minutes and creating other records for TAG (the "TAG documents"). At the time my involvement with TAG ended or shortly thereafter, I returned the TAG documents to TAG. I do not believe that I now have any TAG documents which are not also in the possession of TAG, its officers, directors or counsel.
4. I may have retained copies of some documents from my time at TAG ("My Documents"). Although I do not know exactly how many there may be or where they are located. I do not believe any of My Documents are not also in the possession of TAG, its officers, directors or counsel.
5. I have not kept My Documents in one place, and they are mixed up in a number of different files, boxes and computers. In the month of October 2009, I moved homes and offices, and I have not yet completely unpacked all my possessions, including My Documents. I have not yet set up my new office and I believe that it would take considerable effort for me to unpack and identify My Documents.
6. Even after assembling My Documents, I would have to review them to find the ones that the petitioner has requested.
7. As some of My Documents will be correspondence with TAG's lawyers, I am advised by my legal counsel and verily believe that some of My Documents will be protected by privilege.
8. If I am ordered to attend a deposition, I would need to refresh my memory and I would find it helpful if I was provided with the documents about which I would be examined ...
9. Depending on the scope of the questions I would be asked in a deposition, I am concerned that I may have to exercise my right to avoid self-incrimination.

**20**  The evidence is that through the discovery process, Mr. Angus's California counsel obtained addresses for named respondents Lorenzo Oliva and Davlaur Equities, A.G. These were addresses in British Columbia. However, counsel has determined that those addresses are no longer current and has not found current addresses or any other way of locating that individual and that company in British Columbia. There is a document suggesting that the company Davlaur Equities A.G. is a Belize company, or at least has an office in Belize.

**21**  I am now going to read some excerpts from the affidavit of Mr. Schaffer, who is Mr. Angus's counsel in California. First from his affidavit no. 1, paragraph 18:

1. As Christine Cerisse, Lorenzo Oliva and a representative of Davlaur have material evidence respecting the California state action, as I have been unable to secure their voluntarily attendance for deposition in British Columbia and as they are beyond the jurisdiction of the California state federal court and therefore cannot be compelled to testify at the trial of the California state action, it is my belief that the evidence of Christine Cerisse, Lorenzo Oliva and a representative of Davlaur (collectively the "deponents") will not be available to Hamish Angus at the trial of the California state action unless the deponents are ordered to attend for deposition by this honourable court. If the deponents are not available to testify at the trial of the California state action, the evidence adduced by way of the deposition sought in this proceeding will be admissible at the trial of the California state action.

**22**  I am also going to read some passages from Mr. Schaffer's second affidavit:

1. As is set out in more detail below, the evidence to date in the California action demonstrates that on or about October 26, 2006, Transnational, acting through Ms. Cerisse and at Stephen Wilshinsky's direction, effected the transfer of 2.65 million of the shares to third parties, including 500,000 shares to Stephen Wilshinsky's brother, Moshe Wilshinsky, and the balance to a trust Stephen Wilshinsky had formed for the benefit of his children called the Mazel Trust. These transfers occurred without Mr. Angus's knowledge, authorization or approval. The deposition and documentary evidence also indicates that the transfer of the shares was undertaken as part of a larger transaction to recapitalize Transnational, in which Ms. Cerisse played a central role. Ms. Cerisse's evidence of and involvement in the larger transaction with also relevant to Mr. Angus's claims in the California action as it may further establish the improper nature of the transfer of the shares.

**23**  Paragraph 19 refers to a deposition of a Mr. Browne. Paragraph 19 includes this sentence:

Mr. Browne testified that to his knowledge, Mr. Oliva acted on Ms. Cerisse's instructions as he was her "alter ego."

**24**  And from paragraph 24:

Messrs. Browne and Sedat [phonetic] each testified that on November 1st, 2006, Messrs. Wilshinsky, Sedat, Browne and Ms. Cerisse all met at Mr. Vandeberg's Seattle office. The purpose for this meeting was to consummate the "recapitalization" of Transnational by surrendering a portion of the shares that had been issued to Apache's former stockholders so that Stephen Wilshinsky's group could acquire control over the enterprise. Ms. Cerisse delivered a "fist full" of stock certificates and stock powers which had been signed by the holders. I am advised by Mr. Angus and verily believe to be true that at the time of the November 1st, 2006 meeting, Ms. Cerisse was in possession of the shares, as he had instructed Ms. Cerisse to hold onto the shares for safekeeping and not for any other purpose.

**25**  The application of Mr. Angus for the order that Ms. Cerisse be examined was originally set for hearing in December of 2009, and it was adjourned to March 8, 2010. The hearing proceeded over two days, March 8 and 9, 2010. The evidence was affidavit evidence. The affidavits included some documents and some portions from the depositions.

**26**  I turn first to the argument of Ms. Cerisse that this matter must be adjourned and that it is premature because Mr. Angus has failed to properly serve all of the respondents. There are really two groups of respondents. The first three are the three defendants in the California lawsuit. They are, as such, interested in the outcome of this application. If Mr. Angus is successful in being entitled to examine Ms. Cerisse, naturally the other parties to the lawsuit would want to know about it and would want to have the ability to ask questions as well.

**27**  It appears to me that probably the three California respondents were not properly served under the B.C. Supreme Court Rules, but it is not necessary for me to decide that because the fact of this petition and the hearing date commencing yesterday was brought to the attention of the key individual, Mr. Eade.

**28**  While he is not necessarily an agent or a corporate officer in the usual sense, he is in fact the individual most knowledgeable about what the reaction of the three California defendant respondents ought to be to this application. He has said in his email to Mr. Hill that he would want to attend the deposition. He clearly knows about this hearing, and he chose not to respond.

**29**  Ms. Cerisse objects and says that there has not been proper service on these California respondents. However, the concern of the court about whether they have been properly served is whether those defendants have received the necessary information about this proceeding, and I am satisfied that they have. So it is not necessary to adjourn this hearing for the failure to serve those first three named respondents in this action.

**30**  I turn then to the last two named respondents, and that is, Lorenzo Oliva and Davlaur Equities A.G. The California court also issued letters rogatory for the examination of Mr. Oliva and a representative of Davlaur, but it is not, in my view, essential that they be involved in any questioning of Ms. Cerisse. They may well be interesting witnesses, witnesses who have some knowledge relating to the proceeding, but that is not for me to decide.

**31**  The question is whether, under the Rules, they have a legal interest in the outcome or whether their legal interests would be affected by the order that Ms. Cerisse be subject to a deposition. In my view, whether there is an order that Ms. Cerisse be deposed or not, has no effect on the legal interests of Mr. Oliva or Davlaur. Therefore, it was not necessary to serve them for the purposes of this motion.

**32**  On the service question, Ms. Cerisse's arguments fail, and I therefore turn to the merits.

**33**  So the first question is, is an order arising from the letter of request appropriate in this case?

**34**  I am going to read a quotation from the decision of Madam Justice Lynn Smith in *EchoStar Satellite Corporation v. Quinn*, [*2007 BCSC 1225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3Y5-00000-00&context=), [*71 B.C.L.R. (4th) 172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3Y5-00000-00&context=). Before the passage I come to, she quotes the jurisdiction to enforce letters of request set out in s. 53 of the *Evidence Act,* *R.S.B.C. 1996, c. 124*, and s. 46 of the *Canada Evidence Act*, [*R.S.C. 1985, c. C-5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-F1WF-M09J-00000-00&context=). I do not need to quote those sections, and they are in the *EchoStar* reasons, but I will start reading. I will read paragraphs 36 through 40 of *EchoStar*:

[36] The starting point in responding to a request for the enforcement of letters of request is that the request from the foreign court will be granted unless it would be contrary to Canadian public policy to do so or would otherwise be prejudicial to Canadian sovereignty or to Canadian citizens: see *R. v. Zingre*, [*[1981] 2 S.C.R. 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M22F-00000-00&context=) at 401 ("*Zingre*"). As stated in *Re Westinghouse Electric Corp. and Duquesne Light Co.* [*(1977), 16 O.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F60C-X3FK-00000-00&context=) (H.C.J.) at 290-291:

The enforcement of letters rogatory is always a matter within the discretionary power of the Court. Their enforcement is based upon international comity or courtesy proceeding from the law of nations. Inherent in the idea of international comity is a mutuality of purpose and of power. As a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation consistent with their own jurisdiction to assist each other in obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of justice in all inquiries where it may be material. Courts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries ...

[37] It has been said that there is a presumption that the foreign court acted responsibly in directing the letters rogatory, although this presumption is rebuttable: *Advance/Newhouse Partnership v. Brighthouse Inc.* [*(2005), 38 C.P.R. (4th) 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JP4G-61G9-00000-00&context=) (Ont. Sup. Ct.) at para. 7 ("*Advance/Newhouse*").

[38] In *Advance/Newhouse*, the court referred to *Re Friction Division Products Inc. and. E. I. Du Pont de Nemours & Co. Inc. (No. 2)* [*(1986), 56 O.R. (2d) 722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M15M-00000-00&context=) (H.C.J.) at 732, where Osborne J. set out some of the factors to be considered in determining whether to give effect to letters rogatory. These factors were said to include: (1) relevance; (2) whether the evidence is necessary for trial and will be adduced at trial if admissible; (3) whether the evidence is otherwise obtainable; (4) whether the order sought is contrary to public policy; (5) whether the documents sought are identified with reasonable specificity; and (6) whether the order sought is unduly burdensome having in mind what the relevant witnesses would be required to do and produce were the action to be tried locally.

[39] While in the earlier British Columbia cases it was said that a request to enforce a letter rogatory would not be granted if the request seemed directed at discovery rather than evidence for trial, recent jurisprudence has modified that position. For example, in *Henry Bacon Building Materials Inc. v. Royal Canadian Mounted Police* [*(1994), 98 B.C.L.R. (2d) 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-638N-00000-00&context=) (S.C.), Edwards J., after a brief review of the lines of authority, stated at paras. 32 to 34:

The court in exercising its discretion must be mindful of the burden it is imposing on witnesses in Canada. A wide-ranging fishing trip type discovery imposes a greater burden than does simply providing known evidence for trial. The evidence obtained on discovery may or may not be used at trial, so in that sense it may not be necessary in the interests of justice. In light of these considerations, a request for discovery was typically rejected in British Columbia as too burdensome to be inflicted on a witness, save in exceptional circumstances.

The decisions in *Zingre* and *De Havilland*, [*[1991] O.J. No. 1038*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-JF75-M07R-00000-00&context=), indicate the question of whether the examination proposed is for a discovery or trial purpose is one factor, but not necessarily the determining factor in the exercise of the court's discretion. To automatically order examination of a witness so long as the evidence is for trial or to reject a request where the examining party seeks discovery, unless exceptional circumstances are shown, is to fail to apply the appropriate test of whether "the request would impose an undue burden on, or do prejudice to, the individual whose evidence is requested". (*De Havilland, supra* at 719)

In this case, much argument was directed at the issue of whether the examinations proposed were for trial purposes or really amounted to discovery. That labelling does not address the key issue and is no longer determinative as to whether examination will be ordered, according to the authorities to which I have referred.

[40] Similarly, in *GST Telecommunications, Inc. v. Provenzano*, [*2000 BCSC 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X00V-00000-00&context=), [*73 B.C.L.R. (3d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X00V-00000-00&context=) ("*Provenzano*"), Davies J. followed this approach. Holding that the principal purpose for the examination sought was to obtain testimony which would be used at the trial, he concluded that the fact that such examinations may also affect some ancillary discovery purposes was unavoidable and should not affect the right of the petitioner to have the benefit of the respondent's testimony at trial.

**35**  I turn now to the factors referred to in para. 38 of *EchoStar*. I emphasize that these are said to be factors, not that each one of them is a decisive test.

**36**  The first one is relevance. The position of the petitioner is that it only seeks to ask questions in a limited area. That is set out in paragraph 27 of the petitioner's written argument. The questions that Mr. Angus seeks to ask Ms. Cerisse would be on these issues:

1. the nature of Ms. Cerisse's involvement and the involvement of others, including the California defendants, in the transfer of the shares;
2. the circumstances and background surrounding the transfer of the shares;
3. the identity of the TAG employees and others, including potentially the California defendants, involved in the transfer of the shares;
4. the purported basis for the transfer of the shares;
5. whether Mr. Angus entrusted the shares to Ms. Cerisse for safekeeping;
6. whether Mr. Angus was aware of or authorized the transfer of the shares; and
7. Ms. Cerisse's knowledge of and relationship with Davlaur Equities and Lorenzo Oliva, parties potentially involved in the transfer of the shares.

**37**  The documents sought are limited and set out in the letters rogatory. I am not going to take the time to read that right now, but it is set out in Schedule A to the letter relating to Ms. Cerisse, and it asks that Ms. Cerisse provide listed documents.

**38**  The question in considering this factor is whether, on the balance of probabilities, Mr. Angus has shown that Ms. Cerisse may have evidence relevant to his claim in the United States proceeding.

**39**  Mr. Angus's claim in the United States raises relatively straightforward questions: Were his shares transferred, and if so, why and under what authority? Because he alleges that he entrusted Ms. Cerisse with the share certificates and because she was the securities compliance officer, she is a central party.

**40**  In my view, the petitioner has established that Ms. Cerisse may have evidence relevant to his claim in the California proceeding.

**41**  The next factor is whether the evidence is necessary for trial and will be adduced at trial if admissible. As discussed in the excerpt I read from *EchoStar*, it is no longer decisive if it is not required for trial. It is premature on the material before me to determine whether the evidence would in fact be used at trial. Based on the excerpt from Mr. Schaffer's affidavit that I read before, it might be used at trial, because it would be admissible if Ms. Cerisse was not available to testify at that trial. So that is a factor that can be considered.

**42**  The next factor is whether the evidence is otherwise obtainable. This was very contentious in the hearing before me. Essentially Ms. Cerisse's submission was that other parties might be able to provide any evidence that she could. Other parties may have been at meetings that she attended or have documents that she would have seen or authored or still have in her possession.

**43**  Her counsel argued that if there were a lawsuit in which the plaintiff said the traffic light was red and the defendant also said it was red, it would be unnecessary to get the evidence of an independent witness to say what colour the traffic light was. He said that in this sense, Ms. Cerisse's evidence was otherwise obtainable.

**44**  While that is a factor to consider, in my view, it is not decisive, and nor is it necessary for the petitioner to exhaust all the evidence of any other potential witness. We do not have, in evidence before me, the evidence directly of Mr. Angus. Although we have some evidence that he has given to his lawyer, and it appears that the California defendants have not yet been subject to deposition.

**45**  Mr. Stephen Wilshinsky, at the time of swearing an affidavit, had not appeared for a deposition, although he may do so later.

**46**  Ms. Cerisse is a non-party to the California lawsuit, and she would be a witness as to what occurred, and in particular, she would be a witness as to any conversation between herself and Mr. Angus about safekeeping. This is not the kind of case where, for example, a number of people, like a number of different shareholders, might have the same annual reports and the exact same evidence would be readily obtainable from a number of sources.

**47**  This is a case where it is possible that some of the evidence from Ms. Cerisse would be similar to evidence from other parties, but that is simply a factor that I take into account in considering the centrality of Ms. Cerisse's evidence and the degree of intrusion the California court is seeking to make on her.

**48**  In my view, there is some potential evidence from Ms. Cerisse that may not be otherwise obtainable. While some of the questions posed may include areas that other witnesses would have some evidence on, in my view, that is not decisive.

**49**  The fourth factor set out in paragraph 38 of *EchoStar* is whether the order sought is contrary to public policy. There were no submissions suggesting it was contrary to public policy, although there were suggestions about terms regarding self-incrimination, which I will deal with in due course.

**50**  Item five is whether the documents sought are identified with reasonable specificity. I did not read out Schedule A to the letter of request, but in my view, it is clear what documents are being requested.

**51**  In this particular case, it appears that it is necessary for an individual to go through the boxes from Ms. Cerisse's office and see what documents she has left. She said in her affidavit it would take considerable effort for her to unpack and identify her documents. It is not really clear why. Presumably, at some point in time, she would expect to unpack the documents. So being forced to do it earlier may be an inconvenience. She does not say she is sure she has any of the listed documents. One would think it would be relatively straightforward to look and see if any of these are the listed documents. So that is not a major factor.

**52**  Item six from the *EchoStar* list is whether the order sought is unduly burdensome, having in mind what relevant witnesses would be required to do and produce were the action to be tried locally. If the action were to be tried in British Columbia, I am satisfied that Ms. Cerisse would be asked to provide requested documents and would be required to participate in providing her evidence.

**53**  Having considered all of these factors, I have concluded that it is appropriate to make an order that Ms. Cerisse be examined in British Columbia.

**54**  That brings me to the contentious terms. I am not going to go through what I understand are the agreed terms, just in light of the hour. I will first read out the 11 terms that appear to me to be in issue:

1. whether Mr. Angus must provide a list of the documents that he has to Ms. Cerisse first, to avoid her duplicating those documents;
2. whether Mr. Angus must first obtain a protective order from the California court;
3. who should be the commissioner;
4. what documents Ms. Cerisse should produce and when;
5. how long the deposition should last;
6. what limitations should there be on self-incrimination;
7. whether the deposition should be videotaped;
8. whether Ms. Cerisse can correct the transcript or videotape;
9. what should be done with the transcript or video;
10. what costs, if any, Mr. Angus should pay for Ms. Cerisse's preparation and attendance at the deposition; and
11. the costs of the application.

**55**  In considering the terms, the duty for the court is to try to fashion something which fits all of the circumstances. In my view, it is not appropriate to have a one size fits all set of terms in letters rogatory. There may be very different considerations applying here, where it is an individual, as opposed to a case involving a continuing employee of a corporation, or where the matters in issue in the lawsuit are a class action, or in other different cases.

**56**  First, Ms. Cerisse asks that Mr. Angus first provide a list of the documents he has, to avoid duplication. In my view, that is not necessary in this case. Ms. Cerisse has said she may have documents when she unpacks her office. She should unpack her office and find out what is there. It does not appear to me to create any particular economy for her to then check that off against a listing of documents provided by Mr. Angus. There is also a list to some extent of his documents in the item I referred to earlier, the disclosure. It is at Exhibit C of Mr. Schaffer's first affidavit at Tab 6. In my view, in this particular case, the proposed term would not assist.

**57**  The second contentious item is whether Mr. Angus should obtain a protective order. It was suggested to me in argument that such an order could be obtained from the US court. There was no evidence about that or how that is obtained. The previous cases, however, have addressed issues like maintaining confidentiality, and confidentiality terms should be included in the order. I do not think that is contentious.

**58**  I will refer to the *EchoStar* decision again just to say that there was discussion in para. 83 about obtaining an immunity order. In para. 83, Madam Justice Lynn Smith wrote:

[83] Thus, it appears that an immunity order cannot be obtained since there are no pending criminal proceedings.

**59**  I understand from counsel that a protective order is something different from an immunity order, although as I have said, I did not see evidence about that. However, the protection from confidentiality terms appears to be adequate for what is at issue, and I am referring to paragraphs 13 through 15 of the order proposed by Mr. Angus's counsel.

**60**  I will not take the time right now to read them into the record, but summarize them to say that the parties are prohibited from disclosing documents outside the California action, and the evidence given and documents Ms. Cerisse produces can only be used in that action, and that it will be deemed that she was compelled to give the evidence. So that should be included. A protective order, whatever that might be, is not required.

**61**  The next contentious issue was, who should be the commissioner? The letter of request says this:

This court requests in furtherance of justice by the proper and usual process of your court that Christine Cerisse be caused to appear before you or some competent person appointed and authorized by you.

**62**  It does not say competent to do what. It is my understanding that the parties who have acted as commissioners on depositions under letters rogatory have ranged from judges to masters to lawyers to court reporters. Presumably if it is going to be a judge or a master and perhaps even a lawyer, it is on the expectation that some rulings will be given in the course of the hearing. If it is a court reporter, it will be anticipated that there would not be rulings. So this is related to the overall organization of the hearing.

**63**  The general order that is proposed would enable parties to apply to court in British Columbia for answers to questions if there is some dispute. It does not appear to be a case in which there is going to be a significant number of rulings that would have to be made during the deposition itself.

**64**  There are cases in which it may be appropriate to have a judge or master or lawyer act as commissioner, such as if the witness was going to be unrepresented. In this case, Mr. Eade has said he would want to appear, apparently for the California defendants, at the deposition.

**65**  I will be discussing shortly whether Ms. Cerisse should have legal assistance paid for by Mr. Angus, but in all the circumstances, looking at the whole order, it is appropriate for a court reporter to act as commissioner in this case.

**66**  Item 4 is, what documents does Ms. Cerisse have to produce and when? The list is in the letter of request from the California court. The one that troubles me is Item 3, communications between Ms. Cerisse and Transnational Automotive Group Inc. regarding any securities promised to Ms. Cerisse. I do not see how that arose on the pleadings of the California lawsuit, and I do not see how that arose from Mr. Schaffer's evidence. I will order the deletion of that, but apart from that, the documents should be produced by Ms. Cerisse. I can hear submissions from counsel shortly about timing. My suggestion would be that she would produce it a week prior to the scheduled deposition.

**67**  The fifth item is the length of the deposition hearing. Mr. Hakemi argued that it should be two hours for each party. He suggested that is what the new rules would provide. I wondered if he was referring to a previous version of the new rules. The new rules that I am aware of, that are expected to come into effect in July of 2010, have a limitation for examinations for discovery of seven hours or any greater period to which the person to be examined consents. That is Rule 7-2(2). However, Rule 7-6(9) if it comes into effect, would provide that unless the court otherwise orders, examinations conducted of a person under this Rule by all parties of record must not in total exceed three hours in duration. So perhaps that is what Mr. Hakemi was considering.

**68**  That is, of course, under the B.C. Rules, and they are not yet the B.C. Rules. They are the proposed B.C. Rules. We do not have time limits under the present B.C. Rules, and I do not see a basis right now to impose a time limit. If the parties have some difficulty on this, they can seek further directions.

**69**  The next question is what limits on self-incrimination. Very simply put, Ms. Cerisse seeks a term that during the deposition she be permitted to invoke her rights under the Fifth Amendment to the Constitution of the United States of America. Mr. Hakemi made an interesting argument that previous cases, which did not include that kind of a term, may have been based on failure to understand an American ability to draw adverse inferences against the evidence of a witness, and he cited a paragraph in *King v. Drabinsky,* [*2008 ONCA 566*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64K0-00000-00&context=), [*295 D.L.R. (4th) 727*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64K0-00000-00&context=), for that proposition. He referred to paragraph 15 of that decision.

**70**  It is an interesting argument, although it seems contrary to the analysis of Madam Justice Lynn Smith in the *EchoStar* case. She did examine the series of cases, and she concluded that it would be adequate to have the terms she proposed.

**71**  In the circumstances of this case, I am not prepared to reconsider her decision. Her decision was given orally, although she may have taken more than a few minutes to reserve before providing that decision. In this case, there is no evidence suggesting that Ms. Cerisse is likely to be the subject of criminal proceedings. All she said is that:

Depending on the scope of questions I would be asked in a deposition, I am concerned I may have to exercise my right to avoid self-incrimination.

**72**  In my view, that is not enough in the circumstances of this case for me to revisit the issue. It was considered by Madam Justice Lynn Smith. She relied in particular on the decision of the Ontario Court of Appeal in *United States of America v. Pressey* [*(1988), 65 O.R. (2d) 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JYYX-606M-00000-00&context=), leave to appeal ref'd [*68 O.R. (2d) x*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-FBFS-S451-00000-00&context=), [*[1988] S.C.C.A. No. 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-FBFS-S451-00000-00&context=), and I am not going to order that limitation. So the limitations on self-incrimination as set out in *EchoStar* will be adequate.

**73**  Issue number seven is whether the deposition should be videotaped. In my view, the starting point is the letter of request, and the letter of request asks this court to cause the depositions of Christine Cerisse to be reduced to writing.

**74**  In my view, this court has jurisdiction to order a videotape, and if the California court had requested that the deposition be by videotape, I expect I would order that it be by videotape. Because the California court did not request that, I am not prepared to order the videotape.

**75**  I put in this as an issue, and maybe I was wrong to list it as contentious: it was whether Ms. Cerisse can correct the transcript. The letter of request does not refer specifically to that. It says:

This court further requests that you cause the depositions to be returned to us under cover, duly closed and sealed, endorsed with the title of this action, marked "depositions of Christine Cerisse" together with this letter of request addressed to clerk of the United States District Court for the Central District of California at Los Angeles by mail or other usual channel of conveyance.

**76**  It does not specifically provide for correction. Both counsel put in their draft something about Ms. Cerisse being entitled to look at it and correct it, and I am content to so order if counsel both agree.

**77**  In terms of what should be done with the transcript, it should be dealt with as set out in the letter of request, and I just read that passage.

**78**  The next contentious issue is whether costs, if any, should be paid by Mr. Angus for the preparation for and attendance at the deposition of Ms. Cerisse. I am going to begin by reading some passages from *United States Securities v. Ono*, [*2001 BCSC 1416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-619K-00000-00&context=), [*94 B.C.L.R. (3d) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-619K-00000-00&context=). It is a decision of Mr. Justice Pitfield. I am going to read paragraphs 40 through 45:

[40] In my opinion, in the circumstances of this case neither Mr. Ono nor Mr. Pinsky requires the assistance of counsel before or at the examinations and, as such, the involvement of counsel on their behalf cannot be said to be necessary for the purposes of preparation within the meaning of s. 4 of Schedule 3.

[41] Except as may be permitted through the recovery of the costs of this application, amounts that have been paid by Messrs. Pinsky and Ono to obtain legal advice in relation to the letter of request are not recoverable. Messrs. Pinsky and Ono may attend the examination with counsel but the SEC will not be obliged to pay counsel's fees in relation to the attendance. Counsel for Messrs. Pinsky and Ono will not be permitted to make objections in the course of the examinations.

[42] Schedule 3 to Appendix C of the *Rules of Court* makes payment of a reasonable sum to a witness for preparation mandatory where preparation for examination is necessary. I am satisfied that some amount of preparation will be required in this case but I do not interpret s. 4 of Schedule 3 to require a party to the litigation to pay the full hourly rate charged by either Mr. Ono or Mr. Pinsky in the course of their practice. In that respect, I concur in the observation of Fraser J. in *Northland Properties Ltd.*, [*[1992] B.C.J. No. 1639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S117-00000-00&context=), to which I have referred.

[43] In any litigation, a balance must be struck between the competing interests of ensuring that cost does not deprive a party and the court of necessary and available evidence and ensuring that witnesses are not unduly burdened by litigation.

[44] In this case, Messrs. Ono and Pinsky are to be examined in respect of services rendered to Solucorp for which they were compensated. I am advised that the solicitors were also compensated in respect of their communications with officials of the SEC at the investigatory stage. In the circumstances of this case, the litigant who seeks evidence should not be obliged to purchase the evidence of Messrs. Pinsky and Ono. With respect to the complaint of lost time, I observe that the practice of law carries with it the risk that lawyers may be called upon to testify in relation to transactions or events in which they were involved on their client's behalf. The burden of that risk should not be assumed by litigants who require evidence for purposes of trial. The burden is better absorbed by the client through the fee structure.

[45] I fix the reasonable amount for preparation by Mr. Pinsky at $1,500 and by Mr. Ono at $750. The sums shall be tendered in advance of examination.

**79**  In the *Ono* case, Mr. Pinsky and Mr. Ono were lawyers and could be expected to prepare and protect themselves to some extent. In this case, there is no evidence suggesting that Ms. Cerisse is a lawyer.

**80**  I have also said that this is a case in which I am not ordering that the commissioner be someone like a lawyer or judge who might be providing some independent view of the case which would have the effect of protecting Ms. Cerisse. In light of the magnitude of the claim, $2.25 million US dollars, and in light of the nature of the allegations and the parties, in my view, it is appropriate that Ms. Cerisse receive some payment to allow her to properly prepare for the deposition and to have counsel if she chooses at the hearing.

**81**  I say that even though Mr. Eade has written his email saying that he plans to attend and be there to assert privilege on behalf of Transnational.

**82**  In the *Ono* case, there were lump sum figures ordered, $750 and $1,500. I assume that was based on the magnitude of what was thought to occur.

**83**  In the circumstances of this case, in my view, an appropriate amount is $2,500, to enable Ms. Cerisse to properly prepare for and attend at the deposition.

**84**  The last item is the costs of the hearing of the petition by Mr. Angus. Mr. Angus did achieve what he sought, which is an order that Ms. Cerisse attend for a deposition. However, there have been a number of limitations on the order, some of which were asserted by Ms. Cerisse's counsel. In my view, in the circumstances of a case like this, it is appropriate for Mr. Angus to pay the taxable costs of Ms. Cerisse of this hearing.

**85**  I think I have dealt with everything, counsel. Is there anything you think I have not dealt with?

**86**  It has been a long day. Perhaps if counsel find that they have some difficulty with some terms of the order, they can call the registry and we can see if we can have a hearing at 9:00 one morning to resolve them, if there is some problem.

**87**  Is there anything right now that you see, Mr. Parrish?

**88**  MR. PARRISH: No, My Lady. What I would propose is I will circulate to my friend a draft order, and hopefully we can agree upon terms of an order to provide to Your Ladyship.

**89**  THE COURT: All right.

**90**  MR. HAKEMI: My Lady, there is one question that was not clear to me, and I think it related to item 8 and the -- or maybe the item 9, the ability -- or what was to happen with the transcript. And I think Your Ladyship mentioned that the procedure in the letters rogatory ought to be followed. So if my understanding is correct, the transcript will be sent directly to the court? Is that is ...

**91**  THE COURT: That is how I read the letter.

**92**  MR. HAKEMI: Okay. If that is, then I just wanted to clarify that was the procedure that was being ordered.

**93**  THE COURT: Yes. It goes to the Clerk of the United States District Court.

**94**  MR. HAKEMI: Very well.

**95**  MR. PARRISH: I'm sorry, My Lady. There is one -- there is no date for the deposition. When we originally started, Mr. Justice Smith in his record directed that Ms. Cerisse provide dates. She has provided a number of dates, the latest of which is March 26th.

**96**  What I would propose is that date be set for the date of the deposition, subject to the agreement of the parties or further order of the court. And that would allow the parties to go back to Mr. Eade to see whether he's available on that date or agree upon other dates. But in the event that there is no agreement, and there has been a history of non-agreement on this case, then it can either proceed on that date or the onus be then be on Ms. Cerisse to come back and seek another date or to have that adjourned.

**97**  Rather than having a situation where there's no date, the parties aren't able to come to an agreement and Mr. Angus is again required to incur costs to come back to the court to seek a date.

**98**  THE COURT: What do you say about that?

**99**  MR. HAKEMI: My Lady, the -- I appreciate what my friend is trying to do, but the date of the 26th doesn't work, at least for me. And we're going to have to deal with this issue with whether Mr. Eade is available; for example, whether Mr. Schaffer is available on the date.

**100**  So my suggestion is that while -- maybe what the court ought to order is that the deposition take place at some point in April, and that would give 30 days where everybody can try to find a date that works for them.

**101**  MR. PARRISH: I'm agreeable to that order, My Lady, so long as that we have subject to directions or further order of the court is there is a problem.

**102**  THE COURT: Yes, you can certainly come back if there are problems. I hope there will not be problems. I will say that it is to be on a date in April to be agreed by the parties or set by further order of the court.

**103**  Is there anything else?

**104**  MR. HAKEMI: I have nothing further, My Lady.

**105**  MR. PARRISH: No, My Lady.

1. GRAY J.

**End of Document**

[***Aulakh v. Nahal, [2018] B.C.J. No. 804***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5S8H-74W1-F06F-24VT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J. (In Chambers)

Heard: April 6, 2018.

Oral judgment: April 13, 2018.

Docket: S143946

Registry: Vancouver

**[2018] B.C.J. No. 804** | 2018 BCSC 719

Between Rajinderpal Singh Aulakh, Plaintiff, and Harbhajan Singh Nahal, Manjit Kaur Nahal, Sandra Li and Pan Pacific Platinum Real Estate Services Inc., doing business as New Coast Realty, Defendants, and Ranjit Kaur Aulakh, Inderjit Singh Aulakh and Harpreet Kaur Aulakh, Defendants by Counterclaim

(47 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Offers to settle — When not awarded — Ruling respecting trial costs — Plaintiffs partially successful in action — Their claim against realtors dismissed — Realtors found 25 per cent liable to defendants — No costs awarded — Settlement offers both required the other parties to accept offer and could thus not be considered in determining costs — Plaintiffs' claim against realtors did not have to be adjudicated — Considering defendants did not suffer any loss, realtors should not be awarded 25 per cent of their costs from defendants.**

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| Ruling respecting trial costs. The plaintiff purchasers were partially successful in their action against the vendors of a home. The plaintiffs were awarded the return of their deposit but they were not granted specific performance or damages. The plaintiffs' claim against the realtor was dismissed but the realtors were found 25 percent liable on the defendants' third party claim. The realtor parties offered $100,000 towards a global settlement of the action. The plaintiffs made a settlement offer proposing that the defendants consent to the release of the $100,000 deposit plus accrued interest to the plaintiffs and that the defendants and the realtor parties jointly contribute a further sum such that the plianitffs would receive a total of $250,000 inclusive of the deposit and accrued interest. Neither offer was accepted.  HELD: No costs were awarded.  The realtor parties' offer was a reasonable and genuine attempt to achieve a settlement with two difficult parties. The offer, however, was made to both the plaintiffs and defendants and required both parties to agree. Such offers were not ones that could reasonably be accepted within the meaning of Rule 9-1(6)(a). Given the acrimonious relationship between these parties and their very different views of the merits of the case, there was little likelihood of them agreeing to settle on the terms proposed. The plaintiffs' offer suffered from a similar flaw, in that it required the agreement of both the defendants and the realtor parties. The offer was also not one that the defendants ought reasonably to have accepted. As success was divided in the main action, the appropriate costs order was that each of party bear their own costs. As between the plaintiffs and the realtor parties, the plaintiffs' claim against the realtor parties was in the alternative, and given the ultimate result, it did not need to be adjudicated. Given the findings in the third-party claim against the realtor it could not fairly be said that the realtor parties successfully defended the third-party claim. The parties would therefore bear their own costs of that claim. The defendants had not suffered any damage or loss. It would lead to a perverse result if they were nonetheless able to recover a portion of their costs from the realtor parties. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, s. 3

Supreme Court Civil Rules, Rule 9-1, Rule 9-1(5), Rule 9-1(6), Rule 9-1(6)(a), Rule 14-1(f), Rule 14-1(9), Rule 15-1(15), Rule 15-1(17)

**Counsel**

Counsel for the Plaintiff: G. Allen.

Counsel for the Defendants Harbhajan Singh Nahal and Manjit Kaur Nahal: D.J. Taylor.

Counsel for the Defendants, Sandra Li and Pan Pacific Platinum Real Estate Services Inc. doing business as New Coast Realty: D.J. Marks, M.S. MacGregor.

**Oral Ruling Re Trial Costs and Settlement**

**of Order Terms**

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

**1**   On June 16, 2017, I issued reasons for judgment in this matter, indexed at [*2017 BCSC 1000*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NVG-FX31-K054-G13D-00000-00&context=). This followed a 20-day trial that ran in November and December 2016, and March 2017. At the conclusion of the reasons, I stated that the parties could speak to the issue of costs, and they are now back before the court for that purpose. They also seek to settle the terms of the trial order.

**Background**

**2**  The background facts are canvassed in detail in my reasons, and I do not propose to repeat them here. Generally speaking, the case involved a dispute between two families, the Aulakh family, nominally represented by the named plaintiff, Rajinderpal Singh Aulakh; and the Nahal family, represented by the named defendants Harbhajan Singh Nahal and Manjit Kaur Nahal. I will refer to these parties respectively as the "Aulakhs" and the "Nahals".

**3**  The dispute concerned a failed transaction in which, pursuant to a contract of purchase and sale, the Aulakhs agreed to buy and the Nahals agreed to sell, a house located in Richmond, BC.

**4**  The other named parties are the realtor, Ms. Li, who acted on the transaction on behalf of both the buyer and sellers, and her real estate brokerage. I will refer to these parties as the "realtor parties".

**5**  In my reasons, I concluded that the Nahals had breached the contract. However, I was not satisfied that specific performance, as sought by the Aulakhs, was available, and they otherwise failed to prove that they had suffered any damages as a result of the breach. Thus, the remedy awarded them was the return of a $100,000 deposit that they had paid towards the transaction.

**6**  I also dismissed the Nahals' counterclaim against the Aulakhs as well as the Aulakhs' third-party claim against the realtor parties. With respect to the Nahals' third-party claim against the realtor parties, I apportioned liability 75% to the Nahals and 25% to the realtors.

**7**  I will deal first with the costs issue and then address the question of the form of the order.

**The Offers to Settle**

**8**  Relevant to the determination of costs are two offers to settle made prior to trial, one by the realtor parties and one by the Aulakhs. The offer from the realtor parties was made on November 23, 2016, and was addressed to both the Aulakhs and the Nahals. The realtor parties offered $100,000 towards a global settlement of the action. As counsel for the realtor parties stated in the offer, when that money is combined with the $100,000 deposit being held in trust, each of the Aulakhs and the Nahals would walk away with the full amount of the deposit, which, as counsel submitted, was the best-case scenario for those parties.

**9**  The realtor parties' offer was left open until March 21, 2017, after the completion of the evidence, but it was not accepted.

**10**  On November 25, 2016, the Aulakhs made a formal offer to the Nahals and the realtor parties. In that offer, the Aulakhs proposed that the Nahals consent to the release of the $100,000 deposit plus accrued interest to the Aulakhs, and that the Nahals and the realtor parties jointly, and in whatever proportion agreed between them, contribute a further sum such that the Aulakhs would receive a total of $250,000 inclusive of the deposit and accrued interest.

**11**  The Aulakhs say that, with respect to the Nahals, given the existence of the realtor parties' offer, their offer simply required the Nahals to release the deposit and contribute something less than $50,000 more, once the accrued interest on the deposit was factored in.

**12**  The Aulakhs' offer was not accepted, and was withdrawn on September 13, 2016, partway through trial.

**The Parties' Positions**

**13**  The Aulakhs submit that they were the successful party in that they established their claim for breach of contract against the Nahals and defeated the Nahals' counterclaim. They submit further that their offer to settle was one that ought reasonably to have been accepted by the Nahals, whose failure to do so should attract cost consequences. Accordingly, the Aulakhs seek their costs at Scale B from the commencement of the proceeding to November 25, 2016, the date of their offer, and double costs thereafter.

**14**  With respect to the realtor parties, the Aulakhs submit that their claim against the realtor parties was in the alternative and did not require a determination given the court's finding on the claim against the Nahals. The Aulakhs therefore seek no costs from the realtor parties and submit that they should not be required to pay costs to the realtor parties.

**15**  The Nahals submit that success was divided as between them and the Aulakhs. While the Aulakhs succeeded in establishing that the Nahals had failed to provide legal vacant possession and therefore breached the contract, they were unsuccessful in obtaining specific performance or in establishing that they suffered any damages. In the circumstances, the Nahals submit that they and the Aulakhs should each bear their own costs of the main action and of the Nahals' counterclaim. Alternatively, they submit that the costs should be assessed as fast track costs under Rules 14-1(f) and 15-1(15) to (17), given that the Aulakhs' remedy was limited to recovery of the $100,000.

**16**  The Nahals also submit that the realtor parties should pay 25% of their costs of the third-party claim against those parties given the finding of a 75%-25% apportionment of liability. They rely on s. 3 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, in support of this position.

**17**  The realtor parties submit that they were successful in defending both the Aulakhs' and the Nahals' third-party claims and that they should therefore have an order for costs from both parties. With respect to the Nahals, given that the Nahals were not required to pay damages, the realtor parties submit that the finding of 25% liability on their part was purely academic. They submit further that their offer to settle was one that should reasonably have been accepted by both the Aulakhs and the Nahals and that accordingly, they should be entitled to double costs from the date of their offer of November 23, 2016.

**Legal Principles**

**18**  The rules governing the award of costs are well established. Rule 14-1(9) of the *Supreme Court Civil Rules* sets out the normal or default rule that the successful party is entitled to costs, unless the court otherwise orders. Various authorities have established that substantial success generally means that the prevailing party has succeeded on 75% of the matters in dispute: see *Fotheringham v. Fotheringham*, [*2001 BCSC 1321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-616N-00000-00&context=) [*Fotheringham*]; and *Paul v. Pumple*, [*2013 BCSC 1844*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-F2TK-23K3-00000-00&context=).

**19**  Recently, in *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, [*2018 BCSC 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RHM-83W1-F873-B4BG-00000-00&context=), Madam Justice Russell described the four-step approach established by Bouck J. in *Fotheringham* as follows, at para. 25:

First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.

Second, by assessing the weight or importance of those "matters" to the parties.

Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded", overall and therefore won the event.

Fourth, where one party "substantially succeeded" a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs. (Para. 46).

**20**  Offers to settle are governed by Rule 9-1. Rule 9-1(5) sets out the options available to the court where an offer to settle has been made. Rule 9-1(6) then identifies a number of factors that the court may consider when making a costs award in the face of an offer to settle:

1. whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
2. the relationship between the terms of settlement offered and the final judgment of the court;
3. the relative financial circumstances of the parties;
4. any other factor the court considers appropriate.

**21**  The purposes of costs awards were summarized by the Court of Appeal in *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=). Those purposes include:

1. deterring frivolous actions or defences;
2. encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect;
3. encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and
4. to have 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 defences.

**Discussion**

**22**  I will deal first with the impact, if any, of the two offers to settle.

**23**  With respect to the realtor parties' offer, I agree with counsel for the realtor parties that the offer was a reasonable and genuine attempt to achieve a settlement with two difficult parties. Moreover, the justification given by counsel for the offer included an accurate and realistic assessment of the Aulakhs' and Nahals' respective cases and of their best-case scenarios.

**24**  Nonetheless, I conclude that I am unable to consider the offer when assessing costs. The offer was made to both the Aulakhs and the Nahals and required both parties to agree. Various cases have held that such offers are not ones that can reasonably be accepted within the meaning of Rule 9-1(6)(a): see *Aspen Enterprises Ltd. v. Quiding*, [*2009 BCSC 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B106-00000-00&context=) [*Aspen Enterprises*], at paras. 17 to 19; and *469238 B.C. Ltd. (Lawrence Heights) v. Okanagan Aggregates Ltd. (Motoplex Speedway and Event Park)*, [*2016 BCSC 1159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K56-XS31-FC6N-X37S-00000-00&context=), at paras. 18 and 23.

**25**  Counsel for the realtor parties points out quite fairly that the language of Rule 9-1(6) is permissive in that the factors set out therein are ones that the court may, not must, consider. Thus, she submits, the court retains a discretion to make a cost award as contemplated in Rule 9-1(5), even if the factors in Rule 9-1(6) are not present.

**26**  While the language of the section may admit of such an interpretation, it is important to again keep in mind the purpose of a costs award as set out in cases like *Giles*, which include encouraging settlement and discouraging doubtful or frivolous cases or defences. Those objectives can only be met if the offer to settle in issue is one that is reasonable in the circumstances, and a party should only be subject to adverse cost consequences if they unreasonably fail to accept such an offer.

**27**  Here, given the acrimonious relationship between the Aulakhs and the Nahals and their very different views of the merits of the case, there was little likelihood of them agreeing to settle on the terms proposed. In the circumstances, paraphrasing the decision of Madam Justice Fenlon, as she then was, in *Aspen Enterprises*, the realtor parties' offer was a practical approach to settling the matter, but it is of no assistance to the realtor parties in seeking an order for higher costs.

**28**  The Aulakhs' offer suffers from a similar flaw, in that it required the agreement of both the Nahals and the realtor parties. The circumstances are slightly different, in that the realtor parties' offer of $100,000 was already on the table. Thus, the offer arguably only required the Nahals' consent. Nonetheless, the offer still falls within the category of offers which the courts have held will not attract cost consequences.

**29**  In any event, I am not satisfied that the offer was one that the Nahals ought reasonably to have accepted. Given the parties' knowledge of the facts and likely evidence at trial, at the time the offer was made, the Nahals would reasonably have been of the view that even if the Aulakhs succeeded on liability, their best-case scenario was a return of the deposit. Payment of an additional $150,000 over and above the deposit was not a reasonably contemplated outcome and, as it turns out, far exceeded what the Aulakhs achieved at trial.

**30**  For all of these reasons neither the realtor parties' offer nor the Aulakhs' offer are relevant to the determination of costs.

**Fast Track Costs**

**31**  I will also deal briefly with the Nahals' submission that costs should be dealt with under the fast track rules. In my view, there is no merit to this position.

**32**  Rule 14-1(1)(f) provides that fast track cost rules will apply if the relief granted is $100,000 or less, exclusive of costs and interest. I agree with the Aulakhs that the interest referred to is court-ordered interest and does not encompass the accrued interest on the deposit. Though I was not provided with exact figures, it is clear that the deposit and accumulated interest combined will exceed $100,000, thus removing this case from Rule 14-1(1)(f).

**33**  Moreover, this case was the antithesis of fast track litigation. While originally scheduled for three weeks, it ultimately took four weeks to complete. There were a number of pre-trial applications and extensive examinations for discovery. In my view, it would not be reasonable in the circumstances to apply the fast track cost rule. Thus, even if Rule 14-1(1)(f) could be said to apply, I would exercise my discretion to order otherwise.

**Ordinary Costs**

**34**  The costs issues therefore fall to be determined under the ordinary or normal rules. As between the Aulakhs and the Nahals, I do not accept that there were numerous matters in dispute between them. The concept of considering different matters comes out of family law cases like *Fotheringham*, where there are often a number of matters in dispute. For example, a case may involve questions of parenting time, child support, spousal support and division of family property and debt. Each of these matters involves different factual and legal analyses.

**35**  In this case, as between the Aulakhs and the Nahals, there was, in my view, only one real matter in dispute: who breached the contract, and what was the appropriate remedy? With respect to this matter, it cannot seriously be contended that there was anything other than divided success. While the Aulakhs were successful in establishing liability on the part of the Nahals, they were unsuccessful in obtaining an order for specific performance, which was their primary objective in the litigation. They were similarly unsuccessful in proving any damages. Thus their only remedy was the return of the deposit. In the circumstances, the appropriate costs order is that each of the Aulakhs and the Nahals bear their own costs.

**36**  As between the Aulakhs and the realtor parties, the Aulakhs' claim against the realtor parties was in the alternative, and given the ultimate result, it did not need to be adjudicated. Moreover, given my findings in the Nahals' third-party claim about Ms. Li's role in the demise of the transaction, it cannot fairly be said that the realtor parties successfully defended the Aulakhs' third-party claim. The parties will therefore bear their own costs of that claim.

**37**  With respect to the Nahals and the realtor parties, the Nahals seek recovery of 25% of their costs in accordance with s. 3 of the ***Negligence*** *Act*. They submit that there is no reason to depart from the normal rule established under that section.

**38**  The realtor parties submit that they were successful in defending the Nahals' claim, given that they were only found to be 25% liable, and they submit that they met the 75% threshold for achieving substantial success. In my view, however, that approach has no application to the apportionment of liability which falls under the ***Negligence*** *Act*.

**39**  Section 3 of that *Act* provides that the court has the discretion to depart from the normal rule. This is consistent with the broad discretion afforded trial judges with respect to costs. In my view, this is an appropriate case to depart from the normal rule. It must be borne in mind that although the Nahals were found liable to the Aulakhs for breach of contract, they were not required to pay any damages. Nor have they been ordered to pay the Aulakhs' costs. Accordingly, they have not suffered any damage or loss.

**40**  To my mind, it would lead to a perverse result if the Nahals were nonetheless able to recover a portion of their costs from the realtor parties. That would, in effect, put them in a better position than the Aulakhs, which would not be reasonable. Had the result been different and had the Nahals been found liable to pay damages and/or costs, the realtor parties would have been required to contribute 25%. But that is not the case.

**41**  It would similarly be unreasonable for the realtor parties to recover their costs from the Nahals given the finding of ***negligence*** on their part and Ms. Li's role in the circumstances giving rise to the litigation. It is therefore appropriate that each of the Nahals and the realtor parties bear their own costs of the Nahals' third-party claim. All of the parties will also bear their own costs of this application.

**The Trial Order**

**42**  Turning to the order from the trial, each of the Aulakhs and the Nahals have provided a draft form. Working off the Aulakhs' draft, the parties agree that para. 3 should read that the certificate of pending litigation will be "cancelled" rather than "released".

**43**  With respect to para. 6 of the Aulakhs' draft, it provides that liability for ***negligence*** as between the Nahals and the realtor parties is apportioned at 25% to the realtors and 75% to the Nahals. The realtor parties object to this term on the basis that the apportionment was largely academic. Nonetheless, that term reflects what was ordered. The fact that the apportionment ultimately had no impact on the result does not change that fact. Thus the term shall go as drafted.

**44**  The principal point of departure between the Aulakhs and the Nahals is that the Nahals propose a term as follows:

The defendants Harbhajan Singh Nahal and Manjit Kaur Nahal are at liberty to address the court regarding any remedy they may seek pursuant to the undertaking as to damages provided to the court by Rajinderpal Singh Aulakh, Ranjit Kaur Aulakh, Inderjit Singh Aulakh and Harpreet Kaur Aulakh on April 26, 2016.

**45**  This relates to an undertaking given by the Aulakhs in support of an application to adjourn the trial. The Nahals submit that the issue of the undertaking and any damages flowing therefrom is still a live issue and the trial order should reflect that.

**46**  The issue did come up during the trial but was not addressed in any substantive way. In the transcript excerpt provided by the Aulakhs, when the issue arose, I indicated that the issue could only be dealt with separately from the issues at trial. I do not take that to be a formal ruling that the Nahals are at liberty to address the issue, and as such, the term proposed does not properly form part of trial order. That said, it is also clear that I did not foreclose on the Nahals dealing with the issue at a later date.

**47**  Counsel for the Nahals suggested that there may need to be a preliminary determination of this issue, that being the issue of whether the Nahals can pursue this claim given the suggestion from counsel for the Aulakhs that the matter is *res judicata*. I have some difficulty seeing how the issue could be *res judicata* given how the matter was addressed at trial, but if the parties cannot agree and feel that a preliminary determination is required, I would be prepared to hear an application on this point.

R.A. SKOLROOD J.

**End of Document**

[***Bakker v. Nahanee, [2012] B.C.J. No. 1147***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-248X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.C. Fitzpatrick J.

Heard: March 21, 2012.

Judgment: June 5, 2012.

Docket: M041578

Registry: Vancouver

**[2012] B.C.J. No. 1147** | 2012 BCSC 825

Between Randy Bakker, Plaintiff, and Harry Jacob Nahanee, Roselle Ang and General Motors Acceptance Corporation, Defendants

(78 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Costs — Bullock or Sanderson order — Application by plaintiff for Bullock order against unsuccessful defendant respecting costs paid by him to successful defendants allowed in part — Plaintiff's claim for injuries arising from motor vehicle accident was dismissed against owner and lessee of vehicle and he was ordered to pay costs — Claim against driver, who stole vehicle, settled — It was reasonable for plaintiff to have named successful defendants — Causes of action against unsuccessful and successful defendants were connected — Bullock order limited to costs incurred to date when plaintiff elicited enough information to be satisfied that neither successful defendant had any liability.**

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| Application by the plaintiff for a Bullock order allowing him to claim the costs paid by him to the defendants Ang and General Motors Acceptance Corporation ("GMAC") as a disbursement in the assessment of costs payable to him by the defendant Nahanee. The plaintiff, an on-duty police officer, was injured in a motor vehicle accident involving a vehicle driven by Nahanee. The vehicle, which was leased to Ang from GMAC, was stolen by Nahanee from Ang. The plaintiff, who believed Nahanee was operating a stolen vehicle, was in the process of trying to apprehend Nahanee when his cruiser was struck twice by the vehicle Nahanee was driving. He commenced a claim against Nahanee based on negligent operation of the stolen vehicle. In addition, he commenced a claim against Ang and GMAC based on statutory vicarious liability and ***negligence*** in possibly failing to ensure the vehicle was mechanically sound. The plaintiff attempted to address the issue of liability with the defendants prior to trial without success. A nominal office to settle was made on behalf of Ang and GMAC, which was later withdrawn. At the conclusion of examinations for discovery, the plaintiff agreed that it was appropriate to discontinue the action against Ang and GMAC, but was only prepared to do so if each party bore its own costs or if costs were addressed at the conclusion of litigation. Ultimately, the action against Ang and GMAC was dismissed and costs were ordered to be paid to them by the plaintiff. Costs were assessed in the amount of $10,392, which the plaintiff paid. The claim against Nahanee was subsequently settled. The plaintiff sought a Bullock order allowing him to claim the costs payable by him to Ang and GMAC as a disbursement in the assessment of costs payable to him by Nahanee.  HELD: Application allowed in part.  It was reasonable for the plaintiff to have named Ang and GMAC as defendants in the action as they were potentially liable. While the plaintiff was aware the vehicle was stolen, he was not aware of all of the detail concerning the theft, and he was not aware of the vehicle's maintenance history. Nahanee's conduct, in stealing the car, caused Ang and GMAC to be named and thus the causes of action were related. While the plaintiff was entitled to a Bullock order, it should be limited to costs incurred up to the date of Ang's examination for discovery, when the plaintiff had elicited enough information to be satisfied that neither Ang nor GMAC had any vicarious liability and there were no mechanical issues. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 20*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-47V1-JJSF-24KK-00000-00&context=)(6)

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=)

Supreme Court Civil Rules, Rule 14-1(18), Rule 18A

**Counsel**

Counsel for the Plaintiff: John M. Cameron.

Counsel for the Defendants: Kasia Koltunska.

**Reasons for Judgment**

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| **S.C. FITZPATRICK J.** |

**Introduction**

**1**  The plaintiff Randy Bakker, an on-duty police officer, was injured in an accident involving a motor vehicle driven by the defendant Harry Nahanee. The vehicle was leased by the defendant Roselle Ang from the defendant General Motors Acceptance Corporation (GMAC). Mr. Nahanee had stolen that vehicle from Ms. Ang.

**2**  The litigation that ensued to address Mr. Bakker's injuries was long and convoluted. At the end of the day, the action was dismissed as against Ms. Ang and GMAC and costs were ordered to be paid to them by Mr. Bakker. The claim against Mr. Nahanee was subsequently settled.

**3**  The *Supreme Court Civil Rules* provide that a plaintiff may seek an order that he be allowed to claim the costs payable by him to a successful defendant as a disbursement in the assessment of costs payable to him by an unsuccessful defendant. Such an order is known as a *Bullock* order.

**4**  The only remaining issue in this action is to address whether the costs assessed against Mr. Bakker in favour of Ms. Ang and GMAC can be recovered by him as against Mr. Nahanee pursuant to such a *Bullock* order.

**Factual Background**

**5**  The accident in question occurred on May 6, 2002.

**6**  Mr. Bakker was an on-duty police officer seeking to apprehend Mr. Nahanee, whom he suspected was operating a stolen vehicle. In the process of attempting to stop and apprehend Mr. Nahanee, Mr. Bakker's police cruiser was struck twice by the vehicle Mr. Nahanee was driving. Mr. Bakker was injured as a result.

**7**  There appeared to be little doubt to all concerned that the vehicle had been stolen by Mr. Nahanee. The police reports filed at the time confirm that Mr. Bakker was in pursuit of what he believed to be a stolen car. Mr. Bakker's own report dated May 7, 2002 confirms this. Mr. Bakker also stated the accident occurred when Mr. Nahanee, while trying to stop the vehicle, fumbled with the brakes and gearshift. Mr. Bakker's later statement to ICBC on August 16, 2002 similarly described the vehicle as being stolen.

**8**  On May 6, 2002, Ms. Ang gave a detailed statement to the police confirming that her vehicle had been stolen. She indicated that she had not given anyone, let alone Mr. Nahanee, her permissions to take or use the vehicle.

**9**  Mr. Bakker's counsel, Mr. Cameron, was alive to the issue of Ms. Ang and GMAC's liability in light of Mr. Nahanee's presumed theft of the vehicle. Even before the litigation was commenced, on March 5, 2003, Mr. Cameron wrote to ICBC referring to this likely being an uninsured motorist claim (since Mr. Nahanee was not insured) and asking for ICBC's position regarding liability. There is no indication that ICBC or its counsel responded.

**10**  Mr. Bakker commenced this action on April 19, 2004. The named defendants included Mr. Nahanee, Ms. Ang and GMAC. The claims against Mr. Nahanee were based on negligent operation of the stolen vehicle. The claims against Ms. Ang and GMAC were based firstly, upon their statutory vicarious liability as the respective lessee and lessor of the vehicle pursuant to section 86 of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318* and secondly, on the allegation of ***negligence*** arising from a possible failure to ensure that the vehicle was mechanically sound. Essentially, this last allegation was that the vehicle's brakes had been defective and this defect had, in some fashion, caused the accident when Mr. Nahanee tried to stop the vehicle.

**11**  As Ms. Ang and GMAC were insured with ICBC, a Statement of Defence was filed by counsel on September 20, 2004. The substance of the defence was a denial of all allegations, which strangely would have even included a denial of the allegation that Ms. Ang and GMAC were the lessee and lessor of the vehicle. There are also allegations of contributory ***negligence*** on the part of Mr. Bakker. Finally, there are allegations that Mr. Bakker's injuries were not caused by the accident and that he failed to mitigate any damages.

**12**  Ms. Ang and GMAC specifically pled that Mr. Nahanee acquired possession of the vehicle without the consent, express or implied, of them.

**13**  Mr. Nahanee was not insured through ICBC and was a minor at the time of the accident. Accordingly, the Public Trustee and Guardian became involved. They hired counsel for Mr. Nahanee (Mr. Joseph Battista) who filed an Appearance and Statement of Defence in January 2005.

**14**  In a further attempt to engage counsel on the matter of liability, on January 24, 2005, Mr. Cameron forwarded a letter to Mr. Battista stating "I was also wondering whether you might canvass with your client the issue of liability so that we can see about releasing the owner of the stolen vehicle and thereby limit associated costs".

**15**  I am not aware that Mr. Battista ever responded to this letter from Mr. Cameron on the liability issues.

**16**  Despite Mr. Cameron's attempt to resolve the liability issues, both with ICBC and Mr. Battista, the litigation continued, mostly involving ICBC's counsel on behalf of Ms. Ang and GMAC.

**17**  Following the filing of their defence, Ms. Ang and GMAC's counsel took substantial steps to address the litigation. However, these steps did not include addressing the substance of their defence (ie. that the vehicle was stolen and that there was no negligent maintenance of the vehicle). Instead, those efforts focused on the merits of Mr. Bakker's claim. On September 28, 2004, they demanded production of documents, including clinical records.

**18**  Efforts to obtain document production by ICBC's counsel continued well into 2006 along with efforts to examine Mr. Bakker for discovery. For example, on February 7, 2006, ICBC's counsel again requested and obtained substantial documentation from Mr. Bakker relating to his injuries arising from the accident. In March 2006, ICBC's counsel conducted an examination for discovery of Mr. Bakker, with substantial emphasis on the injuries sustained by Mr. Bakker. Following this discovery, ICBC's counsel continued their request for documents relating to Mr. Bakker's injuries and treatment into July 2006.

**19**  In the midst of these pre-trial procedures, Mr. Cameron again tried to engage ICBC's counsel on the matter of liability, stating in a letter dated May 8, 2006 "we have yet to work out who is actually leading the charge for the defence (i.e.: ICBC or counsel for Nahanee)". Again, there does not appear to have been any substantial response from ICBC.

**20**  In September 2006, counsel for ICBC delivered to Mr. Cameron an Offer to Settle in relation to Mr. Bakker's claims against Ms. Ang and GMAC in the amount of $5,000 and costs in accordance with the former *Supreme Court Rules*. Despite ICBC's written argument on this application that this was a "nominal" offer only which did not recognize any "real liability" on the part of Ms. Ang and GMAC, ICBC's counsel was unable to say why such an offer would have been made in the face of ICBC's knowledge that the vehicle had been stolen and presumably their contention that there had been proper maintenance of the vehicle, such that Ms. Ang and GMAC were not liable for the accident.

**21**  To this point in time, Mr. Nahanee's only involvement in the action had been the filing of his statement of defence.

**22**  Seven months after delivering the Offer to Settle, ICBC communicated to Mr. Cameron that they had "new instructions". It appears that ICBC and its counsel finally realized that Ms. Ang and GMAC did have a substantive defence based on the fact that the vehicle was stolen. On April 24, 2007, ICBC's counsel advised Mr. Cameron that their position was that the vehicle was stolen and that Ms. Ang and GMAC had no vicarious liability as a result. Accordingly, they withdrew the Offer to Settle and indicated that they would seek a dismissal of Mr. Bakker's action if it was not discontinued.

**23**  This was the response that Mr. Cameron had been seeking for some years now since even shortly before the litigation was commenced. He quite reasonably agreed that Ms. Ang and GMAC were likely not vicariously liable since the vehicle was stolen. He also agreed that he could likely discontinue the action against Ms. Ang and GMAC once he completed certain due diligence in respect of the mechanical state of the vehicle. Accordingly, an examination for discovery of Ms. Ang took place on September 20, 2007 at which time her evidence confirmed that she had not been complicit in respect of Mr. Nahanee's possession or use of the vehicle. She also confirmed at that time that the vehicle had been maintained properly.

**24**  Mr. Cameron agreed at the conclusion of the examination for discovery that it was appropriate to discontinue the action as against Ms. Ang and GMAC, however, he was only prepared to do so if each party bore their costs or if the costs would be assessed as amongst all parties at the conclusion of the litigation as against Mr. Nahanee.

**25**  ICBC disagreed and brought an application to dismiss the action pursuant to then Supreme Court Rule 18A. They also sought costs. Ms. Ang's affidavit was filed in support. At the hearing, Mr. Cameron consented to the action being dismissed as against Ms. Ang and GMAC but argued that the issue of costs as between the parties should be determined at the end of the action when the Court could potentially consider either a *Bullock* or *Sanderson* order. Mr. Battista, counsel for Mr. Nahanee, took no position on the costs issue, but advised the Court at the hearing that although liability had been denied in the pleadings, Mr. Nahanee did not, in fact, have a viable defence.

**26**  On October 19, 2007, Mr. Justice Goepel dismissed the action as against Ms. Ang and GMAC. He ordered that the costs of Ms. Ang and GMAC were payable by Mr. Bakker now, disagreeing with Mr. Cameron's position that the issue should be decided at the end of the litigation. He declined to deal with the issue as to whether a *Bullock* or *Sanderson* order was appropriate, noting that the matter was premature in any event since Mr. Nahanee had not yet been found liable. Hence, at that time, there was no "unsuccessful" defendant against whom costs could be awarded. Accordingly, since the costs were to be paid by Mr. Bakker forthwith, he ordered that the issue of recovery by Mr. Bakker of those costs from Mr. Nahanee would be dealt with at the conclusion of the proceedings against Mr. Nahanee. Leave to appeal this decision was denied: *Bakker v. Nahanee*, [*2008 BCCA 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-206X-00000-00&context=).

**27**  The costs of Ms. Ang and GMAC were assessed on March 27, 2008 in the amount of $10,392. These were paid by Mr. Bakker and this represents the amount he seeks to recover from Mr. Nahanee under a *Bullock* order.

**28**  With the action against Ms. Ang and GMAC having been resolved, Mr. Bakker then turned his sights back to Mr. Nahanee, who was still represented by Mr. Battista and not ICBC. The strategy was to involve ICBC in the action against Mr. Nahanee since he was an uninsured motorist.

**29**  On October 14, 2007, Mr. Cameron wrote to ICBC to indicate that Mr. Bakker would be invoking the uninsured motorist provisions under the applicable legislation so as to pursue ICBC if judgment was obtained against Mr. Nahanee. The necessary Statutory Declaration to invoke those procedures had been provided to ICBC earlier in November 2002. Those provisions essentially allow ICBC to step in and defend such an action but only in the event that an uninsured motorist defaults in complying with the procedures in the litigation (for example, failing to file an appearance or defence, failing to appear at the trial or doing or failing to do anything that entitles a claimant to take default proceedings): *Insurance (Vehicle) Act*, [*R.S.B.C. 1996, c. 231, s. 20*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-47V1-JJSF-24KK-00000-00&context=)(6).

**30**  In response, ICBC hired counsel (not the same counsel who acted for Ms. Ang and GMAC) to deal with the matter in early 2008. What followed was a convoluted discussion between Mr. Cameron, Mr. Battista and this new counsel as to whether or not a "default" had occurred that allowed ICBC to step in. In February 2008, Mr. Nahanee was declared incapable of handling his financial and legal affairs and a Certificate of Incapability was obtained. He continued thereafter to be represented by Mr. Battista on behalf of the Public Trustee and Guardian.

**31**  Eventually, after noting that Mr. Nahanee had failed to show up for two examinations for discovery, Mr. Bakker brought an application on August 8, 2008 to allow him to proceed as against Mr. Nahanee as if no defence had been filed. That order was granted by Mr. Justice Brooke on that date and a copy was provided to ICBC shortly thereafter.

**32**  ICBC then immediately became formally involved in the litigation. They filed an appearance and defence in September 2008 for Mr. Nahanee. They also sought an adjournment of the then scheduled trial. They examined Mr. Bakker in April 2009.

**33**  Later still, it appears that ICBC considered that the Order of Brooke J. may not in fact have allowed them to act on behalf of Mr. Nahanee. In that event, they believed that if Mr. Nahanee had not in fact been in default (despite the August 8, 2008 order), their taking steps in the litigation would arguably vitiate ICBC's statutory ability to secure reimbursement from Mr. Nahanee for any monies paid by ICBC on an uninsured claim to Mr. Bakker.

**34**  As a result, on September 18, 2009, ICBC obtained a further order from Brooke J. setting aside his previous order. Mr. Battista did not appear or take any position on this application.

**35**  ICBC now says that as a result, ICBC's standing to act in the place of Mr. Nahanee ended after that one year period and again, it had no status in the litigation effective September 2009.

**36**  In August 2010, Mr. Battista filed a notice withdrawing Mr. Nahanee's statement of defence, in a further attempt to trigger a "default" and cause ICBC to take up the defence of Mr. Nahanee. This ultimately led to a further application by Mr. Bakker for an order that Mr. Nahanee was in default of his pleadings. That order was granted by Master Taylor on December 2, 2010.

**37**  As such, ICBC again took the position that it was allowed to take up Mr. Nahanee's defence and they filed a Response to Civil Claim on his behalf on December 13, 2010.

**38**  On November 2, 2011, Mr. Bakker delivered an Offer to Settle to ICBC pursuant to Supreme Court Civil Rule 9-1 in the amount of $40,000 plus costs and disbursements. The offer included the following provision:

This settlement does not remove the right of the Plaintiff to apply to apply for an order against the Defendants Nahanee for reimbursement for costs previously paid by the Plaintiff to the Defendants Roselle Ang and General Motors Acceptance Corporation in this action nor does it affect the Defendant Nahanee's right to contest that application.

**39**  On December 6, 2011, ICBC accepted this offer on behalf of Mr. Nahanee, specifically noting their ability to contest any application for a *Bullock* order.

**Discussion and Analysis**

**40**  Supreme Court Civil Rule 14-1 (18) provides that the Court may exercise its discretion in ordering that the costs of one defendant be paid by another defendant:

If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

**41**  An order may be granted that an unsuccessful defendant pay the costs of the successful defendant directly (a *Sanderson* order). Alternatively, the order may provide that the plaintiff, while having to pay the successful defendant's costs, is allowed to claim the amount paid as a disbursement in the assessment of costs against an unsuccessful defendant (a *Bullock* order).

**42**  Mr. Bakker seeks a *Bullock* order against Mr. Nahanee in respect of the costs he has paid to Ms. Ang and GMAC.

**43**  In *Robertson v. North Island College Technical & 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=) at 227 (C.A.), the Court discussed both *Bullock* and *Sanderson* orders:

The rule that one defendant may be required to pay the costs of another defendant, or to pay to the plaintiff the costs that the plaintiff is required to pay to the other defendant, has its origins in the Courts of Chancery. The modern formulation of the rule stems from two decisions of the English Court of Appeal, namely, *Sanderson v. Blythe Theatre Co.,* [1903] 2 K.B. 533 (C.A.),and *Bullock v. London General Omnibus Co.,* [1907] 1 K.B. 264 (C.A.). Those cases establish that the rule is applicable in common law cases.

....

The *Sanderson* and *Bullock* cases show that the rule is a rule relating to the exercise of the trial judge's discretion on a matter of costs. It is no different from any other matter of costs. It is inappropriate that the discretion should be whittled away by drawing fine points of comparison between one case and another, and creating a set of legal principles that in the end prevent trial judges from exercising the discretion that they are intended to have over matters of costs.

There is a threshold question. It is expressed by Vaughan Williams L.J. in *Besterman (Bestermann) v. British Motor Cab Co. Ltd.*, [1914] 3 K.B. 181 (C.A.), a decision of the English Court of Appeal, at p. 186, in this way:

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?

....

Once the threshold question is answered affirmatively then the discretion of the trial judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock order, or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold question must be answered affirmatively; the discretion must be exercised judicially; and that is all.

**44**  In *Grassi v. WIC Radio Ltd.*, [*2001 BCCA 376*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63BD-00000-00&context=), Madam Justice Southin provided some clarification as to when such orders may be appropriate:

[33] I do not go so far, as some of the cases have suggested, as to say that such an order should be made "whenever it was reasonable for the plaintiff to have sued the successful defendant", if, by "reasonable", one is looking at the matter from the perspective of counsel for the plaintiff. One must bear in mind that the present rule as to joinder of causes of action is so broad that the causes of action alleged against the various defendants may be completely different, even though they arise out of the same transaction. ... There must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs. ...

[34] But orders under Rule 57(18) are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.

**45**  Recently in *Davidson v. Tahtsa Timber Ltd.*, [*2010 BCCA 528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4CH-00000-00&context=), the Court affirmed the principles from both *Robertson* and *Grassi*, stating that a *Bullock* order requires "some conduct" on the part of the unsuccessful defendant to justify the award: *Davidson* at para. 54.

**(i) Was it reasonable for Mr. Bakker to have sued Ms. Ang and GMAC?**

**46**  I turn to the threshold question as to whether it was reasonable for Mr. Bakker to have named Ms. Ang and GMAC as defendants in this litigation.

**47**  Mr. Bakker submits that in the particular circumstances of this case, it was reasonable to join them and that in those circumstances, Mr. Nahanee ought to pay the costs which Mr. Bakker was required to pay to the successful defendants, Ms. Ang and GMAC. He says in particular:

1. Mr. Nahanee set in motion the chain of events that caused Ms. Ang and GMAC to be brought into this action;

b. It was reasonable for Mr. Bakker to include Ms. Ang

and GMAC in the action to thresh the issues out; and

1. It is a proper and prudent practice to name the owner of any motor vehicle at fault for an accident due to the provisions of the *Motor Vehicle Act* regarding vicarious liability of the owner and where the onus is on the owner to disprove that liability.

**48**  On a preliminary point, ICBC takes the position that the pleadings of Mr. Bakker do not set out a cause of action against Ms. Ang and GMAC on the basis of vicarious liability pursuant to s. 86 of the *Motor Vehicle Act*. I have reviewed the pleadings filed by Mr. Cameron and they clearly name Ms. Ang as the lessee of the vehicle and GMAC as the owner of the vehicle. Why the cause of action was not as clearly stated in the pleading as it could have been, in my view the material facts have been plead upon which a finding of vicarious liability might be made by the Court. In addition, I note that the many communications from counsel for ICBC acting for Ms. Ang and GMAC to Mr. Cameron specifically address this aspect of the claim and therefore, there was clearly no doubt in ICBC's mind that the claim advanced against Ms. Ang and GMAC arose at least in part from this potential vicarious liability.

**49**  Accordingly, I consider the pleadings adequately set out this claim.

**50**  The causes of action against Mr. Nahanee in ***negligence*** in relation to his operation of the vehicle are independent of the causes of action against Ms. Ang and GMAC which arise from their statutory liability. In addition, the allegations that Ms. Ang and GMAC may be liable in ***negligence*** in relation to the maintenance of the vehicle can be said to be independent of the allegations against Mr. Nahanee. Nevertheless, they all arise from the operation of the vehicle by Mr. Nahanee and in that sense, can be said to be connected.

**51**  Mr. Bakker has submitted and I agree that it is the practice in this province where a motor vehicle accident has occurred that counsel will sue all potential parties who may have some liability provided of course that there is some reasonable basis upon which liability may be established. Mr. Cameron has referred me to the *British Columbia Motor Vehicle Accident Claims Practice Manual*, 2d ed. (The Continuing Legal Education Society of British Columbia). At s. 2.12, the authors state:

In general, ... anyone whose ***negligence*** may have caused or contributed to the motor vehicle accident should be joined as a defendant and/or third party.

It is important to canvas thoroughly who may be a party, no matter how seemingly remove at first glance; failure to do so may have adverse consequences for the client and ultimately for the lawyer ...

**52**  It is not a novel concept that when preparing pleadings, all parties who are potentially liable should be included where a valid cause of action can be reasonably advanced. This applies equally in the arena of motor vehicle litigation. In this respect, Mr. Bakker also relied on the evidence of Mr. David Kolb, a Vancouver lawyer who practices in this area. He states that an owner of the vehicle in question is always named as a defendant arising from the statutory vicarious liability under the *Motor Vehicle Act*. He goes on to state that even if the car was purportedly stolen, it is wise to err on the side of caution and name all parties until further investigations are done to ensure that all facts are known before the owner is released from the litigation. He cites as an example, that while the driver/thief and the owner may have different names, further investigations may in fact reveal that they were related and resided together, in which case the owner would be liable even if a stolen vehicle is involved. There may also be issues of fraud or improper motive on the part of the owner who reported the vehicle as stolen. Until such facts as may establish liability are ruled out, it is a prudent practice to name the owner.

**53**  In these circumstances, as a general proposition, I am of the view that Mr. Bakker was reasonable in naming Ms. Ang and GMAC as defendants to this action.

**54**  ICBC submits, however, that the claim for vicarious liability was doomed from the start because it was well known to Mr. Bakker that the vehicle was stolen and that Ms. Ang had nothing to do with it. She also says that Mr. Bakker had plenty of time prior to commencement of the action to investigate matters and determine liability rather than naming parties liberally before the expiration of a pending limitation deadline. Mr. Bakker was represented by counsel as early as March 2003 and the action was not commenced until April 2004, over a year later. She says that accordingly, there was sufficient time to determine that it was not appropriate to add Ms. Ang and GMAC.

**55**  As stated earlier in these reasons, it was the belief of Mr. Bakker that the car was stolen. However, while Mr. Bakker participated in the police reporting in the aftermath of the accident, there is no evidence that Mr. Bakker then fully investigated the matter with Ms. Ang. At no time did he seek to obtain her evidence with a view to proving that she had no relationship to Mr. Nahanee and that she had nothing to do with the fact that the vehicle was taken by Mr. Nahanee. The statements that Ms. Ang gave to both the police and ICBC were given to other individuals, not Mr. Bakker.

**56**  I cannot conclude that Mr. Bakker was aware of all the details concerning the theft of the vehicle and also the previous maintenance history of the vehicle prior to the accident before the action was commenced. In fact, I am not aware of any basis upon which to argue that he had the obligation to fully "investigate" the matter, as ICBC contends. These matters clearly lay within the knowledge of Ms. Ang and therefore ICBC. There is no explanation why ICBC did not respond in a substantive manner to Mr. Cameron's enquiry on March 5, 2003 regarding the liability issues well before the action was commenced. While ICBC was not required to address the matter then, and while they were entitled to later deny liability on behalf of Ms. Ang and GMAC in the action, in those circumstances I do not see how it lies in their mouth to contend now that these parties should not have been named.

**57**  In addition, ICBC submits that the action against Ms. Ang and GMAC was without any evidence or foundation in respect of the allegation that they had failed to ensure that the vehicle was mechanically sound. Counsel for ICBC point to the police investigation done on the date of the accident, including Mr. Bakker's own memo regarding the collision referring to Mr. Nahanee, then a teenager of 14 years old, "fumbling with the brakes and gearshift".

**58**  Similar to my conclusions above, I do not consider that Mr. Bakker's involvement in the accident resulted in him determining, for the purposes of this litigation, that the sole reason for the accident arose from Mr. Nahanee's operation of the vehicle, rather than a mechanical issue relating to the stolen car. It is equally plausible at that time that there was some mechanical problem with the vehicle that had caused or contributed to Mr. Nahanee's faulty operation of the vehicle and the subsequent collision. In these circumstances, it is difficult to fault Mr. Bakker for waiting until this further issue was resolved before addressing the vicarious liability of Ms. Ang and GMAC.

**59**  The simple fact is that Mr. Nahanee stole Ms. Ang's car. By doing so, he squarely put in issue whether Ms. Ang and GMAC, as the lessee and lessor of that vehicle, were vicariously liable in those circumstances. In that sense, it was his conduct that caused them to be named. In my view, the causes of action were also related or connected in the sense that the actions of Mr. Nahanee gave rise to issues not only in relation to himself, but to Ms. Ang and GMAC. I consider that it was reasonable for Mr. Bakker to have named Ms. Ang and GMAC so that all potential parties who might be liable for the accident were brought into the litigation.

**60**  I therefore find that Mr. Bakker has satisfied the threshold question.

**(ii) The Exercise of the Court's Discretion**

**61**  Having met the threshold requirement of showing that joinder was reasonable, the Court must exercise its judicial discretion in deciding whether a *Bullock* order is just and fair in the circumstances.

**62**  Mr. Cameron advises that in the ordinary course, if the case involves a stolen vehicle, both the driver and the owner would be named. Sometime later, ICBC would decide how they wished to deal with the matter which would typically involve ICBC admitting liability for the thief/uninsured motorist. At that point, the innocent owner of the vehicle would be "off the hook" and a discontinuance would be filed by the plaintiff.

**63**  As stated earlier in these reasons, Mr. Cameron made efforts to engage both ICBC and Mr. Battista in these types of discussions in March 2003, January 2005 and May 2006. Again, his words to Mr. Battista were specifically that he should "canvass with [his] client the issue of liability so that we can see about releasing the owner of the stolen vehicle and thereby limit associated costs".

**64**  Unfortunately, an early discussion of the liability issues relating to the defendants or even earlier, potential defendants, did not happen in this case for a variety of reasons.

**65**  Firstly, ICBC did not have conduct of Mr. Nahanee's defence and there does not appear to have been any coordination between Mr. Battista and ICBC in that respect despite the prospect that ICBC would become involved at some point pursuant to the uninsured motorist legislation. Secondly, Mr. Battista in fact defended the action and specifically denied any liability on the part of Mr. Nahanee. Thirdly, ICBC's counsel, who no doubt was well aware that Ms. Ang took the position that her vehicle had been stolen, did not tackle that issue head on. In fact, even in the face of that knowledge, ICBC's counsel ignored her substantive defences and took the rather odd approach of defending the claim on its merits for the ensuing 3 years. This involved substantial document disclosure procedures and examining Mr. Bakker. Even more inexplicable is their Settlement Offer delivered in September 2006 on behalf of Ms. Ang and GMAC which on the face of it, indicated some concerns regarding liability. Again, no explanation was offered by ICBC as to why that Offer to Settle was delivered.

**66**  ICBC takes the position that the lack of merit in Mr. Bakker's claim against Ms. Ang and GMAC was exacerbated by Mr. Bakker's conduct in the prosecution of the claim. ICBC says that Mr. Bakker commenced the action against Ms. Ang and GMAC in April 2004 but that he subsequently made no effort to ascertain the merits of this claim in any material way until September 2007 when Ms. Ang was examined for discovery. By this, I take ICBC to be saying that it was incumbent on Mr. Bakker to take steps to disprove the vicarious claim against them, a proposition that I find defies logic. Mr. Bakker's pleadings made clear that these claims were being advanced against Ms. Ang and GMAC. In the face of ICBC's active defence of the claim on its merits, Mr. Cameron must have reasonably assumed that there was some substance to these claims. This would have been particularly so given the delivery of the Offer to Settle, which was presented even before Mr. Cameron had examined Ms. Ang for discovery on the stolen vehicle and maintenance issues.

**67**  ICBC relies on *Davidson*, at paras. 56 and 57, where the Court found that it was not just and fair in the circumstances to impose a *Bullock* order where there was no credible evidence to support the claim that was later dismissed and the claim was described as being "without foundation".

**68**  In *Cominco Ltd. v. Westinghouse Canada Ltd.* [*(1981), 33 B.C.L.R. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1PN-00000-00&context=) (S.C.), a much more nuanced approach was taken by the Court in the exercise of its discretion in awarding a *Bullock* order. In that case, the Court held that where a relationship was unclear at the time the action was started, but was clarified later on discovery such that it was revealed that no claim could be asserted against one of the parties, a *Bullock* order was limited to only those costs up to the time of that discovery: *Cominco* at 212.

**69**  Contrary to the contention of ICBC, there was some uncertainty, *albeit* minor, as to whether Mr. Nahanee was solely liable for the accident. While Mr. Bakker did not move particularly quickly in determining that issue, I conclude that this arose in part due to the contradictory position of ICBC in defending the claim against Ms. Ang and GMAC on its merits. In addition, I think it can equally be said that ICBC failed in bringing the issue to the fore, especially in circumstances where the evidence to prove Ms. Ang's innocence regarding the stolen vehicle and her proper maintenance of the vehicle were entirely in ICBC's, and not Mr. Bakker's, control. Once Mr. Cameron was advised that ICBC was actively asserting this defence, he moved quickly to examine Ms. Ang for discovery and complete his due diligence on the issues.

**70**  Further, ICBC says that Mr. Nahanee should not be required to pay the costs of Mr. Bakker's "ill-advised" attempt to secure a *Bullock* order against Mr. Nahanee prior to any judgment or settlement against Mr. Nahanee. She says it was only after the discovery of Ms. Ang that Mr. Bakker conceded that the claim lacked merit and agreed that the only remaining issue was costs. Despite that concession, further proceedings before Goepel J. were necessary to dismiss the action and the Court of Appeal denied his leave application to appeal the decision to awards costs in favour of Ms. Ang and GMAC.

**71**  In my view, there is some merit to this argument. By the time of the discovery, it was clear to all that there was no basis upon which to base any liability of Ms. Ang and GMAC. The litigation was at an end in relation to those defendants. I do not consider that it was reasonable for Mr. Bakker to proceed to the hearing before Goepel J. particularly in light of the fact it was clearly premature, as stated by Goepel J. A discontinuance would have been a far more practical solution with Mr. Cameron putting Mr. Nahanee's counsel on notice that he would be seeking a *Bullock* order in respect of costs payable in that event. Nor do I consider that it is reasonable for Mr. Nahanee to incur the costs of Mr. Bakker attempting to appeal the decision of Goepel J. in an attempt to delay the payment of costs that were ordered payable by Mr. Bakker.

**72**  On a final note, both parties made submissions concerning the role that ICBC played - or did not play - in relation to this litigation.

**73**  ICBC says that it should not be forced, through Mr. Nahanee, to pay essentially its own costs incurred defending its insured, Ms. Ang and GMAC, particularly given that ICBC had no standing in relation to Mr. Nahanee during the period that these costs were incurred (from 2004 to 2007). ICBC says that it therefore had no ability to control against the incurring of these costs as a true co-defendant. I would note, however, that it is normally the case that the unsuccessful defendants are separately represented from the successful defendants and in that sense, have no "control" over the costs incurred by the successful defendants.

**74**  Mr. Bakker says the entity behind all these defendants, being Mr. Nahanee, Ms. Ang and GMAC, is the same. Therefore the steps undertaken on behalf of Ms. Ang and GMAC in defending the action on its merits (such as reviewing document disclosure and examining Mr. Bakker) ultimately led to a knowledge of Mr. Bakker's case which assisted ICBC, acting for Mr. Nahanee, in arriving at a settlement of the action. Accordingly, Mr. Bakker submits that there is really no independent "successful defendant" to whom Mr. Bakker should, in these circumstances, pay costs.

**75**  Needless to say, ICBC's involvement in this litigation has been as the statutory insurer of the parties. It has acted in that role in the name of the defendants in this litigation. The decisions of the Court in relation to these defendants affect those defendants, even though financially ICBC bears the cost of those decisions. In those circumstances, I do not consider it particularly relevant that ICBC had various roles to play and that the practical result of any *Bullock* order is to order ICBC to pay itself. Practically, that is what occurs but it happens under the insurance of different parties and the result is or may be of significance to them.

**76**  In *Brooks-Martin v. Martin*, [*2011 BCSC 497*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1M5-00000-00&context=), Mr. Justice Halfyard similarly did not find it of significance that both defendants were separately represented by the same insurer: para. 27.

**Conclusion**

**77**  In my view, and exercising my discretion, the granting of a *Bullock* order is appropriate in the circumstances but the order should be limited, similar to that which was ordered in *Cominco* at 212. Accordingly, Mr. Bakker is entitled to a *Bullock* order but only in respect of the costs incurred up to and including the examination for discovery of Ms. Ang on September 20, 2007. By that time, Mr. Bakker's counsel had elicited sufficient evidence from Ms. Ang to be satisfied that she and GMAC had no vicarious liability and that there were no mechanical issues relating to the vehicle. Beyond September 20, 2007, I am unable to say that it would be just or fair to fix Mr. Nahanee with the costs of Ms. Ang and GMAC.

**78**  Given that Mr. Bakker has been substantially successful, he is entitled to the costs of the application.

S.C. FITZPATRICK J.

**End of Document**

[***Barnes v. Richardson, [2008] B.C.J. No. 1904***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3MY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D.J. Martinson J.

Heard: September 5, 2008.

Oral judgment: September 5, 2008.

Docket: M072678

Registry: Vancouver

**[2008] B.C.J. No. 1904** | 2008 BCSC 1349 | 171 A.C.W.S. (3d) 971

Between Sean Matthew Barnes, Plaintiff, and Samual Keith Richardson, Keith Richardson, Elaine Minichiello and Anthony Minichiello, Defendants

(99 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Back and spine — Recoverable losses — Loss of income — Conditions impacting on award — Pre-existing injury — Action by plaintiff for damages for personal injuries caused in motor vehicle accident — Plaintiff awarded $85,000 non-pecuniary damages and $127,500 for loss of earnings — Totality of evidence established causation — Plaintiff active and healthy before accident, which aggravated pre-existing congenital defect — Plaintiff now limited in activity — Major lifestyle change — Plaintiff's employment in skilled labour restricted because could not engage in heavy lifting — Amounts of $100,000 non-pecuniary and $150,000 loss of earnings reduced to damages awarded because crumbling skull rule applied — Fifteen percent chance another incident would have triggered the pre-existing condition.**

**Damages — Assessment of damages — Limiting factors — Pre-existing conditions — Thin or crumbling skull rule — Action by plaintiff for damages for personal injuries caused in motor vehicle accident — Plaintiff awarded $85,000 non-pecuniary damages and $127,500 for loss of earnings — Totality of evidence established causation — Plaintiff active and healthy before accident, which aggravated pre-existing congenital defect — Plaintiff now limited in activity — Major lifestyle change — Plaintiff's employment in skilled labour restricted because could not engage in heavy lifting — Amounts of $100,000 non-pecuniary and $150,000 loss of earnings reduced to damages awarded because crumbling skull rule applied — Fifteen percent chance another incident would have triggered the pre-existing condition.**

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| Action by the plaintiff for damages for personal injuries caused by a motor vehicle accident. The plaintiff was in the backseat of the car driven by the defendant. The defendant sped through a stop sign and caused a head-on collision. The plaintiff experienced lower back pain almost immediately but, while he mentioned it to his insurance adjustor, he did not report it to his doctor right away. The plaintiff sought $100,000 to $125,000 in non-pecuniary damages, $175,000 to $200,000 for future loss of earnings and $25,000 for retraining. The plaintiff was currently working at a shipyard earnings $28 per hour but was limited because of his back pain. The plaintiff's specialist explained that the accident triggered a pre-existing congenital defect but that it had been asymptomatic until the accident occurred. The defendant argued that the crumbling skull rule applied and argued the plaintiff had not proven causation. The defendant's expert testified that since the plaintiff did not report the accident immediately, it was likely that he had injured his back from another activity.  HELD: The plaintiff was awarded $85,000 for non-pecuniary damages and $127,500 for future loss of earnings.  The totality of the evidence supported the plaintiff's claim he had no back pain until the accident. While the plaintiff did not immediately complain to his doctor, he complained to his insurance adjustor and to his friends and family. The plaintiff's lifestyle had changed dramatically since the accident as he could not participate in many activities he had before. The plaintiff's expert was afforded significant weight because his testimony was consistent with the factual findings of the court. The defendant's expert was afforded little weight as his conclusions were based on inaccurate or incomplete evidence and it was clear he was an advocate for the defence. The plaintiff's non-pecuniary losses totalled $100,000. The plaintiff also suffered from reduced earning potential. His interests were in skilled labour but he was unable to do heavy lifting, which limited his job opportunities and made him less attractive to employers. He would likely earn $5,000 per year less as a result, for a total of $150,000 in loss of earnings, given that he was only sixteen years old at the time of the accident. The awards were reduced because of the crumbling skull rule, however. Given the plaintiff's active lifestyle, there was a fifteen per cent chance that a different trauma would have triggered his pre-existing condition, so the damages were reduced by fifteen per cent. |

**Counsel**

Counsel for Plaintiff: L.M. Blond.

Counsel for Defendants: M. Monroy and A. Laudadio.

**Reasons for Judgment**

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| --- |
| **D.J. MARTINSON J. (orally)** |

**1. Nature of the Claim**

**1**  This is a claim for damages by the plaintiff, Sean Barnes, for personal injuries he says he suffered as a result of a motor vehicle accident that took place on March 3, 2003. He was a back seat passenger, positioned behind the driver, who, along with the other two occupants, were friends. Mr. Barnes was 16 years old at the time. The driver, the defendant Sam Richardson, was speeding, went through a stop sign and the vehicle hit another vehicle head-on. Mr. Barnes saw the collision and grabbed onto the handle, which was ripped from the vehicle as a result of the impact. He asks for non-pecuniary damages in the range of $100,000 to $125,000 and damages for loss of future income earning capacity in the range of $175,000 to $200,000 plus an additional $25,000 to assist with retraining.

**2**  Liability has been admitted. The defendants, Sam Richardson and his father Keith Richardson, agree that Sean Barnes suffered some injury. However, they say that the non-pecuniary damages should be in the range of $20,000 to $30,000. They say he has not proven that he is entitled to damages for loss of future earning capacity.

**3**  I have decided to give you my conclusions first and then give my reasons for those conclusions. My conclusions are these: I am satisfied based on the totality of the evidence that Mr. Barnes has proven on a balance of probabilities that but for the negligent act of the driver, the injuries of which he complains would not have occurred. Taking into account the likelihood that Mr. Barnes' pre-existing condition would have been activated regardless of the accident, I assess non-pecuniary damages at $85,000 and the loss of future earning capacity at $127,500.

**4**  I am going to give my reasons this way: first, I will summarize the arguments made on behalf of Mr. Barnes and then those made on behalf of Sam Richardson and Keith Richardson. Then I will deal with the question of causation. I will next move on to the question of damages, dealing first with non-pecuniary damages. I will then consider damages for loss of future-earning capacity. Then I will discuss the question of the reduction of the damages because of the existence of Mr. Barnes' condition at the time of the accident. Finally, I will explain why I have concluded that the defendants have not proven failure to mitigate.

**2. Arguments**

**5**  The difference in approach is due primarily to a different view taken towards the significance of Sean Barnes' pre-existing congenital isthmic spondylolisthesis (with bilateral pars interarticularis defects), which I will call the "pre-existing condition." The pre-existing condition was not discovered until x-rays were taken on July 11, 2006. The defendants agree that he suffers from this condition, that it has been activated, that it has impacts on his life generally and that he is and will continue to be, as a result, precluded from doing work involving heavy lifting. They, however, say that Sean Barnes has not proven on a balance of probabilities, as he is required to do, that it was activated as a result of the motor vehicle accident.

A. Mr. Barnes

**6**  Mr. Barnes says that he had low back pain almost immediately after the accident. He did not mention it to Dr. Lupton, his family doctor, until July 2003 because there were other symptoms that were initially predominant and he thought it would get better. However, both he and his father, Carl Barnes, told the insurance adjuster about the low back pain early on. The adjuster confirmed this. He says that the evidence of his father; his mother Patricia Barnes; his brother Scott Barnes; his girlfriend, Ana Sasi; and his friend, Skylar Martin, support his evidence in this respect.

**7**  He says that he never suffered from any significant back pain before the accident. He saw a chiropractor in 2001, but it was for minor pain, which resolved almost immediately. He continued with all of his activities. He agrees that he was in a fight after the accident and he fell down some stairs, but says neither affected his back. He did not recall an incident described by a friend, Chase Gatska, in the fall following the accident in which he jumped off a raised patio, tackled him, and they went through the door of a shed, landing on the ground. He did agree it was possible. He submits, though, that there is no evidence that these events activated the pre-existing condition.

**8**  Dr. Hunt, the specialist in pain medicine called on behalf of Mr. Barnes, says that in his opinion, the collision permanently aggravated the pre-existing condition. While he agrees that activities such as twisting and bending can activate the condition, the literature suggests that baseball is an unlikely cause. He does not think that the low back pain Mr. Barnes had in 2001 activated the condition. If it had, the pain would have become progressively worse and that did not happen. It is, he says, much more likely that the strong impact of this accident permanently activated the pre-existing condition.

**9**  Mr. Barnes says that Dr. Hunt is a highly qualified and experienced pain specialist and his opinion should be preferred over that of Dr. Schweigel. He submits that Dr. Schweigel's evidence should be given very little weight. He drew unfair inferences both with respect to the chiropractic notes in 2001 and the incidents that took place after the motor vehicle accident. He also primarily based his opinion on the fact that Mr. Barnes did not complain to his doctor about low back pain for several months. Mr. Barnes did, however, report low back pain almost immediately to the insurance adjuster. Dr. Schweigel, Mr. Barnes submits, acted as an advocate for the defendants.

**10**  Mr. Barnes disagrees with the defence suggestion that he should have called Dr. Lupton as a witness and that an adverse inference should be drawn as a result. Dr. Lupton's clinical records were provided. He is not an expert and would not have been able to help. Mr. Barnes did not regularly see his doctor as he specifically did not like Dr. Lupton and he generally does not like doctors or hospitals.

**11**  On the question of damages, Mr. Barnes argues that this is a thin skull case, which means that the Richardsons took him as they found him and are responsible for all the damages he has suffered. With respect to non-pecuniary damages, he was previously a healthy, very active boy. Now he is very limited in his activities; his condition affects his daily life and significantly affects his future earning capacity. Both doctors agree that he cannot do heavy lifting. That is also the opinion of John Lawless, the vocational rehabilitation expert who testified on Mr. Barnes' behalf. Mr. Barnes was not going to go to university before, preferring a labour type job. Mr. Lawless says that Mr. Barnes is capable of obtaining a university degree, which he had not considered. He will now likely do that.

**12**  He disagrees with the defence argument that he has not mitigated his damages. He says that he did get assistance from a chiropractor and has been doing some exercises but they did not work.

B. Sam Richardson and Keith Richardson

**13**  The defendants say that Mr. Barnes has not proven that the motor vehicle accident did activate his pre-existing condition. He did not complain to a doctor about his low back pain until four months after the accident. The pre-existing condition was not disclosed until more than three years after the accident. His expert reports were not prepared until five years after the accident.

**14**  The evidence, the defence argues, shows that there are other ways in which the pre-existing condition could have been activated. Mr. Barnes admits to participating in activities which both Dr. Hunt and Dr. Schweigel say can cause such an activation. In addition, Dr. Schweigel, an orthopaedic surgeon called on behalf of Samuel Richardson and Keith Richardson, says the accident did not activate the condition and is of the opinion that there are other explanations to account for his current complaints. Dr. Schweigel bases his opinion primarily on the information he had that Mr. Barnes did not report low back pain to his doctor until several months after the accident, though he saw him the next day. That day the physical examination was normal. He also placed significant emphasis on the fact that Mr. Barnes played baseball at a high level as a pitcher before the accident and the clinical notes of a chiropractor Mr. Barnes saw in 2001. In addition Dr. Schweigel felt that the activities Mr. Barnes participated in after the accident, including a fall down some stairs and a fight, likely activated or aggravated the condition. The defence says that Dr. Schweigel is a highly qualified and experienced orthopaedic surgeon and his evidence is entitled to significant weight.

**15**  The defence also argues that the adverse inference should be drawn against Mr. Barnes that Dr. Lupton would give evidence unfavourable to his case because he did not present an opinion from him or call him as a witness.

**16**  With respect to damages, the defence argues that if the Court finds that causation has been proven, this is a crumbling skull case and the pre-existing condition was inherent in his original position. The defendants argue that they are only responsible for the difference. There is a substantial likelihood that the condition would have been activated anyway and damages should be reduced accordingly. Sean Barnes has not, the defendants argue, mitigated his damages.

**3. Analysis - Causation**

A. Legal Principles

**17**  Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions: ***A.(T.W.N.) v. Clarke***, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=), [*22 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=) at para. 16. Causation concerns whether the accident caused the pre-existing condition to be activated or aggravated. The assessment of damages considers whether there was a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***: ***Hosak v. Hirst***, [*2003 BCCA 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=), [*9 B.C.L.R. (4th) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=) at para. 10.

**18**  Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: ***Athey v. Leonati***, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at para. 13, [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=).

**19**  The Supreme Court of Canada considered the principles that apply to causation in ***Resurfice Corp. v. Hanke***, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=), [*[2007] 1 S.C.R. 333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=). The "but for" test applies, except in very limited circumstances. Mr. Barnes bears the burden of showing that, but for the negligent act of the driver, the injuries of which he complains would not have occurred. In special circumstances, the law has recognized exceptions to the basic "but for" test and applied a "material contribution" test: see ***Resurfice*** at paras. 24-25. Those circumstances do not apply in this case. See also ***Bohun v. Sennewald***, [*2008 BCCA 23*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208M-00000-00&context=), [*77 B.C.L.R. (4th) 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-208M-00000-00&context=), a medical malpractice case.

**20**  However, neither test requires that the plaintiff establish that the defendant's ***negligence*** was the sole cause of the injury. A defendant is liable as long as he or she is part of the cause of an injury, even though his or her act alone was not enough to create the injury: ***Athey*** at para. 17.

**21**  There is no reduction of liability because of the existence of other preconditions. The defendants remain liable for all injuries caused or contributed to by their ***negligence***: ***Athey*** at para. 17. A non-tortious cause that precedes the accident but contributes to the injury, a precondition, is not relevant to causation unless symptomatic at the time of the accident: ***Larwill v. Lanham***, [*2003 BCCA 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60NC-00000-00&context=), [*190 B.C.A.C. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60NC-00000-00&context=) at para. 22. Even if a minor impact causes the plaintiff's symptoms, it is no answer for the defendant to say that the plaintiff was peculiarly vulnerable to injury because of a pre-existing susceptibility: ***Rai v. Wilson*** [*(1999), 120 B.C.A.C. 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-2259-00000-00&context=) at para. 6, 196 W.A.C. 122.

**22**  The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient that the defendant's ***negligence*** was a cause of the harm: ***Athey*** at para. 19.

**23**  The finding of a contribution outside of the *de minimis* range is a material contribution and sufficient to render the defendant fully liable for the damages: ***Athey*** at para. 44. The British Columbia Court of Appeal clarifies in ***Sam v. Wilson***, [*2007 BCCA 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=), [*78 B.C.L.R. (4th) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2210-00000-00&context=) at para. 109 that "material contribution", as used in ***Athey***, is synonymous with "substantial connection", as used in ***Resurfice***, and should not be confused with the "material contribution test".

**24**  The issue in ***Hosak v. Hirst***, [*2003 BCCA 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=), [*9 B.C.L.R. (4th) 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4Y8-00000-00&context=) was whether the accident activated or aggravated a pre-existing but asymptomatic degenerative condition of the plaintiff's cervical spine, spondylosis. Madam Justice Rowles explains at para. 70 that the plaintiff has to establish that the accident caused or contributed to the activation or aggravation of the pre-existing spondylosis. The plaintiff does not have to show that it was the only cause, but that it was a cause. Once the burden of proof is met, causation must be accepted as a certainty. Loss cannot be apportioned according to the degree of causation where the loss is created by tortious and non-tortious causes: ***Hosak*** at para. 71.

**25**  In ***White v. Stonestreet***, [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=), the issue arose as to whether the plaintiff's spondylolisthesis became symptomatic as a result of a motor vehicle accident. The Court explained at para. 68 that the plaintiff was required to prove, on a balance of probabilities, that the accident was a contributing factor outside of the *de minimis* range. The accident did not have to be the sole cause and causation did not need to be established to scientific precision. The Court determined that the plaintiff's continuing lower back problems were not caused by the motor vehicle accident. The temporal sequence did not establish a causal connection.

**26**  In ***Sananin v. MacHale***, [*2006 BCSC 672*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B21C-00000-00&context=), the issue was whether the accident rendered the plaintiff's lower back more susceptible to injury than it had been prior to the accident as a result of its pre-accident spondylolysis and spondylolisthesis condition. Mr. Justice Edwards said at para. 20 that in this context, more susceptible does not mean more likely to suffer an accident resulting in trauma to the back, but more likely that any trauma to the back would cause the plaintiff to experience more pain, in terms of intensity or duration or both, than he would have but for the accident. The Court found that the plaintiff had not proved that the accident made his back more susceptible to injury than he was as a result of his pre-existing condition.

B. Findings of Fact

**27**  I must make findings of fact with respect to Sean Barnes' low back pain both before and after the motor vehicle accident.

1. *Before the Motor Vehicle Accident*

**28**  The evidence called on behalf of Mr. Barnes relating to low back pain before the accident, is his evidence that he did not have low back pain, other than that referred to in the chiropractic clinical record in 2001. He says that pain was minor, resolved within a few days and he never had problems after that. The evidence of his mother, father, brother, and girlfriend is that he never complained of low back pain before the accident.

**29**  He was active in a wide variety of activities and continued to play baseball up to the time of the accident.

**30**  The defence relies on the clinical notes of the chiropractor, Dr. Alderson. On May 14th the note says, "Insidious, acute left low back pain - unknown etiology - patient not showing any self improvement." It also says, "The patient has no history of serious back problems." The May 17th note says, "Patient felt rough till today - woke up in far less pain and is much more functional, bending without pain."

**31**  Dr. Alderson was not called as a witness. His clinical note has limited evidentiary value; it cannot be used to prove any opinion he may have had with respect to a diagnosis.

**32**  I am satisfied on the totality of the evidence that Mr. Barnes did not have lower back pain problems before the accident, other than a minor problem in 2001 that resolved quickly.

*(ii) After the Motor Vehicle Accident*

**33**  The impact was significant. Mr. Barnes did not go to the hospital after the accident. He told Sam Richardson that he was okay immediately after. He spent the first two or three days in bed. He saw Dr. Lupton the next day and focused on the chest pain caused by the seatbelt. He did not mention low back pain to a doctor until July 2003.

**34**  He was very active before the accident, playing high level baseball, hiking, playing hoops with his friends, swimming, and playing sports such as badminton. He was involved in kick boxing for several years, and got his green belt.

**35**  Immediately following the accident he was not able to participate in these activities either at all, or to a much lesser extent. He tried to play baseball again, but was unable to do so and stopped playing. This was an important decision as he loved baseball and was very good at playing it.

**36**  This conclusion is supported by the evidence of Sean Barnes himself and by the evidence of his mother, Patricia Barnes; his brother Scott Barnes; and his girlfriend, Ana Sasi; and his friend Skylar Martin. There was no evidence to the contrary. I accept their evidence in this respect.

**37**  I am satisfied that Sean Barnes did have low back pain immediately following the motor vehicle accident. Evidence of his complaints to others is admissible to rebut the suggestion made by the defendants that he in fact did not have low back pain then.

**38**  He and his father told the insurance adjuster about back pain. On March 6th his father reported that his son had a very sore back, neck and ribs. On March 20th he told the adjuster that he had pain in his upper and lower back. The adjuster's note on April 23rd says that his lower back still hurts. The evidence of Patricia Barnes, Scott Barnes, and Ana Sasi supports the conclusion that he was complaining of back pain early on and exhibited behaviour consistent with low back pain.

C. The Evidence of Dr. Hunt

**39**  Dr. Hunt's opinion is that the reason Mr. Barnes has persistent activity-related low back pain is because his previously asymptomatic congenital isthmic spondylolisthesis with bilateral pars interarticularis defects was permanently aggravated in the motor vehicle accident of March 3, 2003.

**40**  Dr. Hunt says that the fact that Mr. Barnes had a brief episode of low back pain and hip pain two years before the accident suggests that he had mild musculoligamentous strain and that his congenital spondylolisthesis remained asymptomatic.

**41**  Dr. Hunt is of the opinion that Mr. Barnes has developed a mild myofascial pain syndrome in the interscapular muscles. He says that his pain arises from tender regions in the damaged spinal ligament and in the associated musculature with associated muscle spasm.

**42**  Dr. Hunt says that Mr. Barnes suffered injuries in the motor vehicle accident to his asymptomatic, pre-existing, congenital isthmic spondylolisthesis with pars interarticularis defects at L5-S1. These injuries have resulted in a condition of chronic low back pain. Dr. Hunt states:

Given his history of no significant pain or physical impairments, with respect to his low back prior to the accident of March 3, 2003, and with the onset of symptoms in his low back the morning following the motor vehicle accident and his activity-related low back pain continuing down to the present, the motor vehicle accident impact **most certainly** resulted in forces to his lumbosacral spine which readily explain his condition. His history, ongoing symptoms, limitations, physical examination and imaging studies all consistently indicate that the motor vehicle accident of March 3, 2003 was causative.

[Emphasis in original]

**43**  I find that in Dr. Hunt's opinion is entitled to significant weight. For the most part the factual assumptions upon which he relies are consistent with the findings of fact made by the Court.

D. The Evidence of Dr. Schweigel

**44**  The report of Dr. Schweigel states that the cause of the spondylolisthesis is a developmental anomaly. Mr. Barnes either developed it as he was growing up, quite spontaneously, and/or he was born with this condition. Dr. Schweigel is of the opinion that it was not caused by the motor vehicle accident of March 3, 2003.

**45**  His opinion is based primarily, but not exclusively, on the premise that the low back pain was not mentioned for several months after the accident and, therefore, there is no association between the two.

**46**  Dr. Schweigel also describes treatments by a chiropractor in 2001 for low back pain that occurred insidiously. He says that this is the usual reason that a patient experiences discomfort from a spondylolisthesis.

**47**  He says that spondylolisthesis is a developmental anomaly, which means that the patient developed this sometime in childhood for no specific reason. It may be a genetic problem or it may be a traumatic event at that time. Dr. Schweigel is of the opinion that this spondylolisthesis would have been present for many years prior to the motor vehicle accident.

**48**  Dr. Schweigel indicates that Mr. Barnes was predisposed to having pain in his lower back and the low back pain was, more likely than not, due to playing baseball.

**49**  He states that if the motor vehicle accident caused pain, it would have been expressed to his doctor in the first few days after the accident and there is no documentation of moderate or severe pain. Dr. Schweigel also says that the physical abnormalities at that time were extremely sparse.

**50**  Dr. Schweigel expresses that if there is documentation that he did have low back pain in the first day or two after the accident, he would have to conclude that the accident caused a minor soft tissue injury to the lumbar spine that would have resolved within one to three months.

**51**  He also says that the low back pain that was first documented in July by the family doctor could have been caused by a variety of events, such as the events of normal living, being in a fight, or being pushed down the stairs.

**52**  In my view the evidence of Dr. Schweigel should be given limited weight. He is no doubt a well-qualified orthopaedic surgeon. However, his opinion with respect to causation is based to a large extent on incorrect and incomplete information. His factual conclusions are, for the most part, inconsistent with the findings of fact made by the Court.

**53**  Dr. Schweigel says in his report that Sean Barnes told him he had low back pain right after the accident. He rejected that statement and focused on the fact that Mr. Barnes had not complained to his doctor about low back pain until several months later. For whatever reason, he did not have, then or later, the insurance adjuster's notes showing that he had complained about low back pain shortly after the accident.

**54**  In offering his opinion he downplayed the severity of the impact, though he agreed in cross-examination that the more severe a collision, the more likely is injury to the spine. He did not comment on the fact that Mr. Barnes' activities were curtailed after the accident but not before.

**55**  He drew inferences from the brief clinical notes of Dr. Alderson that supported the conclusion that the pre-existing low back pain was significant. When summarizing the May 17th note, he put "less pain" when the note actually says "woke up in far less pain and is much more functional, bending without pain."

**56**  He was prepared to conclude, on very limited evidence, that the post accident incidents that were at issue likely caused the activation of the pre-existing condition.

**57**  As I see it, Dr. Schweigel acted as an advocate for the defendants, not an expert whose sole purpose is to assist the Court. He highlighted all matters that would support the defence position and either downplayed or ignored those that would support the position of Mr. Barnes.

E. Conclusion

**58**  When considering the question of causation, I need to deal with the question of a temporal connection; that is, a connection in time. That question was dealt with by this Court in ***White***. Mr. Justice Ehrcke speaks of the care one must take when considering a temporal connection. He said at para. 75:

In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer it time, that would provide an alternate, and more accurate, explanation of the true cause?

**59**  In this case, there is more than just a temporal connection, but there is additional evidence as well.

**60**  With respect to the defence argument that the Court should draw an adverse inference because Dr. Lupton was not called, I have concluded that Mr. Barnes has provided a reasonable explanation for not doing so. The situation may well be different if the clinical records had not been provided, but they were. This conclusion is consistent with the very recent analysis of the Court of Appeal on this issue in ***Muksh v. Miles***, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=).

**61**  The defence has raised a concern that Mr. Barnes did not see very many health care professionals in the years since the accident. However, this Court has concluded in ***Myers v. Leng***, [*2006 BCSC 1582*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2KB-00000-00&context=) that not much should be made of non-attendances at a doctor when a reasonable explanation is provided for doing that. I agree with that proposition. A reasonable explanation has been provided. In addition, in the particular circumstances of this case, the defence does not take the view that Mr. Barnes is not suffering from the injuries he says he is suffering from. Rather, the defence says that the injuries are not caused by the motor vehicle accident.

**62**  The evidence does not support the conclusion that the fall, fight, or tackle caused the activation of the pre-existing condition. Dr. Schweigel draws his conclusion that it did, with very limited evidence to support it. Dr. Hunt did say that the fight and stairs could do so with the right torque and position. However, the evidence did not show what the right torque and position would be. Dr. Hunt agreed that the balcony incident could render him symptomatic.

**63**  I am satisfied based on the totality of the evidence that Mr. Barnes has proven, on a balance of probabilities, that but for the negligent act of the driver, the injuries of which he complains would not have occurred. There is a substantial connection between the motor vehicle accident and the injuries.

**4. Analysis - Damages**

A. Non-pecuniary Damages

**64**  That brings me to the question of non-pecuniary damages. Non-pecuniary damages are those that have not required the payment of money. The purpose is to compensate Sean Barnes for such things as pain, suffering, disability, inconvenience, and loss of enjoyment of life. I have found that Mr. Barnes, as the teenaged boy of 16 years of age, found himself in the position where his lifestyle changed significantly. He was very active before the accident and his activities are much more limited. He has problems with sleeping and some issues with his mood. He suffers some pain on a regular basis. I conclude he will continue to do so into the future and he was 21 at the date of the trial, though he has recently turned 22. I have considered each of the cases relied upon by his counsel and counsel for the defendants. They are, of course, helpful as guides, but I must base my decision on the particular facts of this case. As I said at the start, I have assessed non-pecuniary damages at $100,000.

B. Loss of Future Earning Capacity

**65**  When determining what might happen in the future I must decide if the event is a real possibility, rather than merely guess work. If it is a real possibility I must then determine the actual likelihood of its occurrence.

**66**  Some of the considerations that can be taken into account in assessing whether there is a loss are (as originally 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=) at para. 8 (S.C.)):

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.

**67**  There is no reason why an injury which permits a plaintiff to continue in a particular occupation but at a reduced level of performance and income should not be compensated for through damages for loss of earning capacity: ***Sinnott v. Boggs***, [*2007 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=), [*69 B.C.L.R. (4th) 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HM-00000-00&context=) at para. 15.

**68**  The Court is tasked with assessing damages, not calculating them on some mathematical formula: ***Mulholland (Guardian ad litem of) v. Riley Estate*** [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=), at para. 43, [*63 B.C.A.C. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=). The impairment of earning capacity as a capital asset must be valued. A starting point is the comparison of the likely future of the plaintiff if the accident had not occurred with the plaintiff's likely future after the accident and the difference between the amounts earned. However, the overall fairness and reasonableness of the award must also be considered: ***Rosvold v. Dunlop***, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=), [*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=) at para. 11; ***Reilly v. Lynn***, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=), [*10 B.C.L.R. (4th) 16*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=). Allowance must then be made for the contingency that the assumptions upon which the award is based may prove to be wrong: ***Reilly*** at para. 101.

**69**  I dealt with this issue in ***Downey v. Brousseau***, [*2007 BCSC 149*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-620C-00000-00&context=).

**70**  In this case the defendants do not take serious issue with the limitations Mr. Barnes has. They have not provided an occupational rehabilitation report.

**71**  Those limitations are described in Dr. Hunt's report as follows:

He should work in the sedentary to light work classification. He must avoid activities that involve medium to heavy lifting, repetitive activities that involve flexion and extension, lifting that involves twisting rotation. He should only lift when he can use proper mechanics of lifting and keeping the lead close to his body. He should avoid any activity which would subject his lower back to any sudden loading for which he is unprepared. He should avoid repetitive bending, twisting, and stooping, or moving in and out of awkward positions. He should avoid activities that involve heavy pushing or pulling. He should be able to stand, sit, and move at will. If he has a desk job, his work station should be ergonomically adjusted to minimize stress on his lower back.

**72**  Dr. Schweigel agreed that Sean Barnes needs to avoid heavy lifting.

**73**  I accept the evidence of Mr. Barnes that he likes to do physical work using his hands. It is to his credit that he has continued to work in spite of the pain it causes him, rather than sitting at home feeling sorry for himself. However, he likely will not be able to continue with this type of employment for much longer because of his limitations and his experience with how the job affects him now. At the time of the accident, he had considered various labour occupations including skilled labour jobs such as pipefitting, welding, and plumbing. I conclude that though he thought about university, it was not a priority for him. He was unsure about what he wanted to do and this, as Mr. Lawless suggests, is not unusual for someone who is 16 and in grade 11, nor was it a priority for him when he graduated from high school. This is clear from the employment he did get at the gas station and then the shipyard.

**74**  He enjoys his job at the shipyard and it is a union job. He is now making $28 an hour. His friend, Skylar Martin, has worked for two years at both the shipyard where Mr. Barnes works and at the related dry dock as a labour rigger. He is a member of the Shipbuilders Union and earns up to $31 an hour. He testified that he can make from $45,000 to $100,000 a year, depending on overtime. He is a friend of Mr. Barnes and confirmed that Mr. Barnes complains about back pain at the end of a work day.

**75**  The testimony of Mr. Lawless shows that Mr. Barnes' strongest basic interest areas include carpentry; protective services; athletic sports; animal service; scientific research and development; performing and entertaining; and educating. He also has similar interests to people in occupations like police officer and private investigator. The testing shows he prefers mechanical activities, skilled trades, and technical occupations. At the same time, he would rather work with people than things.

**76**  Mr. Lawless has prepared a thorough report on occupations that would not be available to Mr. Barnes. I agree with the defendants that little weight should be placed on the conclusion, using his computer search, that he had been eliminated from approximately 81 percent of his pre-accident job choices. The Court did not have the raw data before it so as to be in a position to assess the accuracy of the results of the search. However, it is clear that numerous occupations that require heavy and medium lifting and the other activities he can no longer do, including many labour union jobs and jobs in the trades, are no longer open to him. Mr. Lawless also provided some helpful information as to the occupations that are now in line with his interests, including the amounts that he might be expected to earn: electrical and electronic engineers, $68,000; land surveyors, $56,000; probation and parole officers and related occupations, $52,450; and secondary schoolteachers, $61,250.

**77**  Sean Barnes has been rendered less capable overall from earning income from all types of employment. He is less marketable or attractive as an employee to potential employers. He has lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured. He is less valuable to himself as a person capable of earning income in a competitive labour market. In my assessment, it is likely that he will now choose to go to university. He, based on the testing done by Mr. Lawless, is quite capable of doing undergraduate and probably graduate work. That will require some upgrading of courses. It would likely take at least four to five years. The evidence of Mr. Lawless is that tuition and books are about $6,500 a year. He would, at best, only be able to work part time during the time he spends at university.

**78**  The defence focuses on the question of whether Mr. Barnes planned to go to university before the accident. They say he had not made up his mind as to what he would do, and would likely have gone even if he were not involved in the accident.

**79**  I conclude, based on the occupation earning found in the Lawless report, as well as on the evidence of what Mr. Barnes now makes and the evidence of Mr. Martin as to what he now makes and could make, there is a real likelihood that Mr Barnes would have earned $5,000 a year more, but for the accident.

**80**  I assume he will work until he is 65 or for 44 more years.

**81**  I have taken into account the various negative and positive contingencies.

**82**  Taking into account the present value tables, I assess damages for loss of future earning capacity at $150,000.

C. Change in Original Position

**83**  The essential purpose of tort law is to restore the plaintiff to the position he or she would have enjoyed but for the ***negligence*** of the defendant: ***Athey*** at para. 20. It must be kept in mind that the plaintiff is not to be placed in a position better than his or her original one: ***Athey*** at para. 32.

**84**  It is therefore necessary to assess what the plaintiff's original position would have been. The plaintiff's loss is the difference between the original position and the injured position: ***Athey*** at para. 32. The question is what award is appropriate to reflect the difference between the plaintiff's original state and the state in which the plaintiff now finds himself or herself in: ***York v. Johnson*** [*(1997), 148 D.L.R. (4th) 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61BC-00000-00&context=), [*37 B.C.L.R. (3d) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61BC-00000-00&context=) at para. 6 (C.A.).

**85**  The plaintiff is entitled to full recovery only for the damage caused by the defendants' wrongful conduct, and not for loss and damage that would have occurred anyway: ***A. (T.W.N.)*** at para. 52.

**86**  According to the thin skull rule, the tortfeasor is 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: ***Athey*** at para. 34.

**87**  On the other hand, the crumbling skull rule recognizes that the pre-existing condition was inherent in the plaintiff's original position. The defendant is liable for the additional damage but not for any effects of the pre-existing condition which the plaintiff would have experienced anyway: ***Athey*** at para. 35.

**88**  An asymptomatic non-tortious precondition, while not relevant to causation, may be taken into account in assessing contingencies: ***Larwill v. Lanham***, [*2003 BCCA 629*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60NC-00000-00&context=), [*190 B.C.A.C. 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60NC-00000-00&context=) at para. 22. 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***, this can be taken into account in reducing the overall award: ***Athey*** at para. 35.

**89**  The pre-existing condition does not have to be manifest and disabling at the time of the tort to be within the ambit of the crumbling skull rule: ***A.(T.W.N.)*** at para. 62.

**90**  As described by Esson J.A. in ***Zacharias v. Leys***, [*2005 BCCA 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2JK-00000-00&context=) at para. 16, [*219 B.C.A.C. 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B2JK-00000-00&context=), the crumbling skull rule is difficult to apply when there is a chance, but not a certainty, that the plaintiff would have suffered the harm but for the defendant's conduct. Such a contingency does not have to be proven to a certainty; it should be given weight according to its relative likelihood: ***A. (T.W.N.)*** at para. 48.

**91**  In ***Smyth v. Gill***, [*2001 BCCA 650*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3XB-00000-00&context=), [*160 B.C.A.C. 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M3XB-00000-00&context=), the Court determined that the plaintiff had experienced substantial symptoms prior to the accident and therefore could only recover to the extent that the defendant's conduct worsened her condition, not for all her pre-existing medical problems.

**92**  In ***Hirvi v. Roy***, [*[1999] B.C.J. No. 1397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4KM-00000-00&context=) (S.C.) (Q.L.), Meiklem J. found that the plaintiff's pre-existing condition of spondylolisthesis created a thin skull, rather than a crumbling skull, situation to all heads of damage up to the trial date as there was no evidence for finding on a balance of probabilities that the plaintiff would have suffered low back pain from his congenital abnormality prior to that time. However, the overall award was reduced because the spondylolisthesis would have detrimentally affected the plaintiff in the future regardless of the defendant's ***negligence***.

**93**  The approach normally taken is to apply a percentage discount to the award that would otherwise be made were the future (in the absence of the accident and in light of the accident) known: ***York*** at para. 8. Newbury J.A. went on to say in ***York*** at para. 25 that while there is some authority for reducing non-pecuniary awards to reflect future contingencies, this approach has not been generally adopted and she declined to do so. The assessment of non-pecuniary damages reflects real and substantial future possibilities, both positive and negative, which could impact on the plaintiff's quality of life and there is, therefore, no need to translate the possibilities into a percentage figure and adjust the assessment accordingly. The Court of Appeal in ***Ayles (Guardian ad litem of) v. Talastasin***, [*2000 BCCA 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X21R-00000-00&context=), [*73 B.C.L.R. (3d) 60*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X21R-00000-00&context=) at para. 27 similarly said that the application of a discount factor is an unconventional procedure for non-pecuniary damages.

**94**  However, in ***McKelvie v. Ng***, [*2001 BCCA 384*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63KX-00000-00&context=), [*90 B.C.L.R. (3d) 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63KX-00000-00&context=) at para. 16, Saunders J. said that the measurable risk of debilitating effect in the future of the plaintiff's pre-existing condition, ankylosing spondylosis, should be reflected in the damage award both as to non-pecuniary damages and the loss of future income. Further, a five-member panel of the Court of Appeal held in ***A.(T.W.N.)*** at paras. 36-37 that the reduction in damages due to unrelated intervening events or pre-existing conditions that would have affected the plaintiff's original position adversely in any event applies equally to non-pecuniary damages and to damages for loss or impairment of earning capacity.

**95**  A percentage reduction is therefore appropriate for both non-pecuniary damages and pecuniary damages. In ***Corrado v. Mah***, [*2006 BCSC 1191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FJTD-G3CS-00000-00&context=), Mr. Justice Slade found that the pre-existing condition of the plaintiff was inherent in his original position and must be considered in the assessment of damages. At para. 56 he notes that this applies equally to non-pecuniary damages and damages for loss of earning capacity. Non-pecuniary damages were reduced by 25% due to the risk of progression of a pre-existing condition. The award for future income loss was reduced by 50% to reflect a number of contingencies.

**96**  Deductions may also be made for independent intervening events. If an independent intervening event occurs, the assessment of the plaintiff's position is affected and the net loss experienced by the plaintiff is reduced. However, if the event is a product of the accident, it does not affect the assessment of the plaintiff's original position: ***Athey*** at para. 33. Unrelated intervening events are taken into account in the same way as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely, in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately: ***A.(T.W.N.)*** at para. 36.

**97**  In my opinion, the pre-existing condition of Mr. Barnes should be reflected in a reduction of both non-pecuniary and pecuniary damages. This case falls within the crumbling skull rule described in ***Athey*** in that there was a chance that his spondylolisthesis would have become symptomatic in any event. Dr. Hunt indicates that symptomatic patients usually present with low back pain following trauma, heavy lifting or sudden abrupt rotational movement. I agree with the defendants that Mr. Barnes' activities and employment meant there was a chance, although not a certainty, that the plaintiff would have suffered harm regardless of the defendants' conduct and therefore this contingency should be given weight according to its relative likelihood.

**98**  There is a real possibility that his pre-accident condition would have been activated regardless of the accident. I assess that likelihood at 15%. I reduce the award for non-pecuniary damages to $85,000 and the award for loss of future earning capacity to $127,500.

D. Mitigation

**99**  With respect to the question of failure to mitigate, I accept Sean Barnes' explanation on the question of mitigation of damages. With respect to exercise that was recommended, his evidence was that he did exercises, not every day as suggested, but when he did them, he did them longer than recommended. He had not started Pilates yet at the date of trial as recommended, but said that the physiotherapy he was doing was of the same nature. As a result, the defendants have failed to prove that Mr. Barnes failed to mitigate his damages.

D.J. MARTINSON J.

**End of Document**

[***Benoit v. Farrell Estate, [2002] B.C.J. No. 2736***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3J5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nanaimo, British Columbia

Grist J.

Heard: April 16 - 19, 30, May 2 and 16, 2002.

Judgment: December 3, 2002.

Nanaimo Registry Nos. S28381, S33491

**[2002] B.C.J. No. 2736** | 2002 BCSC 1664 | 120 A.C.W.S. (3d) 158

Between Fredrick James Benoit and Angela Benoit, plaintiffs, and The Estate of Terry Allan Farrell, deceased, and Mary Anne Joyce Farrell, defendants, and Her Majesty the Queen in Right of the Province of British Columbia and Mainroad Mid-Island Contracting Ltd., third parties (Nanaimo Registry No. S28381) And between Maryanne J. Farrell, plaintiff, and Mainroad Mid-Island Contracting Ltd., and Her Majesty the Queen in Right of the Province of British Columbia Provincial Ministry of Transportation and Highways (Nanaimo Registry No. S33491)

(41 paras.)

**Case Summary**

**Torts — *Negligence* — Highways — Maintenance contractors (incl. snowplow operators) — Standard of care.**

|  |
| --- |
| Action by the estate and widow of the deceased, Farrell, against Mainroad Mid-Island Contracting for damages for ***negligence***. Pursuant to its service contract with the Ministry of Transportation and Highways, Mainroad was responsible for road maintenance. In January 2002, Farrell was driving to work on a highway. Conditions were very icy and his truck crossed over the centre line and collided with another vehicle, resulting in Farrell's death. At issue was whether the icy road conditions caused the accident, and the liability of Mainland. A motorist whose car slid into a ditch in the same area shortly before the accident testified that the road was very icy. The standard of care was indicated by the service contract between Mainroad and the Ministry. The contract specified that, in winter, the contractor was to apply de-icing agents "as required", and that patrols were to be made every four hours. Mainroad had not patrolled so often on the night in question, and had not applied salt to de-ice the highway.  HELD: Action allowed.  The icy road conditions had caused the accident. Mainroad was negligent in failing to anticipate the freezing, and also in failing to apply salt to the road in a timely fashion. It had failed to meet the standard of care set out in the contract. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act.

**Counsel**

No one appeared for the Benoits as plaintiffs in Action No. S28381. Peter Giovando, for the Estate of Terry Allan Farrell, deceased, and Maryanne Joyce Farrell, defendants in Action No. S28381. Morley W. McKeachie, for Maryanne Joyce Farrell, plaintiff in Action No. S33491. Jonathon L.S. Hodes, for Her Majesty the Queen in Right of the Province of British Columbia and Mainroad Mid-Island Contracting Ltd. in both actions.

|  |
| --- |
| **GRIST J.** |

**1**   At about 6:20 a.m. on January 5th, 2002 two pickup trucks heading in opposite directions collided on a straight portion of Highway #4, the main road from the east side of Vancouver Island to Port Alberni. The collision site was approximately four kilometres west of the Coombs turnoff and one kilometre east of a store and gas station at Whiskey Creek.

**2**  Both drivers were on their way to work. Mr. Farrell, to his job as a foreman at the pulp mill in Port Alberni and Mr. Benoit, to his employment as an equipment operator near Coombs. Both were severely injured and Mr. Farrell subsequently died of his injuries.

**3**  The crumpled frame of one of the vehicles made a gouge in the pavement, establishing that the collision occurred in the east bound lane and that Mr. Farrell's west bound truck had crossed over the centre line. The collision was head on, but the vehicles were off-set such that the left front of each vehicle bore the force of the impact.

**4**  The sky had been overcast through most of the night, but stars could be seen at times through the morning hours. The temperature was near zero and dropping. By 5:00 a.m. roads in the area were wet and beginning to ice up. Sunrise was not until 8:10 a.m.

**5**  Maintenance of Highway #4 is designated as a high priority, but no salt had been applied in the area through the night or the early morning prior to the collision. People attending the site to give assistance after the crash noted the pavement was so slippery that it was difficult to walk on the road surface.

**6**  There are two actions indicated in the combined style of cause. In the first action the representative of the estate of Mr. Farrell claims over against Mainroad Mid-Island Contracting Ltd., the road maintenance contractor, for ***negligence*** in failing to apply salt as an anti-icing agent that morning. In the second action Mrs. Farrell advanced the same claim as the basis of a Family Compensation Act action. There were two issues associated with this common claim of ***negligence***. They are:

1. Did icy road conditions cause the collision?
2. Was the contractor negligent in failing to spread salt to prevent the formation of black ice?

**7**  My conclusion is that the treacherous road conditions that morning caused the collision and that the road maintenance company was negligent, originally in failing to anticipate the freeze-up and subsequently in failing to apply salt to Highway #4 in the area of the collision in a timely manner.

WAS THE ICY ROADWAY THE CAUSE OF THE COLLISION?

**8**  The hazard the frozen road surface presented to traffic was best indicated by the evidence of Ms Dunnington. During the winter of 2000, Ms Dunnington travelled Highway #4 each weekday to her job in Nanaimo. On January 5th she and her passenger, Tina LaFortune, left from Port Alberni at 5:50 a.m.

**9**  On leaving Port Alberni Ms Dunnington noted that the road was wet. It was cold out but the road was not slippery. She could see that the road maintenance truck had been through earlier.

**10**  The first part of their drive eastward took them over the portion of Highway #4 known as "the hump". Highway #4 east of Port Alberni climbs to a summit 375 metres in elevation and then descends through a number of downhill sections.

**11**  After passing through this portion of Highway #4 Ms Dunnington came onto the straight and level stretch of road that extends two kilometres from the site of a local business, Fair Deal Tires, past the Whiskey Creek Store, to a point where the road enters a right hand curve. Four kilometres east of this point the highway branches. Highway #4 continues north to Qualicum and Highway #4A (the Coombs turnoff) continues east to Parksville.

**12**  As she passed Fair Deal Tires she saw a road maintenance truck parked adjacent to the highway. From this point the roadway showed indications of ice.

**13**  Ms Dunnington was formerly in the military stationed at Cold Lake, Alberta. She took a number of defensive driving courses as part of her training. When she saw the ice she slowed from 75 kilometres per hour to 55 kilometres per hour. Through the stretch to the Whiskey Creek Store she could see the road was slippery, but it did not prove to be a problem at the reduced speed. As she went further to the end of the straight stretch, however, she began to slide sideways, crossing over into the westbound lane, back into her lane and eventually into the right hand ditch. She estimated she slid 100 to 200 yards. Ms Dunnington's car was not damaged and she drove out of the ditch and she and Ms LaFortune continued on to work.

**14**  The collision between the trucks driven by Mr. Farrell and Mr. Benoit occurred approximately five minutes after Ms Dunnington's car slid into the ditch. The collision site was only a short distance to the west from where she left the road.

**15**  Both Mr. Farrell and Mr. Benoit were alone in their vehicles. Mr. Benoit has no recall of the collision and Mr. Farrell died shortly after.

**16**  Examination of the roadway showed no skid marks. The experts who gave reconstruction evidence based their opinions on pictures of the wrecked vehicles and the notes made by the RCMP member who investigated the site and located the gouge mark marking the point of impact and the final orientation of the vehicles.

**17**  Both of these engineers concluded that the collision damage to Mr. Farrell's truck showed no marked evidence of yaw, or sideways sliding, at the time of impact. They reached this conclusion through observation of the displacement of the truck frame resulting from the force of the impact. This sort of analysis is not as exact as in a case where the vehicle has left a record of skid marks on the pavement and each of the experts acknowledged that the collision damage could be consistent with a gradual sideways slide that took the vehicle across the center, but didn't result in a marked degree of yaw.

**18**  Further, each expert acknowledged that the vehicle damage could be consistent with an earlier loss of control that put the Farrell vehicle into the opposite lane, with no chance to return after regaining control.

**19**  There is no indication that either driver was driving at an excessive rate of speed. The configuration of the road was straight and flat and there is no evidence of any other factor that could have resulted in Mr. Farrell driving into the opposite lane. In these circumstances, and given the dramatic evidence of Ms Dunnington, I am of the view that the only reasonable conclusion from the circumstances is that the treacherous state of the road caused this collision.

THE ROAD MAINTENANCE STANDARD

**20**  The decisions in Holbrook v. Argo Road Maintenance, [*[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=) and Belitchiev v. Grigorov [*2000 BCSC 765*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61JD-00000-00&context=), establish that the duty of a road maintenance contractor towards highway users is to provide the maintenance standard set out in the Service Contract with the Ministry of Transportation and Highways. Highway 4 and Highway 4A are located in an area maintained by Mainroad Mid-Island Contracting Ltd. The contract provides maintenance standards applicable to the various roadways in the Mid-Island Region. These roads are classified to establish a priority in allocating patrol and maintenance services. Highway 4 is designated as Class A for winter operations. This classification is the highest level, requiring more frequent patrols and shorter response times for application of salt and sand. When freezing temperatures are present or anticipated, for example, patrols of the highway are to be made no less than every four hours.

**21**  The contract requirements for winter maintenance are as follows:

The contractor will perform winter abrasive and de-icing chemical application as required on highways to restore surface conditions on the highway which constitute or have the potential to create an unsafe condition for the travelling public or other highway users to a safe condition by:

1. Preventing hazardous, slippery surface conditions from developing; and
2. eliminating hazardous slippery surface conditions; within one or more of the following groups of maintenance activities and in accordance with this maintenance standard.

**22**  The following specifications are provided:

Performance Standard

1. The contractor will
2. keep all travelled lanes free of slippery... conditions in accordance with the response times
3. prevent the development of slippery surfaces by the application of de-icing chemicals;

**23**  The particular response times for application of de-icing chemicals (salt) are as follows:

De-Icing Chemical Application

1. To prevent black ice and for pre-snowfall application the contractor will use de-icing chemicals when the temperatures are at or near zero and falling and pavements are wet or when storm snowfalls are forecast or are starting. The following table establishes the maximum response times within which the contractor will have applied de-icing chemical on paved highway surfaces.

Winter Highway Classification

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | A. | B. | C. | D. |  |
|  | 90 minutes | 3 hours | 5 hours | N/A |  |

**24**  The contract provides that the contractor use pavement surface and air temperature sensing thermometers in determining the difference in temperature between the air and paved surface. This aids in determining when to take de-icing measures. There is also a requirement that the contractor should note forecasted weather conditions and road reports.

**25**  Mainroad maintained Highway 4 from Qualicum to the location of Fair Deal Tires from its Parksville works yard. From that point to Port Alberni, the company uses workers and equipment from the Port Alberni yard. During the night of January 4th - 5th two drivers were on the night shift working out of the Parksville yard, Mr. Morton and Mr. Wierks. Their shift began at 9:00 p.m. and ended at 5:00 a.m. The road from Port Alberni to Fair Deal Tires was patrolled by Mr. McConnell. His shift ran from 11:30 p.m. to 7:30 a.m.

THE WEATHER AND THE ROAD MAINTENANCE RESPONSE

**26**  The 4 p.m. Environment Canada forecast on January 4th for the east Vancouver Island Region predicted cloudy skies with clear periods and a slight chance of showers. The expected average overnight low for the area was zero degrees. The synopsis indicated an approaching ridge of high pressure, which was expected to bring clearing skies. The earlier 10 a.m. and 5 a.m. forecasts were similar but forecast overnight lows of minus one.

**27**  There are weather reporting stations near the collision site at Coombs and the hatchery on the Little Qualicum River. Mainroad maintains a weather station and logs readings from Cochrane, a site equipped with a thermograph that provides a continuous recording of air temperature. Coombs is approximately 5 kilometres east of the collision site and the hatchery site is a like distance to the west. The Cochrane site is a similar distance North and West of Whiskey Creek. During the night and early morning of January 4th - 5th, Coombs recorded a low temperature of minus three degrees. The temperature at the hatchery site fell to minus one. The thermograph at Cochrane showed that the temperature was about 2 degrees centigrade until approximately 4 a.m., when the temperature gradually began to fall. It reached 1 degree centigrade just before 6 a.m. with a more rapid decline to minus one just after. These temperature recording sites measure the air temperature approximately 1.5 metres above the ground.

**28**  The evidence given by Dr. Weaver, a Professor of Atmospheric Science, was that weather conditions developed during the evening in accordance with the forecast. Loss of temperature through the night occurred as a result of radiational cooling. Given that it was a relatively still evening, the surface temperature of the ground was likely cooler than the air temperature recorded at the various sites, with breaks in the cloud cover allowing rapid temperature loss. Temperatures would decline during the evening with the lowest temperatures for any given location being observed at daybreak. Finally, the formation of black ice could be expected to occur on wet pavement as ground temperatures reached freezing.

**29**  Mr. McConnell, on the Port Alberni side of Highway 4, began his shift patrolling the highway in a pickup truck. At about 1:00 a.m. he noted the road was damp. He was beginning to see stars through the cloud cover. He returned to the yard and took out a salt truck, positioning himself on the hump to continue to watch the weather. He noted that the clearing was continuing and that the temperature was 2.5 degrees C and dropping. Between 4:00 a.m. and 5:00 a.m. he began to spread salt and sand, proceeding to the boundary at Fair Deal Tires. The trip took approximately one hour.

**30**  From the Parksville side Highway #4 was only patrolled once during the nightshift. On that occasion, Mr. Morton drove his salt truck to the west boundary at about 4:00 a.m. He also noted the roads were wet and that the odd star showed through the cloud cover. He said he pulled over at the boundary and sat for five to ten minutes. His truck mounted thermometer showed 3 degrees C.

**31**  Mr. Morton testified he came to the conclusion that conditions would not likely change and the temperature would remain above zero. He said he spoke to Mr. McConnell, eight to ten kilometres away on the hump but that nothing said in this conversation indicated to him that the cloud cover would clear. This evidence was not consistent with what Mr. McConnell testified he was seeing and the fact that Mr. McConnell was beginning to spread salt.

**32**  Mr. Morton travelled back over Highway #4 to Qualicum and went north to spread salt on Highway 19A, the Old North Island Highway, from Qualicum North to Deep Bay where there were reports of freezing temperatures.

**33**  Mr. Morton was questioned about weather forecasts faxed to the Parksville yard. The afternoon forecast was likely not available to the nightshift because it was usually received on the office fax machine after the office closed at 4:00 p.m. Mr. Morton's evidence was that he did not have any information with respect to the weather forecast for over night on January 4th - 5th. He said he relied solely on his observations of the sky and temperature and information given by other drivers.

**34**  At 5:00 a.m. the day shift began work at the Parksville yard. Mr. Campbell was one of the drivers who came on shift. At 5:15 a.m., after loading his truck, he received a call reporting icy conditions on Errington Road, a side road that leaves Highway #4A heading south about halfway between Parksville and Whiskey Creek. He salted the highway from Parksville to the Errington Road turnoff and subsequently spread salt on Errington and other side roads in the area south of the highway. He noted the temperature at 5:25 a.m., when he turned off the highway, to be 2.5 degrees centigrade and -.2 degrees centigrade when he finished the side roads at 6:00 a.m. At this point he decided a general freeze up was occurring and he returned to Parksville to call in further drivers to deal with it. When questioned as to why he didn't continue to the west placing the call for the other drivers from another location, he explained he ultimately wanted to return to Highway 19, the new North Island Highway, where salt had been applied during the night, as he felt this highway was most important.

**35**  Mr. Campbell testified that he had looked at a weather forecast for the evening. He believed it predicted an average low of +2 degrees centigrade. This evidence did not coincide with Environment Canada's forecasts for that evening. None of the forecasts listed an expected overnight temperature above the freezing point.

WAS THE COMPANY NEGLIGENT?

**36**  There were deficiencies in Mainroads' performance during the night of the motor vehicle collision. In particular, Highway 4 was not patrolled to the standard indicated in the contract, and the workers did not have ground temperature thermometers available to them. There was also a failure to log some of the work done that night. Mr. Morton's work log did not list his patrol trip to the western boundary at 4:00 a.m., for example. The 4:00 a.m. patrol, however, was within four hours of the collision and despite that a ground sensing thermometer may have shown a surface temperature closer to freezing than the 3 degrees C observed by Mr. Morton, this was not, in my view, critical to this case. Each of the drivers who gave evidence recognized that temperatures were likely to fall from any of the levels they observed that night to freezing should the cloud cover lift. What was critical was the failure to appreciate the forecasted trend in the weather and the signs that the clearing was in fact beginning to occur.

**37**  Each of the drivers observed stars appearing through the evening as morning approached. To the west on Highway #4 Mr. McConnell said he observed substantial clearing at about 4:00 a.m. and began to lay down salt, proceeding eastward to the border of his zone. Mr. Morton, however, at about the same time, although in communication with Mr. McConnell, apparently did not appreciate that skies were clearing and decided not to apply salt from the western boundary back along Highway #4.

**38**  The opportunity to see to the application of salt did not end with Mr. Morton's decision. Notwithstanding that Mr. Morton did not anticipate the freeze, there was a further opportunity to see to the application of salt when Mr. Campbell came on shift and began to salt the most easterly section of Highway #4A. Rather than continuing over the 11 kilometres to the western boundary he turned off to salt the lower priority side roads. Mr. Campbell was responding to complaints of icing in the Errington Road area, but ice on these side roads was another indication that the major route to the west was also likely to freeze.

**39**  Lastly, when he turned back to salt highway #19, the temperature was actually below zero and the road to the west continued to be left untreated, giving rise to the onset of black ice. The stage was set for the resulting treacherous road surface encountered at Whiskey Creek.

**40**  In summary, the failure in performance was directly attributable to a failure to appreciate that freezing temperatures were forecast to accompany a clearing trend and that what was being observed during the night supported the conclusion that the weather was developing as forecast. The approaching freeze-up should have been anticipated in the early morning hours when Mr. Morton was assessing the conditions at the western boundary. If this had been appreciated and salt applied, treatment of the roads would have been accomplished well within the maximum ninety minute response time indicated in the contract and prior to the collision at 6:20 in the morning.

**41**  Secondly, when salt was being applied in the area, the actions of the road crew did not conform with the listed priorities for maintenance of the highways. Mr. Campbell, in anticipation of black ice, spread salt to Errington Road but failed to continue to complete the application over the remaining 11 kilometres. Instead he chose to deal with the lower priority roads and ultimately, despite freezing temperatures, responded to another highway of like priority some distance away, which had already received some de-icing treatment.

GRIST J.

**End of Document**

[***Bentley Aviation Ltd. v. Homelife Benchmark Realty Corp., [2017] B.C.J. No. 2291***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R14-66C1-F1P7-B1KT-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Master G. Taylor

Heard: October 19, 2017.

Judgment: November 15, 2017.

Docket: S150402

Registry: Vancouver

**[2017] B.C.J. No. 2291** | 2017 BCSC 2067

Between Bentley Aviation Ltd., Plaintiff, and Homelife Benchmark Realty Corp., Randy Evans, Northstar Realty Ltd., dba Royal LePage Northstar Realty and Steve Andersen, Defendants, and Fraser Valley Aggregates Ltd., B & B Contracting Ltd., Gary Bailey and Fraser Bruce, Third Parties

(29 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Actions — Causes of action — Joinder and consolidation — Applications and motions — Conduct of hearing — Adjournments — Motion by defendants to adjourn trial, to have it tried at same time as another action, for implied undertakings to be breached and for second action to be reset for 30 days commencing September 2018 dismissed — Plaintiff commenced action against realtors after majority joint venture partner purported to accept offer to purchase land on behalf of joint venture and later commenced second action against lawyers — Cases were not so interwoven so as to make separate trials at different times before different judges undesirable.**

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| Motion by the defendants to adjourn the trial, to have the matter tried at the same time as another action (the "Lawyer's Action"), and for the implied undertakings to be breached. The plaintiff created a joint venture with two other parties, Fraser Valley Aggregates and First Effort Investments, in which each owned an interest in a property that was to be developed. The majority joint venture partner purported to accept and offer to purchase the development lands on behalf of the joint venture. When the plaintiff learned of the proposed sale, it objected and negotiated a settlement with the majority partner by selling its interest to the majority partner. The plaintiff then commenced this action seeking the difference between what the plaintiff received under the settlement agreement and what it would have received had it held on to the property, sold it to a different buyer or developed the property. Approximately 18 months later, the plaintiff commenced a separate action against its solicitors in relation to the same transaction. The defendants in this action claimed that the defendants in the Lawyers Action were at fault and for the plaintiff's loss. The defendants in the Lawyers Action submitted that the third parties were at fault for the plaintiff's loss. As a result, the defendants submitted that without the matters being heard at the same time, there was a risk of different apportionments of fault, which would complicate any later double recovery issues. The plaintiff argued that the parties in this action and the Lawyers Action were different and each action raised distinct causes of action. As a result, the plaintiff argued that a finding of liability of the defendants in the Lawyers Action would not impact the liability of the defendants in this action and vice versa.  HELD: Motion dismissed.  Although the claims in the two actions arose out of the same factual matrix, the claims were discrete. This case was against the realtors and their employers for tortious wrongs committed by them against the title of the property, while the Lawyers Action was against the lawyers for professional ***negligence***. The only commonality in the actions was the action of the realtors in submitting the offer to the majority partner which it purported to accept. The cases were not so interwoven so as to make separate trials at different times before different judges undesirable and fraught with unnecessary expense. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 22-5(8)

**Counsel**

Counsel for Plaintiff: D. Church, Q.C., A. Evans.

Counsel for Defendants Northstar Realty Ltd., dba Royal LePage Northstar Realty and Steve Andersen: S. Cordell.

**Reasons for Judgment**

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| **MASTER G. TAYLOR** |

**1**   The defendants Northstar Realty Ltd., dba Royal LePage Northstar Realty and Steve Andersen (collectively referred to as "Northstar") seek an order for adjournment of the trial in this matter currently set to commence in April 2018, and an order that Vancouver Action No. S155192 (referred to as the "Lawyers Action") be tried at the same time, subject to the directions of the trial judge. As well, the usual orders are sought to allow for the implied undertakings to be "breached" to allow all parties to use evidence from both actions in one another.

**2**  Lastly, Northstar seeks an order that the trial of the Lawyers Action and the within action be reset for 30 days commencing September 17, 2018, for 30 days.

**3**  For clarity, the Lawyers Action is an action commenced by the same plaintiff against its lawyers, Lindsay Kenney LLP (a firm), Joel Hagyard, and Timothy Goepel, for solicitor's ***negligence*** arising out of similar factual circumstances. That action was commenced on July 20, 2016, whereas the instant action was commenced on January 16, 2015.

**Factual Background**

**4**  The plaintiff, Bentley Aviation Ltd. ("Bentley" or "the plaintiff"), Fraser Valley Aggregates Ltd. ("Fraser Valley"), and First Effort Investments Ltd. ("First Effort") created a joint venture on or about June 1, 2011, in which each owned an undivided interest in a property called the Station Road Property, which they were in the process of developing into 103 serviced lots.

**5**  The joint venture partners owned the property and the development in the following proportions:

1. Fraser Valley (whose principal is Gary Bailey) - 65%
2. Bentley Aviation (whose principal is Herb Feishl) - 25%; and
3. First Effort (whose principal is Wolfgang Meyer) - 10%.

**6**  Under the terms of the joint Venture Agreement, major decisions concerning the Station Road Property, including decisions regarding the disposition of the property were only to be undertaken with the approval of 75% of the ownership interests in the Station Road Property.

**7**  On May 17, 2013, Mr. Bailey of Fraser Valley, purported to accept an offer to purchase the development lands on behalf of all of the joint Venture Partners.

**8**  Upon learning, on or about September 23, 2013, of the proposed sale, the plaintiff immediately objected to the transaction and, in order to mitigate its loss, negotiated a settlement with Fraser Valley by selling its interest to Fraser Valley.

**9**  The plaintiff commenced this action on January 16, 2015, claiming against the defendants in ***negligence***, injurious falsehood, and slander of title. In the action, Bentley is seeking the difference between what the plaintiff received under the settlement agreement with Fraser Valley and what it would have received had it held onto the property and sold it at a later date; had it sold to a prospective buyer with whom it was negotiating at the time of the transaction; or had it subdivided the property and sold it in lots as was contemplated by the Joint Venture Agreement.

**10**  Specifically, Bentley alleges:

1. "Station Road Terraces JV", the vendor identified in the May, 2013 offer as accepted by Mr. Bailey , did not exist;
2. Bentley was not aware of, and would not have agreed to acceptance of the May, 2013 offer;
3. A June 1, 2011 Joint Venture Agreement required "major decisions' to be undertaken with the approval of 75% of the ownership inerests in the property
4. Mr. Bailey did not have authority to act on behalf of Bentley or First Effort in accepting the May, 2013 offer;
5. Mr. Andersen and Mr. Evans, the real estate agents, committed an injurious falsehood and slandered the plaintiff's title to the property, by falsely representing and falsely publishing statements that "Station Road Terraces J.V." was properly the seller of the property and that Mr. Bailey had the authority to accept the May, 2013 offer;
6. Mr. Andersen and Mr. Evans owed Bentley a duty of care to ensure Bentley's consent to sell its interest in the property was confirmed, and they breached that duty of care; and
7. the defendants' conduct was malicious and warrants an award of punitive damages.

**11**  On July 20, 2016, Bentley commenced a separate action against its solicitors in relation to the same transaction. In that action, the plaintiff pleads causes of action in ***negligence*** and for breach of fiduciary duty, and alleges that prior to September 23, 2013, neither the lawyers nor anyone else acting on behalf of Lindsay Kenney:

1. took steps to determine whether the plaintiff was aware of the contract or was in agreement with its terms;
2. contacted the plaintiff to discuss the contract;
3. provided the plaintiff with any advice Lindsay Kenney had given in regards to the contract; or
4. advised the plaintiff that the contract had been signed by a non-entity and was thus unenforceable.

**12**  It was only as a result of being told by Mr. Bruce, an associate of Mr. Bailey, on September 23, 2013, that Bentley Aviation was advised for the first time of the contract and proposed sale to Pacific Bay. Thereafter, the plaintiff learned of the actions of the defendant lawyers in relation to the contract and how they had been consulted by others in the Joint Venture.

**Legal Basis**

**13**  Rule 22-5(8) of the *Supreme Court Civil Rules* is the rule that permits matters to be tried together and the rule under which this application is made, and it provides:

Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

**14**  There is no dispute as to the applicable test. It is set out in *Robak Industries Ltd. V. Gardner*, [*2006 BCSC 1628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2NX-00000-00&context=) at paras. 2-3 as follows:

[2] The parties agree that my decision is a discretionary one to be exercised after weighing the factors set out in *Merritt v. Imasco Enterprises Inc*. [*(1992), 2 C.P.C. (3d) 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61JR-00000-00&context=) at 282 (B.C.S.C.). In *Merritt, supra*, Master Kirkpatrick, as she then was, set out these two tests to be met for separate actions to be heard together:

1. Do the pleadings disclose common claims, disputes and relationships between the parties?
2. Having regard to matters outside the pleadings, are the claims so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense?

[3] If the first test is passed then I must go on to consider the second test and specifically whether:

1. the order sought will create a saving in pre-trial procedures;
2. there will be a real reduction in the number of trial days taken up by the trials being heard at the same time;
3. there is a potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest;
4. there will be a real savings in experts' time and witness fees;
5. one of the actions is at a more advanced stage than the other;
6. the order will result in a delay of the trial of one of the actions and, if so, whether any prejudice which a party may suffer as a result of that delay outweighs the potential benefits which a combined trial might otherwise have; and
7. there is a substantial risk that separate trials will result in inconsistent findings on identical issues.

**Positions of the Parties**

1. **The Defendants**

**15**  The defendants submit the factual and legal issues which must be dealt with in both actions include, but are not limited to:

1. Did Bailey have express or implied authority from Bentley to sell the property to Pacific Bay and regards other matters?
2. did Bentley have a right to participate in such decision, or was it barred from doing so at the relevant time because of cash calls and the terms of a joint venture agreement?
3. if Bailey did not have such authority, what, if any, damage did the plaintiff suffer? The defendants allege this will require a detailed examination of the state of development, including regulatory and financial issues, from the acceptance of the May 2013 offer through Bentley's sale of its interest to Fraser Valley, and a proper valuation of what Bentley achieved from that sale.
4. Did the plaintiff cause its own damages or, alternatively, properly mitigate given legal advice given to the joint venture partners that the accepted May 2013 offer was unenforceable for reasons other than issued related to authority, and did Bailey and Fraser Valley or First Effort, or both, breach the terms of the Joint Venture Agreement by failing to advise the plaintiff of this advice?
5. as between Fraser Valley, Bailey and related parties (all of whom are third parties in the within action), First Effort, the realtors, the plaintiff and lawyers, who bears responsibility for any loss the plaintiff suffered, and in what proportion?

**16**  The defendants in the instant action say, or will say, the defendants in the other action are at fault for the plaintiff's loss. In this action, there should be an apportionment of fault as regards the third parties as a result of the plaintiff waiving any portion of damage resulting from their fault. The defendants also submit that the defendants in the Lawyers Action allege that the same third parties are at fault for the plaintiff's loss, and without both matters being heard at the same time, there is a clear risk of different apportionments of fault occurring if there are separate trials, which would complicate any later double recovery issues.

1. **The Plaintiff**

**17**  The plaintiff submits that the pleadings in the instant case and the pleadings in the Lawyers Action do not disclose common claims or relationships.

**18**  Similarly, the plaintiff maintains none of the defendants to the instant action are parties to the Lawyers Action. None of the Third Parties are parties to the Lawyers Action, and none of the defendants to the Lawyers Action are parties to the case at bar.

**19**  Each action, says the plaintiff, raises distinct causes of action such that the tortious or wrongful conduct alleged in the Lawyers Action is completely separate and distinct from that alleged in the instant case.

**20**  Thus, says the plaintiff, a finding as to the liability of the defendants to the Lawyers Action will not impact the liability of the defendants in the case at bar, and *vice versa*. Simply put, a finding that the defendants in the Lawyers Action acted in breach of the fiduciary duty and duty of care that they owed to the plaintiff does not alter the actions or conduct of the defendants in this action.

**21**  The plaintiff also maintains that the defendant Northstar is attempting to circumvent solicitor-client privilege without having to show express or implied waiver, which could occur if the two actions were heard together.

**22**  Lastly, the plaintiff says that having reached a B.C. Ferries Agreement with the Third Parties in the Realtors Action, there can't be issues of double recovery.

**Analysis and Decision**

**23**  As set out above, I am required to make a determination as to whether there are common claims, disputes, and relationships which exist between the parties, and whether they are so intertwined as to make a separate trial at different times before different judges undesirable and fraught with unnecessary expense.

**24**  Although the claims in the two actions arise out of the same broad factual matrix, in my view, the claims are discrete. The instant case is against the individual realtors and their employers by way of vicarious liability for the tortious wrongs allegedly committed by the realtors, against the title of the property and for any loss that resulted, while the case against the lawyers is for professional ***negligence***. In fact, while the factual matrix may be similar, the cause of action against the lawyers arose some time following the acceptance of the offer by Bailey.

**25**  I am satisfied that the only commonality in these two actions is the action by the realtors in submitting the offer to Bailey who purported to accept the offer on behalf of a non-existent entity. Thereafter, the cases diverge.

**26**  Having decided that the cases are not so interwoven so as to make separate trials at different times before different judges undesirable and fraught with unnecessary expense, I need not make a determination pursuant to the second part of the test as set out in *Merritt, supra*.

**27**  I therefore exercise my discretion not to grant the order sought that these matters be heard at the same time subject to the directions of the trial judge.

**28**  Northstar also sought an adjournment of the trial of the instant matter currently set for trial in April 2018. My understanding of the rationale to seek an adjournment was that the applicants anticipated an order that both matters be heard together and that a trial date of September 17, 2018, for 30 days would be preferable. Given my decision that the matters not be heard together, it would seem that the date for trial in April 2018 could proceed. In the event the parties do not wish the Realtors Action to proceed in April 2018, they could consent, or failing consent, apply for an adjournment via chambers application.

**29**  In my view, the plaintiff is entitled to its costs of the application.

MASTER G. TAYLOR

**End of Document**

[***Bindseil v. McDonald's Restaurants of Canada Ltd., [2009] B.C.J. No. 88***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B10X-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

C.J. Bruce J.

Heard: January 16, 2009.

Judgment: January 23, 2009.

Docket: S99285

Registry: New Westminster

**[2009] B.C.J. No. 88** | 2009 BCSC 61 | 174 A.C.W.S. (3d) 290

Between Karl Heinz Bindseil, Plaintiff, and McDonald's Restaurants of Canada Limited and Franchisee of McDonald's Restaurants of Canada Limited, Defendants

(41 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Causal connection — Action by plaintiff for damages on basis contaminated food consumed in defendant restaurant caused his colitis dismissed — Plaintiff suffered terrible abdominal pain and blood diarrhoea after eating at defendant restaurant — Plaintiff had witnesses who also became ill after eating defendant's food, but they were not diagnosed and did not have same symptoms as plaintiff — Plaintiff unable to produce medical evidence clearly linking food poisoning to colitis and defendant's expert witness testified colitis an autoimmune disease and noted that plaintiff's medical charts showed he had suffered colitis symptoms prior to eating allegedly contaminated food.**

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| Action by the plaintiff for damages on the basis that he developed ulcerated colitis as a result of eating contaminated food in the defendant restaurant. The plaintiff consumed a hamburger, fries and an iced tea on June 9, 2004 at defendant restaurant. He dined with a friend and saw other friends there, all of whom testified to how dirty the restaurant was. The plaintiff suffered terrible stomach cramps and bloody diarrhoea the following day and continued to suffer for another month, when he was diagnosed with colitis. The colitis worsened, leading to hospitalization at one point, and eventually becoming ulcerated. The plaintiff's witnesses testified that they had suffered vomiting and diarrhoea after eating in the restaurant. The plaintiff's doctors noted the possibility of a link between contaminated food and the colitis. The defendant called an expert witness who testified that colitis was an autoimmune disease, not caused by contaminated food, and that a review of the plaintiff's charts indicated he had symptoms of colitis prior to eating at the restaurant.  HELD: The action was dismissed with costs.  There was very little medical evidence to support the plaintiff's claim and stool samples taken had found no bacterial infection normally caused by food poisoning. While there were other restaurant patrons who became ill, they were never diagnosed and did not have bloody diarrhoea as the plaintiff did. Finally, the plaintiff had suffered the same symptoms one month prior to eating at the restaurant, so his colitis appeared to be a pre-existing condition. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Rules, Rule 18A

**Counsel**

Counsel for the Plaintiff: P. Fominoff.

Counsel for the Defendants: W.G. Neen.

**Reasons for Judgment**

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| **C.J. BRUCE J.** |

**INTRODUCTION**

**1**  Mr. Bindseil claims that he consumed contaminated food at a McDonald's restaurant on June 9, 2004, that caused him to develop colitis which over time progressed to ulcerative colitis. Mr. Bindseil argues that the defendants were negligent, that they owed him a duty of care, and that as a result of their ***negligence*** he is entitled to general and special damages, and compensation for loss of income, both past and future.

**2**  The defendants argue that while Mr. Bindseil may have ulcerative colitis, it was not caused by contaminated food eaten at one of its restaurants. The defendants say the evidence does not establish a causal relationship between consumption of the food and the injury on a balance of probabilities.

**3**  Although this matter was set for trial commencing March 2, 2009, both parties agree the matter should be dealt with by way of summary trial pursuant to Rule 18A. Having reviewed the evidence and the submissions of the parties, I am satisfied that the facts are not in dispute. It is the legal consequences of those facts that are in issue.

**4**  The parties agreed that the court would address the issue of liability only. If Mr. Bindseil was successful on that issue, the court reserved jurisdiction to deal with the question of damages in the event the parties were unable to resolve the matter informally.

**FACTS**

**5**  Mr. Bindseil is 52 years old and he lives with his wife in Abbotsford. Since moving here from Ontario in 1990, Mr. Bindseil has been a self-employed painter. On June 9, 2004, Mr. Bindseil and his friend, Kenneth Wight, were working together during the day and decided to have lunch at a nearby McDonald's restaurant. Mr. Bindseil ate a hamburger, fries, and drank an iced tea. Mr. Wright also consumed a hamburger and fries.

**6**  While at the restaurant, Mr. Bindseil and Mr. Wight spoke with an acquaintance, Joanne Krenus, who was there with her three children. Only two of the children and Ms. Krenus consumed food at the restaurant. Her older daughter had a coffee. While eating lunch, everyone commented on the lack of cleanliness in the restaurant. It was dirty and the tables had not been cleared of paper and garbage.

**7**  The next day Mr. Bindseil suffered terribly from stomach cramps and bloody diarrhea. He thought it was the flu but there were no headaches and nausea. On June 11, 2004, he attended at the Peninsula Medical Clinic and complained to Dr. Natha, his family physician, that he had been having blood and mucus in his stool for two days. Dr. Natha's report dated July 4, 2008, indicates that Mr. Bindseil was given a prescription for Ciproflaxacin 500 mg to be taken twice a day for a week.

**8**  A few days later Mr. Bindseil was seen by an emergency physician at Peace Arch Hospital complaining of continuing blood and mucus in his stool. Stool samples showed no major abnormalities and he was directed to add Flagyl and Buscopan to his medications.

**9**  Mr. Bindseil's intestinal problems continued into the next month and on July 5, 2004, Dr. Natha sent him for stool testing that revealed Aeromonas Hydrophila. Mr. Bindseil was prescribed more antibiotics and re-testing thereafter indicated no abnormalities remained. Notwithstanding these positive test results, Mr. Bindseil continued to have bloody diarrhea.

**10**  Some time after the end of July 2004 Mr. Bindseil had a colonoscopy and Dr. Lauzon diagnosed him with colitis. He was given Asacol and this slowly reduced the diarrhea. In October 2004 Dr. Natha again saw Mr. Bindseil who was complaining of continuing abdominal pain. The stool tests were normal and Dr. Natha thought that Mr. Bindseil may have an ulcer. Nexium and Gavascon helped with the condition and in December 2004 a repeat colonoscopy revealed that he was suffering from mild ongoing colitis.

**11**  As a result of the colitis Mr. Bindseil was severely restricted in his diet. He had to avoid grains and other types of carbohydrates, as well as meat and sauces. He became very depressed and did not adapt well to his new health circumstances. He at times ate foods that were not on the diet and suffered the consequences.

**12**  In October 2005 he was referred to Dr. Ramji who is a gastroenterologist. Dr. Ramji reviewed the patient's history and noted the August 2004 colonoscopy showed mild to moderate active colitis. From the tests performed, Dr. Ramji could not say if the condition was due to ulcerative colitis or an infectious etiology. Another colonoscopy in January 2006 showed only minor changes and Dr. Ramji prescribed suppository treatments in addition to the other medications that Mr. Bindseil was taking.

**13**  Regardless of the treatment, Mr. Bindseil continued to suffer from chronic bouts of colitis. His condition worsened to the point where Mr. Bindseil was admitted to hospital and treated intravenously with Cyclosporine. Since that time his condition has generally improved.

**14**  Before the court is the affidavit of Joanne Krenus who deposes that she was at the same McDonald's restaurant as Mr. Bindseil on June 9, 2004, with her three children. She confirms the restaurant was very dirty with garbage overflowing in the receptacles. She and two of her children had a hamburger, fries, and soft drinks. Her older daughter did not order a meal. Ms. Krenus deposes that in the days after June 9, she and the two children who ate at the McDonald's restaurant suffered from abdominal upsets and diarrhea. The older daughter was not sick. While Ms. Krenus and her two children sought medical treatment, there is no evidence of their diagnosis or what treatment was prescribed.

**15**  Mr. Wight's affidavit is also before the court. He deposes that while at the McDonald's restaurant he consumed a hamburger, fries, and a drink. The next morning he felt bad and thought he had the flu. Mr. Wight's symptoms were vomiting and diarrhea for two days. He recovered after a week. There is no evidence of any medical diagnosis or treatment for Mr. Wight.

**16**  Other facts relevant to this action are as follows. Mr. Bindseil's granddaughter, Hanna, had been babysat in the Bindseil residence every day during the week of June 9. Hanna was sick on June 1 and June 14 and missed school as a result.

**17**  The first time Mr. Bindseil saw Dr. Natha was on March 26, 2004. He had been experiencing bloody diarrhea for a week. Dr. Natha gave him a prescription for Ciproflaxcin because he suspected an infection of the gastrointestinal system. This medication resolved the problem. Later. Mr. Bindseil told Dr. Natha that this episode may also be due to a contaminated hamburger he ate at McDonald's.

**18**  In his examination for discovery, Mr. Bindseil acknowledged that no specific medical test had been conducted that linked his condition to a contaminated hamburger.

**19**  The defendants operate numerous restaurants in identical fashion throughout the world. The location related to this action served about 3,000 hamburgers per month in 2004. The operations manager deposes that there were no other complaints of food poisoning apart from Mr. Bindseil's. He also deposes that the restaurant maintained a daily food safety checklist which, for June 9, 2004, indicates that the recorded temperatures for hamburgers were in accordance with McDonald's and regional health authority limits.

**MEDICAL OPINIONS**

**20**  Dr. Natha's opinion in regard to the cause of Mr. Bindseil's colitis is found on p. 6 of his report:

It is my opinion that Mr. Karl Bindseil developed colitis after eating a contaminated hamburger at the McDonald's restaurant in the Peninsula Mall in 24th Avenue in South Surrey in June 2004. He initially developed colitis which has progressed to ulcerative colitis. He has been significantly disabled from working as a painter and has not been able to do so since June 2004.

**21**  Dr. Ramji also provided an opinion in respect of the causal connection between the consumption of the hamburger and Mr. Bindseil's colitis. On p. 2 of his report dated November 4, 2008, he says:

A difficult question has always been whether his ulcerative colitis has been caused by the infectious etiology. It does appear that there is at least a time course suggestive of potential association. A causal factor is difficult to determine even from the literature of patients with previous infectious colitis and inflammatory bowel disease. There has been a relationship suggested between infectious gastroenteritis and that of inflammatory bowel disease, particularly an exacerbation of inflammatory bowel disease. A causal link is more difficult to determine. It may be that an infectious etiology allows presentation of inflammatory bowel disease at that particular time. There is a theory of initiation of inflammatory bowel disease being multifactorial and part of this may include destruction of normal gut homeostatic mechanisms.

**22**  Dr. James Gray is a Gastroenterologist retained by the defendants to provide an opinion in respect of the causal connection between the theoretical ingestion of contaminated food and colitis. Dr. Gray did not examine Mr. Bindseil. He reviewed Dr. Natha and Dr. Dykstra's clinical records. He also reviewed Dr. Ramji's report. Dr. Gray concluded from the records of Dr. Natha that Mr. Bindseil was suffering from colitis as far back as March 2004:

I note that Dr. Natha's reports that Mr. Bindseil was seen on March 26, 2004 with a one week history of bloody diarrhea with up to five bowel movements per day. This led to stool studies being performed which were negative for abnormal bacteria and parasites but did comment on "many white blood cells". On a March 30 visit he was receiving Celebrex and "antibiotics". On April 2, 2004 he was still complaining of bloody diarrhea. On June 11, 2004 he was reporting blood and mucous in his stool and on June 24, 2004 he was described as having continuing diarrhea and was given Metronidaszole and Buscopan.

From this set of notes I would conclude that Mr. Bindseil was having bowel complaints from early or mid March 2004 and these complaints were consistent with a diagnosis of ulcerative colitis which he ultimately was given when he was more extensively investigated. (at p. 1)

**23**  Dr. Gray reviewed Mr. Bindseil's medical history from March 2004 onward and agreed that he was suffering from active and chronic inflammatory bowel disease or ulcerative colitis. In his opinion, however, the onset date was March 2004.

**24**  Dr. Gray was also of the opinion that there was little support in the research for an infectious cause of this disease. Dr. Gray also comments on the causal relationship of the findings of Aeromonas in Mr. Bindseil's stool cultures. He says at p. 2 of his report:

We do not know the exact cause of ulcerative colitis which is a form of idiopathic inflammatory bowel disease. Most of us say that it is an autoimmune condition. There is certainly very little literature to support an infectious cause such as food poisoning for this condition. In particular, Aeromonas hydrophilla has not been associated with this condition. Certainly infectious conditions can aggravate the bowel complaints and can sometimes make the diagnosis more actively sought out. I do not think there is any literature to support the Aeromonas infection's being a cause for inflammatory bowel disease.

In Mr. Bindseil's case I note that he had multiple stool cultures done and these did not show any aeromonas infection, except on one occasion. Many specialists have thought that aeromonas is a normal part of the gastrointestinal flora and may well not even cause bowel complaints. It is considered a water-borne infection. In this regard it is unlikely that one would necessarily implicate the McDonald's hamburger in his aeromonas infection. Furthermore, I do not think that one could necessarily implicate the aeromonas in his symptoms, particularly as his symptoms preceded the aeromonas diagnosis.

**25**  Dr. Gray disagreed with Dr. Natha's opinion that the McDonald's food caused the ulcerative colitis. In Dr. Gray's opinion, Mr. Bindseil was suffering from symptoms consistent with this diagnosis in March 2004, before he consumed the hamburger, and this kind of greasy food, along with the medication he was given (Celebrex), can aggravate the symptoms of ulcerative colitis.

**ARGUMENT**

**26**  Mr. Bindseil argues that his ulcerative colitis stems from the consumption of contaminated food at a McDonald's restaurant. He says the similar symptoms experienced by Mr. Wight, Ms. Krenus and her two children after eating at the same restaurant on the same day support a conclusion that the food ingested was the cause. He also points to the fact that Ms. Krenus' oldest daughter, who consumed no food on that day, did not become ill.

**27**  Mr. Bindseil argues that medical evidence supports a conclusion that colitis can be caused by contaminated food. The fact that he suffered a more serious injury as a result of the ingestion of the contaminated food than the other patrons may be due to his greater sensitivity to gastrointestinal disorders. Mr. Bindseil also argues that Dr. Gray does not address the absence of symptoms between April and June 2004 when he says the condition pre-dated the June 9 events. Dr. Gray's report also supports a conclusion that contaminated food is one factor that may cause colitis.

**28**  In support of his argument, Mr. Bindseil relies upon ***Richards v. McDonalds Restaurants of Canada***, [*2007 SKQB 460*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-JN14-G2V5-00000-00&context=).

**29**  The defendants argue the medical evidence does not support a diagnosis of food poisoning from food eaten at its restaurant. Dr. Natha's opinion has no foundation other than what Mr. Bindseil advised him. The stool testing revealed no bacterial infection that could have been caused by contaminated food. While a later test showed some areomonas in the stool, Dr. Gray says it is unlikely it was caused by a hamburger. The defendants argue there is also no evidence of what type of food poisoning was present and no evidence it was linked to any McDonald's food.

**30**  The defendants argue the lay witnesses could as likely have had the flu as food poisoning. They all had contact with each other at the restaurant and the flu could be spread in this fashion. In addition, the other witnesses had no medical diagnosis of their illness and their symptoms do not match Mr. Bindseil's. It is also the case that Mr. Bindseil's granddaughter was sick at the relevant time and she could have spread the flu to him. The defendants point to the fact that no other complaints of food poisoning were received at the relevant time. They maintain this evidence shows that it is unlikely that the McDonald's food was contaminated.

**31**  Even if the food was contaminated, the defendants say the evidence does not support a conclusion that colitis is caused by eating contaminated food. Dr. Ramji is unable to say there is a causal connection between food poisoning and colitis. Relying upon Dr. Gray's report, the defendants say there is no medical evidence to support a causal connection and, because Mr. Bindseil was suffering from colitis before June 2004, it is unlikely that he developed this disease after eating the hamburger.

**32**  In support of their submission, the defendants rely upon ***Steeves v. Air Canada***, [*[1996] B.C.J. No. 2879*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1YR-00000-00&context=) (S.C.).

**DECISION**

**33**  The onus rests with Mr. Bindseil to prove on the balance of probabilities that he ingested contaminated food at the McDonald's restaurant and further, that it was the McDonald's food that caused his colitis.

**34**  There is very little medical evidence to suggest that the symptoms suffered by Mr. Bindseil were caused by the food that he ate at McDonald's. The stool samples taken after June 9 indicated no bacterial infection or other abnormality that could have been caused by food contamination. While there was a type of bacteria found in the stool samples taken after July 5, Dr. Gray's opinion is that Aeromonas is unlikely to have been caused by food poisoning because it is a waterborne bacteria. Neither Dr. Natha nor Dr. Ramji has suggested this bacteria is related to contaminated food.

**35**  While there were other patrons who became ill coincidentally with their consumption of McDonald's food, the evidence surrounding their diagnosis and symptoms is less than satisfactory. There is no medical diagnosis of their symptoms and, significantly, there is no evidence of blood in their stool similar to Mr. Bindseil's experience. Their symptoms of diarrhea, vomiting, and stomach upset are equally consistent with the flu.

**36**  Moreover, the fact that Mr. Bindseil suffered the same symptoms two months before the June 9 incident tends to support the defendants' argument that he had a pre-existing condition of colitis that was aggravated by eating a greasy hamburger. Clearly Dr. Gray's opinion supports a conclusion that Mr. Bindseil had colitis before June 9 and that ingesting a hamburger, particularly after taking anti-inflammatory drugs, would cause a flare up of his symptoms.

**37**  Lastly, even if it could be proven that the McDonald's food was contaminated, the medical evidence before the court does not clearly support a causal connection between ingesting contaminated food and the development of colitis. People develop colitis for a variety of reasons; however, while a bacterial infection may in some cases produce the symptoms associated with colitis, the medical evidence does not indicate that it is one of the causal factors. Neither Dr. Ramji nor Dr. Gray, the only specialists to provide opinions, believes that food contamination is a causal factor in colitis or the development of ulcerative colitis. Dr. Natha's opinion that it was the hamburger that caused Mr. Bindseil's colitis amounts to a bare statement without any foundation. In these circumstances, I must prefer the opinions of the specialists in this area of medicine.

**38**  While Mr. Bindseil relies upon the decision of the Saskatchewan Queen's Bench in ***Richards***, that case is distinguishable from the facts at hand. In ***Richards*** the medical experts agreed the plaintiff suffered from gastrointestinal problems that were the result of food ingestion. The only disagreement was whether the plaintiff's illness was a result of food poisoning or some other infectious agent. In Mr. Bindseil's case, there is no reliable evidence that his colitis was caused by food ingestion regardless of whether it was from a toxin or an infectious agent.

**39**  There is no doubt that Mr. Bindseil suffers terribly from ongoing ulcerative colitis. Further, this disease has adversely affected Mr. Bindseil's quality of life and his ability to work at his chosen profession. Unfortunately, I am not satisfied that the evidence establishes a causal relationship between contaminated food and the colitis from which he continues to suffer. It is trite law that the plaintiff is not required to establish a causal connection to a virtual certainty. However, in this case Mr. Bindseil was not diagnosed with food poisoning. He was diagnosed with colitis which is a condition that is not normally caused by an intestinal infection from contaminated food.

**40**  The timing of his illness and the symptoms suffered by the other patron witnesses raises suspicions about the food. However, this circumstantial evidence is not sufficient to establish on a balance of probabilities that either the food was contaminated or that food poisoning caused Mr. Bindseil's colitis.

**41**  I must therefore dismiss the plaintiff's action with costs to the defendants at scale B.

C.J. BRUCE J.

**End of Document**

[***Boschman v. Azad, [2002] B.C.J. No. 1317***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2PK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Williams Lake, British Columbia

Melvin J.

Heard: April 29 - May 3, 2002.

Judgment: June 12, 2002.

Williams Lake Registry No. 98-11818

**[2002] B.C.J. No. 1317** | 2002 BCSC 887 | 2 B.C.L.R. (4th) 342 | 114 A.C.W.S. (3d) 331 | [2002] B.C.T.C. 887

Between Kathleen Joyce Boschman, plaintiff, and Aristotle Azad, defendant

(37 paras.)

**Case Summary**

**Medicine — Liability of practitioners — *Negligence* or fault — Failure to inform or disclose.**

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| Action by Boschman for damages arising from surgery performed by the defendant Azad. Boschman had a history of right arm pain. She had tried a series of treatments and surgeries with minimal success. She was referred to Azad. She consulted with him and urged him to perform surgery as she was desperate for relief. Azad advised her prior to the surgery that there was a risk of phrenic nerve injury. However, he did not advise her of the consequences of such an injury. Boschman's phrenic nerve was damaged by the surgery. As a result, her right hemidiaphragm was paralyzed. This impacted on her breathing ability. The surgery performed carried a three to five per cent risk of damage to the phrenic nerve. Such damage could reduce the patient's vital capacity by ten per cent. Boschman had pre-existing respiratory difficulties that she did not disclose to Azad.  HELD: Action dismissed.  Azad breached his duty by failing to advise Boschman of the consequences of phrenic nerve damage. However, a reasonable person in Boschman's position would not have declined surgery if such consequences had been disclosed. |

**Counsel**

S.J. Oliver, for the plaintiff.

D.P. Roberts, Q.C., and T. Martin, for the defendant.

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| **MELVIN J.** |

**1**   By her statement of claim issued April 3, 1998, the plaintiff seeks compensation for injuries that she alleged occurred during a surgical procedure conducted by the defendant. The plaintiff's claim is based on the allegation that the defendant failed to inform her of the risks associated with the surgery. The plaintiff does not allege that the defendant is negligent in the course of the surgical procedure.

**2**  The plaintiff, born July 27, 1953, had a history of right arm pain, subsequently diagnosed as causalgia. Over a period of years, she tried a variety of treatments with varying success. The treatments included medication, acupuncture and sympathetic ganglion blocks. Ultimately, she was advised that a surgical procedure called "sympathectomy" may be her best hope for pain reduction or elimination. As a result she was referred to the defendant, a vascular surgeon, who performed the surgical procedure on September 7, 1996. Although the sympathectomy was successful, an injury occurred to the phrenic nerve during the course of the surgery. As a result, a paralysis of the right hemidiaphragm occurred, which impacted on the plaintiff's breathing ability.

**3**  On her attendance at the defendant's office, prior to surgery, a history was obtained by the defendant (Exhibit 2, Tab 7). On February 7, 1996, the date of the initial consultation, the defendant noted the plaintiff's past medical problems, including right shoulder and arm problems and treatments associated therewith, the limitations on the plaintiff's activities due to the right shoulder and arm problems, previous trauma (1983), current medications, and noted "all else normal". There is no mention by the plaintiff of prior shortness or breath, allergies or asthma-like breathing difficulties. Nor were there any inquiries by the defendant in these areas.

**4**  On that same date, the defendant wrote to the plaintiff's general practitioner, Dr. Coetze, outlining the plaintiff's history and stating as follows:

I did explain to her in a fair amount of detail as to what is going on here and what her various options were.

**5**  In that letter, the defendant recommended sympathetic testing to rule out causalgia and further ganglion blocks if the plaintiff wished. As to carrying out a sympathectomy, the defendant advised in the letter that it is virtually impossible to do the sympathectomy on a permanent basis on the upper limbs. They only last six to 12 months. This was explained to the plaintiff, again in detail.

**6**  At trial, the plaintiff acknowledged that the defendant advised her that the permanent pain free success was not expected. She expected, received, and still receives, some relief from pain.

**7**  The key issues at trial relate to the plaintiff's failure to disclose her prior breathing difficulties to the defendant, the duty of the defendant to advise the plaintiff of possible phrenic nerve damage, the question as to whether the defendant did so advise the plaintiff, and finally, if so advised, on an objective basis, would the plaintiff have undergone the surgery having knowledge of the risk of the harm in question.

**8**  I am satisfied that the evidence demonstrates that prior to the surgery, the plaintiff did have breathing difficulties. The plaintiff testified as to her difficulties, which included pneumothorax as a result of a 1983 fracture of ribs. In addition, the plaintiff used a "puffer" to assist her breathing as needed. In Dr. Coetze's clinical notes of April 1993 he records that the plaintiff "takes Lectopan for breathing".

**9**  I am also satisfied that the plaintiff was concerned prior to surgery about respiratory problems due to her previously fractured ribs, pneumothorax, and according to Dr. Silva, "history of reactive airways". I note as well that Dr. Demetrick, in his report of October 2000, refers to the plaintiff suffering from severe asthma. The plaintiff denied that she was ever advised that she suffered from asthma although she acknowledged that she has asthma-like symptoms "due to her respiratory problems". The clinical records of May 27, 1996, prior to the surgery, record "problems breathing". As a result, the plaintiff was referred to a specialist for allergy testing.

**10**  The specialist's report of June 27, 1996 to Dr. Coetze reports the plaintiff's history of tightness in the chest, trouble breathing, headaches and fatigue. He refers to symptoms occurring while the plaintiff was at restaurants and motels, or was in contact with pollen from some flowers. The physician also noted that the plaintiff used a ventolin inhaler to decrease feelings of tightness in her chest, and he further noted that the plaintiff had not been told that she has asthma.

**11**  In addition, at trial, her general practitioner Dr. Coetze testified that in retrospect, he now believes that the plaintiff had mild asthma prior to the operation.

**12**  With this background, the plaintiff submits that the defendant should have made a more detailed inquiry regarding the plaintiff's health issues and should have specifically detailed the risk of harm to the phrenic nerve and the potential consequences thereof. At the same time, it should be noted that neither the plaintiff nor the referring physician disclosed to the defendant any respiratory concerns. In my opinion, there was no information in the defendant's possession to alert him of the plaintiff's possible respiratory concerns. The 1983 left rib fractures did not indicate the plaintiff had any respiratory problems. Consequently, in my opinion, the defendant did not fail in his history-taking in this respect.

**13**  The plaintiff acknowledges that the defendant preferred treatment by another set of ganglion blocks before surgery; this occurred, apparently without success. Consequently, and with some urgency, the plaintiff wrote to the defendant a remarkable letter dated June 4, 1996 (Exhibit 5), and sent a copy to her general practitioner. In my opinion, this letter clearly demonstrates the plaintiff's state of mind in June 1996:

June 4, 1996

Dear Dr. Azad:

I have been a patient with you for only a few months. Being from out of town makes it difficult to have appointments in your office as often as I should. But could you please read this **important letter right away** as I have been experiencing MAJOR difficulties with the pain in my fingers (1,2,3), wrist, shoulder, & neck on the RIGHT SIDE as well as deteriorating strength and dizziness and headaches that have kept me in bed.

**I am scheduled to be at Royal Inland Hospital for June 17 - 2** 1 to have MORE injections done. I have closed my business down for that week and WILL BE THERE. However, I want you to consider doing surgery, severing the nerves that are causing all this DETERIORATING & DISABLING PAIN.

The VASCULAR TESTING was POSITIVE. WHAT DOES THAT SHOW TOWARDS A MAJOR PROBLEM? The pills you prescribed DID NOT HELP (they only make me "dozey" like Amitriptoline does and I can't run a music business that way). Pain pills don't work anymore, and I can't keep going for shots to the hospital, which has become even more frequent.

**Dr. Azad, I am not one to give up easily, but I have suffered with this for over 10 years and it's getting worse by the month**.

1. I can't do my normal housework - ie. cutting veggies, vacuuming, cleaning, opening jars, carrying heavy things or sometimes even picking up a coffee cup.
2. I can't do my music career anymore - ie. practising piano, writing in dictation books for students & performing.
3. My personal life is so limited - no sports, no bra, no crafts etc., etc. etc.
4. I go to bed with pain from using my arm all day, and I wake up with pain from any position I sleep in.
5. I've been into emergency more frequently for pain shots.

In these years I have had

1. SURGERY on my shoulder to try relieve pressure.
2. SEEN DOCTORS in Prince George, Vancouver, Williams Lake, and in Kamloops.
3. Had weeks of ACUPUNCTURE three different times.
4. Had STELLATE GANGLIAN [sic] BLOCKS two times up to three times a day for a week each time.
5. Worn neck collars, wrist aids, and slings numerous times. IN ALL SINCERITY THESE TREATMENTS HAVE ALL BEEN BAND-AIDS (some totally in-effective like the last set of blocks) AND I WILL HAVE TO CONSIDER QUITTING MY BUSINESS (or any other work) AND APPLYING FOR DISABILITY ASSISTANCE IF THIS CONTINUES.

Dr. Azad, you were ready to give me surgery to sever some sympathetic nerves when you saw the Vascular tests results in Royal Inland Hospital. I am ready to chance something permanent so that my life (at this young age) can go on. It's worth a try to me, if you sever nerves that could relieve this pain, and I'm willing to take the risk of side-effects.

I have a family reunion in Winnipeg July 1 - 13 (A GREAT TIME FOR ME TO REST & RECOUPERATE [sic] FROM SURGERY), then a Missions trip to Mexico July 12 - 28th (WHEN I'D LIKE TO BE FREE OF THIS AGONY), and trips to Calgary & Vancouver for weddings in August. (My business is closed June 15th until September).

I HAVE NEVER WRITTEN A LETTER LIKE THIS, BUT I'VE HAD ENOUGH! PLEASE CONSIDER DOING MORE THE WEEK I'M AT ROYAL INLAND HOSPITAL JULY 17th to 21st. THANKYOU!!

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| --- | --- | --- | --- |
|  |  | Kathleen Boschman |  |
|  | CC. Dr. Coetze | 398-5333 |  |

|  |  |
| --- | --- |
| (Signed "KJBoschman") |  |

[emphasis in original]

**14**  It is obvious that the plaintiff had enough of various treatments and wanted surgery. The evidence shows the plaintiff made a number of telephone calls to the defendant in August of 1996. After the plaintiff was admitted through emergency at Royal Inland Hospital, the defendant performed the surgery on September 7, 1996, which was a Saturday and not a normal day for the defendant to perform surgeries.

**15**  The plaintiff acknowledges that the defendant told her that the relief from the operation "may not last" and that Horner's syndrome (droopy eye) may occur as a side effect. She denies that the defendant advised her that the phrenic nerve may be damaged or harmed. The defendant testified that as well as advising the plaintiff of Horner's syndrome, he advised her that the phrenic nerve may be harmed. He acknowledged that he did not advise of the consequences of such harm.

**16**  In the surgical authorization release/form dated September 7, 1996, the plaintiff acknowledges with reference to surgery that "the nature, purpose, probable risks and benefits have been explained to me ...". The document does not describe or define "probable risks".

**17**  I accept the evidence of the defendant that he advised the plaintiff of possible harm to the phrenic nerve. As a specialist in vascular surgery, he was aware of the risk of Horner's syndrome and damage to the phrenic nerve. In my opinion, it is unlikely he would refer to one risk and not the other.

**18**  The duty of the surgeon has been described by the Supreme Court of Canada in Reibl v. Hughes, [*[1980] 2 S.C.R. 880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1Y2-00000-00&context=). At page 884 Laskin C.J. stated:

It is now undoubted that the relationship between surgeon and patient gives rise to a duty of the surgeon to make disclosure to the patient of what I would call all material risks attending the surgery which is recommended. The scope of the duty of disclosure was considered in Hopp v. Lepp [[*[1980] 2 S.C.R. 192*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1WB-00000-00&context=)], at p. 210, where it was generalized as follows:

In summary, the decided cases appear to indicate that, in obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation. However, having said that, it should be added that the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case.

**19**  Further, at page 895:

... What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatment.

The materiality of non-disclosure of certain risks to an informed decision is a matter for the trier of fact, a matter on which there would, in all likelihood, be medical evidence but also other evidence, including evidence from the patient or from members of his family.

**20**  Further at page 898-899:

I think it is the safer course on the issue of causation to consider objectively how far the balance in the risks of surgery or no surgery is in favour of undergoing surgery. The failure of proper disclosure pro and con becomes therefore very material. And so too are any special considerations affecting the particular patient. For example, the plaintiff may have asked specific questions which were either brushed aside or were not fully answered or were answered wrongly. In the present case, the anticipation of a full pension would be a special consideration, and, while it would have to be viewed objectively, it emerges from the patient's particular circumstances. So too, other aspects of the objective standard would have to be geared to what the average prudent person, the reasonable person in the patient's particular position, would agree to or not agree to, if all material and special risks of going ahead with the surgery or foregoing it were made known to him. Far from making the patient's own testimony irrelevant, it is essential to his case that he put his own position forward.

**21**  Further, at page 900:

... In short, although account must be taken of a patient's particular position, a position which will vary with the patient, it must be objectively assessed in terms of reasonableness.

**22**  And, at page 928:

In my opinion, a reasonable person in the plaintiff's position would, on a balance of probabilities, have opted against the surgery rather than undergoing it at the particular time.

**23**  This issue was again addressed in White v. Turner [*(1981), 120 D.L.R. (3d) 269*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23SS-00000-00&context=); [*31 O.R. (2d) 773*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23SS-00000-00&context=); aff'd [*12 D.L.R. (4th) 319*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M4SH-00000-00&context=); [*47 O.R. (2d) 764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M4SH-00000-00&context=) (C.A.), a decision of Mr. Justice Linden of the Ontario High Court of Justice. At page 282, he stated:

It is clear that Canadian doctors are obligated to disclose to their patients "the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation".

...

Further, in analysing the quality and quantity of the information given to a patient under ***negligence*** principles, the test to be employed is no longer the professional medical standard, heretofore used by our Courts, but rather the reasonable patient standard. This is a major shift heralded by the Supreme Court of Canada in Reibl v. Hughes, supra. No longer does the medical profession alone collectively determine, by its own practices, the amount of information a patient should have in order to decide whether to undergo an operation. From now on, the Court also has a voice in deciding the appropriate level of information that must be conveyed to a patient in the circumstances as a question of fact.

The essential issue, then, is to determine what a reasonable patient in the position of the plaintiff would consider to be "material risks" or "special or unusual risks" about which he would want to receive information.

Before deciding this matter, the Court will certainly expect to hear expert medical evidence on the question of what the risks inherent in a particular operation are, how serious these risks are, how frequently these risks may arise, and what information medical practitioners usually transmit to their patients in relation to these risks.

But that is not all the Court will have regard to; it will also give due consideration to the evidence of the patient and his family as to his general situation. The Court will be interested in the information he would want to know in the circumstances. The Court will then assess what a reasonable patient would like to know in these circumstances. Weighing all of these factors, the Court will decide whether the information given to this patient in these circumstances was sufficient.

...

The meaning of "material risks" and "unusual or special risks" should now be considered. In my view, material risks are significant risks that pose a real threat to the patients' [sic] life, health or comfort. In considering whether a risk is material or immaterial, one must balance the severity of the potential result and the likelihood of its occurring. Even if there is only a small chance of serious injury or death, the risk may be considered material. On the other hand, if there is a significant chance of slight injury this too may be held to be material. As always in ***negligence*** law, what is a material risk will have to depend on the specific facts of each case.

As for "unusual or special risks", these are those that are not ordinary, common, everyday matters. These are risks that are somewhat extraordinary, uncommon and not encountered every day, but they are known to occur occasionally. Though rare occurrences, because of their unusual or special character, the Supreme Court has declared that they should be described to a reasonable patient, even though they may not be "material".

...

In summary then, this exercise of defining the scope of the duty of disclosure is now a complex one for the Court, requiring much time, effort, thought and evidence. The co-operation and assistance of the medical profession will be vital to the task. The Courts will, as always, move very cautiously in this area. In most cases, the Courts will probably continue to accept as reasonable the customary practices of the profession as to disclosure, since they are, after all, based on experience, common sense and what doctors honestly perceive their patients wish to know. However, it is now open to the Courts, if invited, to participate in the process of evaluating the information that has been communicated and to find it wanting in appropriate cases, even if the medical profession disagrees.

...

... In order to recover in ***negligence*** law, therefore, it must be established that the patient would have refused to undergo the surgery if he had been told about all the relevant risks.

... It is not enough, therefore, for the Court to be convinced that the plaintiff would have refused the treatment if he had been fully informed; the Court must also be satisfied that a reasonable patient, in the same situation, would have done so. That is the meaning of the objective test adopted in Reibl v. Hughes ...

**24**  Accepting that the defendant disclosed risk of damage to the phrenic nerve, without identifying the consequences, the question then arises: did the defendant perform the duty imposed upon him by law. The risk of damage to the phrenic nerve, according to the expert testimony on behalf of the plaintiff and the defendant, when performing a sympathectomy, is three to five percent. If the diaphragm is permanently paralyzed, as in the case at bar, the patient's vital capacity will be reduced by approximately ten percent.

**25**  Dr. Finley, on behalf of the plaintiff, noted that the balance of the reduction of the plaintiff's capacity is probably secondary to mild airway obstruction. In his report of April 8, 2002, he states that the findings of the pulmonary function tests of March 1999 are in keeping with "the diagnosis of mild reactive airways disease and right diaphragmatic paralysis".

**26**  At trial, Dr. Finley testified that with a three to five percent risk of harm to the phrenic nerve, it is up to the doctor to decide if there is a significant risk. If there were no other breathing problems then non-disclosure is not an issue. If breathing problems exist, Dr. Finley is of the view that the situation is different and the breathing problem would be a factor to consider in deciding to warn the patient. Considering all of the information, the warning or lack thereof is a judgment call. With reference to reactive airways, as referred to in Dr. Silva's report, as "a history of reactive airways" that, according to Dr. Finley, may be called "asthma".

**27**  Dr. Taylor, a vascular surgeon specialist testified that the surgical procedure in the case at bar was well indicated, appropriately performed and that paralysis of the right hemidiaphragm from phrenic nerve damage can occur during a sympathectomy without ***negligence*** on the part of the surgeon. In his report of April 2, 2002 (Exhibit 13), he stated:

Most patients with phrenic nerve injury or paralysis from other causes are not aware of the problem, suffer no shortness of breath or exercise intolerance related to it, and have it found only because a chest x-ray was done for some other reason. Based on the rarity of its occurrence and its usual functional insignificance, I would not normally think it necessary to disclose the possibility of phrenic nerve injury to a patient prior to cervical sympathectomy. It is not common practice to warn patients of the possibility of phrenic nerve injury prior to cervical sympathectomy.

Ms. Boschman also has, apart from the right phrenic nerve and paralyzed right hemidiaphragm, other lung disease. She has been diagnosed as having reactive airways disease requiring Theophylline for treatment which may limit her functional ability and cause some shortness of breath.

**28**  At trial, Dr. Taylor acknowledged that a full medical history is advisable, if not necessary, including past breathing problems. He warns his patients who have prior breathing problems of the risks associated with a sympathectomy. A risk of three to five percent in his opinion might be worth mentioning if the operation may cause more than normal damage. He also stated that most people would not notice the impairment (paralysis of the right hemidiaphragm) without strenuous exercise.

**29**  Although it was strenuously argued by counsel on behalf of the defendant that no duty to disclose existed, in my opinion, having accepted the defendant's evidence that he disclosed the risk of harm to the phrenic nerve without the consequences thereof, the issue is not now whether the doctor had a duty to disclose, but once he embarked upon a disclosure, the activity of disclosure should be meaningful. In other words, once he recognized or accepted or embarked upon a disclosure, it must be complete and meaningful. In this respect, in my view, the defendant failed. Consequently, little is to be gained by an analysis of the authorities to determine on the basis of the evidence in the case at bar whether the duty to disclose existed simpliciter. I am satisfied that the defendant did disclose. The issue, as Madam Justice Allan stated in Bryan v. Hicks, [*[1993] B.C.J. No. 662*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-2389-00000-00&context=) (March 25, 1993), Vancouver Registry No. C906641 (B.C.S.C.); aff'd [*(1995), 10 B.C.L.R. (3d) 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0RF-00000-00&context=); [*[1995] 10 W.W.R. 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0RF-00000-00&context=) (B.C.C.A.), is whether or not the defendant gave the plaintiff sufficient information to make an informed decision. In my opinion, to mention a risk of harm to a nerve without at the same time advising as to the potential consequences to the patient of such harm, is not generally sufficient.

**30**  It is important in the case at bar to note that the plaintiff anticipated surgery in the nerves in the area between the neck and the right shoulder with reference to the sympathectomy. She was aware that this surgery contemplated the cutting of nerves which were causing the pain in the right arm area. Advising that the phrenic nerve may also be harmed in this context becomes rather insignificant unless one is informed of the fact that the phrenic nerve has a specific function, in this case it impacts upon the ability of the right hemidiaphragm to perform.

**31**  Having concluded that the defendant should have advised the plaintiff of the consequences of the risk, which was appreciated by the defendant by his advising of the possibility of the risk without consequence, the next issue relates to what has been described as "causation".

**32**  The issue then arises as to whether a reasonable person in the plaintiff's position would decline surgery.

**33**  In this respect, what is most important is not only the medical history of the plaintiff and the problems to her right arm that she had lived with for years, but also specifically what occurred during the summer of 1996. In this respect, in my opinion, the letter of June 4, 1996 is critical. That letter, coupled with the urgency of the telephone calls to the defendant by the plaintiff in August of 1996 demonstrate that the plaintiff was at the end of her tether. In this respect, her state of mind is obvious.

**34**  When considering the minimal likelihood of damage to the phrenic nerve, and considering the impact of damage if it did occur which may cause a reduction of ten percent of vital capacity, the question then arises as to whether a reasonable person in the plaintiff's position would, on a balance of probabilities, refuse or proceed with the surgery.

**35**  The plaintiff, in this respect, testified that she would not, if she had known there may be an impact on her ability to breathe, have undergone any surgery which may have exposed her to risk in this respect. The test is not whether the plaintiff would have undergone the surgery; the test is whether a reasonable person in the plaintiff's position would have, on a balance of probabilities, opted against the surgery. See Reibl v. Hughes at page 928.

**36**  When one considers the totality of the evidence, and specifically the inability of the plaintiff to seek relief, and the risk assessment involved, I am satisfied that a reasonable person in the plaintiff's position would, on a balance of probabilities, have undertaken the surgery. Such a reasonable person, in my opinion, would not have refused surgical relief for ongoing pain, which the plaintiff described as "DETERIORATING & DISABLING PAIN".

**37**  Consequently, the plaintiff's action is dismissed and the defendant will recover costs on Scale 3.

MELVIN J.

**End of Document**

[***Brain v. Craven, [2004] B.C.J. No. 75***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S36M-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Dawson Creek, British Columbia

Chamberlist J. (In Chambers)

Heard: November 12, 2003.

Judgment: January 16, 2004.

Dawson Creek Registry No. 13345

**[2004] B.C.J. No. 75** | 2004 BCSC 67 | 128 A.C.W.S. (3d) 475

Re: Application to Strike Jury Notice Between Gregory Stephen Brain, plaintiff, and Frank Geoffrey Craven, Leon Gniwesch, the Chetwynd and District Hospital Society, the South Peace Health Council, Penny Morton and Janet Grant, defendants, and Dr. James Survis, Doctors John Doe 1-10 carrying on business as Fort St. John - Dawson Creek Laboratory Council and Fort St. John - Dawson Creek Laboratory Council, third parties

(51 paras.)

**Case Summary**

**Practice — Juries and jury trials — Right to a jury — Setting aside a jury notice.**

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| Application by two defendants in a medical malpractice action to strike the jury notice. The plaintiff, Brain, who was 25 years old, claimed that his lifelong and serious disabilities were caused by medical ***negligence*** and breach of contract among certain physicians, health care workers, a hospital and a health council. He sought damages related to the diminution in his quality of life and his ability to earn income. The two defendants argued that the nature of the proof would be complex and scientific, such that it would be best considered by a judge alone.  HELD: Application allowed.  The jury notice was struck. The case involved scientific investigation which could not be made conveniently by a judge sitting with a jury. The complex, intricate and interwoven factual, legal, medical and economic issues rendered the matter unsuitable for a jury. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 39(27).

**Counsel**

D.J. Holubitsky, for the plaintiff. K. Sacher, for the defendant, Frank Geoffrey Craven. P.M. Willcock, for the defendant, Leon Gniwesch. D.J. Marks, for the defendants, South Peace Health Council, Penny Morton and Janet Grant.

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| **CHAMBERLIST J.** |

INTRODUCTION

**1**  The defendant, Leon Gniwesch, has returned his notice of motion filed March 25th, 2002 for an order that the trial of this action, presently set to proceed in Dawson Creek, British Columbia, before a judge sitting with a jury proceed before a judge sitting without a jury pursuant to Rule 39(27). The motion is supported by the defendant, Frank Geoffrey Craven, and opposed by the plaintiff, Gregory Stephen Brain and the other three remaining defendants.

**2**  The within action was previously discontinued by the plaintiff against the defendant, the Chetwynd and District Hospital Society. A notice of discontinuance has been filed in the proceedings relative to the third party, Dr. James Survis. The trial of the within action is presently set down for 25 days in Dawson Creek. The relevant provision upon which the application is made is Rule 39(27) of the Rules of Court, which provides as follows:

Except in cases of defamation, false imprisonment and malicious prosecution, a party to whom a notice under subrule (26) has been delivered may apply

1. within 7 days for an order that the trial or part of it be heard by the court without a jury on the ground that
2. the issues require prolonged examination of documents or accounts or a scientific or local investigation which cannot be made conveniently with a jury, or
3. the issues are of an intricate or complex character, or
4. at any time for an order that the trial be heard by the court without a jury on the ground that it relates to one of the matters referred to in subrule (25).

**3**  The defendant, Frank Geoffrey Craven, had also filed his application to have the jury notice struck on March 25th, 2002.

BACKGROUND

**4**  The two defendants, Frank Geoffrey Craven and Leon Gniwesch, were at all material times medical practitioners practicing in the Village of Chetwynd, Province of British Columbia.

**5**  The plaintiff, presently aged 25, alleges that as a result of the negligent medical care and malpractice, and negligent hospital care, treatment and professional services given to him by the defendants between June 30th, 1978 and July 4th, 1978, he suffered injury, loss and expense.

**6**  The plaintiff also alleges that the defendants were in breach of contract for failing to provide the services and the quality of services for which they were paid.

**7**  The plaintiff was born at the Chetwynd Hospital at approximately 21:58 hours on June 30th, 1978. There was moderate antepartal hemorrhage during the hour preceding delivery, the cause of which was unknown. The plaintiff's mother's blood group was noted to be A+.

**8**  Frank Geoffrey Craven (hereinafter referred to as "Dr. Craven") was the attending physician during the birth of the plaintiff and during his care while in hospital.

**9**  At 23:35 hours on June 30th, 1978, the then infant plaintiff was transferred to the nursery at the Chetwynd Hospital. On the same date at approximately 01:05 hours there were indications in the nursing notes that the plaintiff appeared to be a healthy normal baby. At approximately 12:00 hours he was noted to have made a good attempt at breast feeding, but approximately 19:10 hours the nursing notes indicate that the infant plaintiff was refusing his mother's breast and was very jaundiced. Dr. Craven was notified and attended to examine the infant plaintiff. At that time Dr. Craven noted the plaintiff to be quiet, jaundiced and pale on examination. The nursing notes made at 21:50 hours indicate that the infant plaintiff appeared lethargic.

**10**  On July 1st, 1978, the infant plaintiff's haemoglobin was reported at 13 gm and the hematocrit was recorded at 40%. His blood group was reported to be A+.

**11**  The following day at approximately 01:00 hours the nursing notes indicate that the plaintiff still appeared very jaundiced then and was refusing his mother's breast. Nursing notes made at 02:30 hours indicate that the infant plaintiff appeared sick and very jaundiced. Nursing notes made at 08:00 hours indicate that the plaintiff appeared to have become more jaundiced during the night. At approximately 09:30 hours the infant plaintiff was examined by Dr. Craven and lab work was done. Dr. Craven noted his impression to be that the plaintiff's anemia was stable, his jaundice was progressing and his lassitude was moderate. At approximately 10:00 hours the nursing notes indicate that the plaintiff nursed well although he remained jaundiced and very quiet and sleepy.

**12**  Between 13:00 hours and 15:00 hours on that day, Dr. Craven noted that although the infant plaintiff nursed vigorously, he appeared more jaundiced and very sleepy. At 14:00 hours Dr. Craven made an unsuccessful attempt to obtain blood for bilirubin testing.

**13**  At approximately 15:30 hour on July 1st, 1978, Dr. Craven consulted with a physician in the intensive care nursery at Vancouver General Hospital. Inter alia it was recommended to Dr. Craven that he monitor the infant plaintiff's bilirubin levels, if possible, and also commence phototherapy, if possible. It was also suggested that antibiotics therapy be commenced which was done. The infant plaintiff continued to be observed and dealt with by Dr. Craven.

**14**  On July 3rd, 1978, at approximately 03:00 hours nursing notes indicate that the infant plaintiff's jaundice was very apparent, and at 06:00 hours nursing notes indicate that the plaintiff's colour had not improved.

**15**  The infant plaintiff was noted between 07:00 and 09:00 hours to be feeding poorly and had an elevated body temperature, although Dr. Craven noted that in his examination of the infant plaintiff that he had full active movements and good sucking ability.

**16**  At approximately 09:00 hours, Dr. Craven again attempted to obtain a blood sample from the plaintiff but was unsuccessful. Dr. Craven noted in his charts that he would consult the defendant, Leon Gniwesch (hereinafter called "Dr. Gniwesch").

**17**  On July 3rd, 1978, Dr. Gniwesch saw the plaintiff for the first time, and at approximately 09:30 hours he obtained a blood sample from the infant plaintiff.

**18**  At the time of this initial assessment, Dr. Gniwesch had received the results of blood sample testing, which recorded a bilirubin level of 12 mg%.

**19**  From his review of the infant plaintiff's chart it is submitted by the applicant in the motion before me that he would have thought that he was dealing with an infant who was getting better rather than an infant who was getting sicker or staying the same. Dr. Gniwesch thought that a possible reason for the improvement was the administration of antibiotics, which had been commenced the day before. In considering the etiology of the jaundice, Dr. Gniwesch did not think it was likely non-pathological or physiological jaundice because the bilirubin level of 12 mg% was too high for this.

**20**  Following his assessment of the infant plaintiff Dr. Gniwesch recommended that the infant plaintiff's jaundice be monitored pending the results of bilirubin testing the following day. He recommended that if the bilirubin level was up the following day that the infant plaintiff should be transferred to Dawson Creek and District Hospital for treatment as the Chetwynd General Hospital did not have the facilities to provide phototherapy or blood transfusions which treatment had been recommended to Dr. Craven by the physician at the intensive care nursery at Vancouver General Hospital.

**21**  On July 4th, 1978, the total bilirubin level was reported to be 15.0 mg%. The evidence placed before me at the hearing of this application indicates that the technician responsible for the testing of the blood sample, one Janet Grant, one of the defendants in the within action, has subsequent to the commencement of this lawsuit advised through her counsel that she believes she used the incorrect graph in analyzing the infant plaintiff's bilirubin sample on July 4th, 1978. She has advised that she used a "macro" graph, rather than a "micro" graph and that if she had used the correct graph, her analysis would have revealed a bilirubin count of approximately "30", rather than "15".

**22**  There is dispute in the expert medical evidence to be tendered at trial as to whether or not a bilirubin level of 12 mg% in an infant on the third day of birth is within the normal range. But on the 4th day there is no doubt that the information available to Dr. Craven on July 4th, 1978, even though, perhaps in error, certainly showed an increase in the bilirubin levels.

**23**  At 11:15 hours the infant plaintiff was transferred by Dr. Craven to the care of Dr. Alyward at the Dawson Creek and District Hospital because of progressive jaundice, anemia and weakness. Upon arrival at the Dawson Creek and District Hospital, emergency investigations were carried out which revealed that the plaintiff's bilirubin levels to be 45 mg%.

**24**  Arrangements were made thereafter to transfer the infant plaintiff's care to the intensive care nursery at Vancouver General Hospital (VGH) and he was flown out to Vancouver at that time. Upon arrival at VGH an exchange transfusion procedure was carried out which reduced the infant plaintiff's bilirubin count from 33 mg% to 13 mg%.

ISSUES

**25**  It is common ground that a high level of bilirubin is dangerous at various times in the life of a newborn. The damaging illness from a high bilirubin count is known as kernicterus. As I understand the plaintiff's position this condition would have occurred and the results have been directly connected to this condition which would not have occurred had it not been for the ***negligence*** of the defendants in identifying and adequately treating the infant plaintiff's high bilirubin readings.

**26**  Bilirubin is the product of the destruction of red cells after processing in the liver. Bilirubin at higher levels is toxic to the brain and treatment is generally instituted before or at 20 mg%. The initial treatment from mild elevation of bilirubin is phototherapy (by placing the baby under special fluorescent lights), as bilirubin is light sensitive. More serious elevations of bilirubin, particularly those resulting from blood group incompatibility, may require an exchange transfusion, a procedure which the baby's circulating blood volume is completely replaced. It is not seriously contested in the material that is well known that if high bilirubin levels are not treated, the resulting kernicterus would leave a surviving child with cognitive difficulties, athetoid cerebral palsy and deafness. The plaintiff presently has these permanent difficulties. With the passage of the plaintiff's life, post-delivery medical records are voluminous in that he has required treatment over the 25 years of his life. The plaintiff with the assistance of his college instructors and no doubt considerable effort on his part has graduated from two computer based diploma programs. Despite job applications being made by him he has been unable to find employment in the competitive marketplace, although most of his classmates with generally lower marks have been able to seek secure employment.

**27**  Against this backdrop the plaintiff submits that there will be relatively little conflict between medical experts because the plaintiff's disabilities are beyond doubt and are relatively easy to clarify. The plaintiff submits that the jury will be in the best position to resolving any conflicts in the medical evidence and be able to assess the evidence of lay and expert witnesses in accordance with the jury's function to try the facts.

**28**  The plaintiff submits that for the defendant to be successful in striking the jury notice, the court must find that the evidence establishes that the issues require the prolonged examination of documents or accounts, that the issues require scientific or local investigation, and that the issues are of an intricate or complex character.

**29**  The plaintiff submits on the authority of Nichols v. Gray [*(1978), 9 B.C.L.R. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F60C-X0SM-00000-00&context=) (B.C.C.A.) that only if the former is established should I proceed to exercise my discretion to either allow or disallow the trial by judge and jury to proceed.

**30**  The applicant defendant maintains that the 12 expert reports which have been served and which will be relied upon by the parties offer opinions on medical issues that are complex regarding the care provided by the applicant, Dr. Gniwesch, Dr.Craven, and the technicians. A review of the opinions that deal with the care received and the standard of care expected at the Chetwynd and District Hospital in 1978 are in conflict. Likewise a significant issue in this action involves the level of bilirubin at which therapy is required, the level of bilirubin at which damage occurs, the reliability of laboratory results on serum bilirubin levels and the causes of jaundice in the first 24 hours of life. A review of the various expert opinions which have been appended to the material appear to have opinions that conflict on these issues. There is no doubt that the trier of fact will be required to comprehend and assess the conflicting evidence from the numerous experts regarding when the infant plaintiff's serum bilirubin level first demonstrated a cause for concern and whether or not there was a continuing cause for concern. A very important issue to be determined relative to Dr. Gniwesch is when the causative damage occurred. Dr. Gniwesch was not the attending physician. He became involved with the treatment of the infant plaintiff at a determinable time. Inherent in the analysis of the medical scientific evidence would be an understanding of the material as to appreciating and determining at each specific point in time the causal effects of the high bilirubin levels. This will be especially important to the applicant who had limited involvement in the care of the infant plaintiff. It will be necessary for the trier of fact to fully comprehend the significance of the evidence relative to the timeline that is established. The significance of these findings by the trier of fact are demonstrated aptly at paras. 66 to 71 of the applicant's written submissions which I set out in detail.

1. One of the Plaintiff's experts in general practice, Dr. Blackman, states at p. 8 of his report as follows:

The consultation by Dr. Gniwesch on July 3 was appropriately sought. However, the record is fairly scanty and the gravity of the situation is not appreciated. I recognize he is misled by the inaccurate laboratory data, but the history and the obvious poor condition of Gregory at this stage should have led to a different conclusion . . .

1. On the other hand, Dr. Fritz, a general practitioner retained on behalf of Dr. Gniwesch opines that from a clinical standpoint, once the bilirubin level increases to above 10, it is very difficult to assess the level of bilirubin by observation alone. Thus, based upon the lab results and clinical picture, Dr. Fritz is of the opinion that it was reasonable for Dr. Gniwesch to conclude that no active treatment was indicted on July 3, 1978.
2. Similarly, Dr. David Riddell, a paediatrician retained on behalf of Dr. Craven, opines at p. 5 of his report that "because of the difficulty with subjective interpretation, it is usual medical practice to rely extensively on a blood test for bilirubin value" and that "treatment is based upon the laboratory value of bilirubin".
3. On another issue, namely the physiological and pathological causes of jaundice, Dr. David Riddell, paediatrician retained on behalf of Dr. Craven, opines at p. 5 of his report that the cause of the Plaintiff's jaundice was not clear, and that "until the fourth day the jaundice could be considered physiological".
4. On the other hand, Dr. G. Goertzen, one of the Plaintiff's experts in general practice, opines at p. 4 of his report that "the cause of jaundice in the first 24 hours in the newborn is the result of the destruction or dissolution of red blood cells, it is never physiological (ie. normal) and until proven otherwise, must be considered as such". On that issue, Dr. Goertzen states at p. 4 of his report as follows:

The most common cause of hemolytic disease of the new born is that associated with an Rh negative mother, sensitized with a previous exposure to Rh positive blood, pregnant with an Rh positive infant. Less frequent incompatibilities . . . include those of ABO where the mother is O and the baby is either A or B is most common. However, other combinations of ABO may also (although less commonly), be a cause. Other antigens like C or E account for less than 5% of hemolytic disease of the newborn.

1. Dr. Goertzen, general practice expert retained by the Plaintiff, opines at p. 4 of his report that the presence of urobilinogen in the urine in the second 24 hours of life would almost certainly suggest hemolytic disease of the newborn.

**31**  The plaintiff alleges that as a result of the ***negligence*** of the two named doctors, the two named technicians and the hospital society that he has suffered serious and permanent personal injuries, which are described in the statement of claim as follows:

1. permanent and severe brain damage;
2. severe spasticity in his arms and legs;
3. difficulty with walking and running;
4. poor balance;
5. hearing deficits;
6. speech and language difficulties;
7. visual deficits;
8. social and emotional deficits;
9. educational and vocational deficits and disabilities;
10. developmental and orthopaedic problems; and
11. detrimental effects on social development and personality.

**32**  In addition the plaintiff also claims that as a result of injuries sustained he has experienced and will continue to experience, pain and suffering, loss of enjoyment of life and amenities, financial losses and expenses including continuous past and future care, treatment and special education, and income loss and loss of earning capacity.

**33**  All of the existing defendants deny that they were negligent or in breach of contract.

**34**  There is a substantial volume of medical and other records concerning the plaintiff, not the least of which, document his progress through school and his life experiences for the past 25 years.

**35**  At the present time the plaintiff has tendered expert reports from six experts and the defendants have tendered a similar number of reports setting out their positions. It is not surprising that the expert evidence of the plaintiff's experts on the issue of standard of care and causation are in conflict with the expert evidence of the defendants.

**36**  The applicant submits that there are many intricate, complex and interconnected issues which will have to be determined in this proceeding. These issues, says the applicant, will have to be resolved by reference to, and following detailed consideration of extensive expert evidence concerning medical and economic matters. Based on the submissions I heard at the hearing of this matter the following issues will be the main issues that will have to be considered and resolved by the trier of fact:

1. What was the appropriate standard of care in 1978 of a general practitioner practicing in a rural area in treating an infant who is jaundiced within the first 24 hours of birth, and did the attending physician, Dr. Craven, meet the standard of care expected of him;
2. What was the appropriate standard of care in 1978 of a general practitioner practicing in a rural area in treating an infant with jaundice with a bilirubin reading of 12 mg% on the third day after birth, and did Dr. Gniwesch meet the standard of care expected of him;
3. What was the appropriate standard of care in 1978 of a laboratory technician in obtaining and analysing a blood sample for bilirubin levels, and did the technicians meet the standard of care expected of them.

**37**  In addition to these general questions as they relate to each of the named defendants in these proceedings, there will also have to be resolution of more specific issues such as whether or not Dr. Craven or Dr. Gniwesch ought to have developed a differential diagnosis in light of their own observations of the infant plaintiff notwithstanding the reports being obtained by the laboratory. In particular, a question that will arise for resolution by the trier of fact is whether or not it was reasonable for Dr. Gniwesch to conclude that the infant plaintiff's jaundice was due to an infectious process.

ANALYSIS

**38**  Applying the criteria set out in Nichols v. Gray, supra, I am satisfied that the issues involved in this case as they pertain to the alleged liability of all defendants, and in particular the liability of the applicant will require the trier of fact to make a scientific investigation. That leads to the question of whether the scientific investigation which will need to be undertaken by the jury can be made "conveniently". In Wipfli v. Britten et al [*(1981), 32 B.C.L.R. 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1PC-00000-00&context=), McEachern, C.J.S.C. (as he then was) in the course of his judgment setting aside the jury notice held as follows at pp. 347 and 349:

Convenience, in the sense in which that word is used in the rule, does not depend solely upon whether or not the jury can be made to understand the evidence.. . . What is required before it is convenient to have a scientific investigation made with a jury is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.

. . .

I do not believe that it will be convenient to make this scientific investigation with a jury. If the trial proceeds with a jury, and if it should last 25 days or thereabouts, the members of the jury whose note-taking ability is at least questionable will listen, usually in silence, to many days of scientific evidence about the matters mentioned above. They will then hear submissions pro and con which will compress this case the way counsel choose to compress it but not, perhaps, the way the jury would like to have it discussed. The jury will have practically no opportunity (except possibly for a few hesitant questions), to take part in the trial, and the jury will have no verbal interaction or opportunity to discuss this case with the witnesses or with counsel, as a judge has. The jury will then hear the judge's best efforts to analyze and simplify the case, but it is doubtful if the case can properly be explained in a protracted monologue, keeping in mind that I have mentioned only some of the issues in the case.

. . .

I do not believe that the time-honoured process of jury trials, which may be eminently sensible for some cases, can be described as "convenient" in this case either in the sense that I have described or in any other sense of that word. This case cries out for unhurried and thoughtful consideration. There must be a weighing of alternatives, and an opportunity to reflect upon these alternatives. The first decision the jurors reach may well be the right one, but all these parties, including the various defendants as between themselves, are entitled to have the case considered and reconsidered before a final decision is irrevocably announced.

**39**  McEachern, J.'s statement in Wipfli, supra, was affirmed by Braidwood, J. (as he then was) in Nikal et al v. Caira et al, [*[1993] B.C.J. No. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1NR-00000-00&context=), February 10, 1993, Vancouver Registry No. C920490. Braidwood, J. described at pps. 9 and 10 some factors to be considered when determining whether a scientific investigation can be conveniently made with a jury:

I am of the opinion based on the above principles that this is not an appropriate case to be tried with a judge and jury.

Many of the elements considered by the cases are present in the case at bar, including: the duration of the trial; the need for leisurely and thoughtful consideration in an experienced way; the complexity and volume of the evidence to be heard; consideration of conflicting medical reports; the probability that extensive discovery evidence will be read into the record; the fact that there are 6 individual defendants and 1 corporate defendant involved, there is more than one standard of care to be applied considering the issue of ***negligence***; the use of unfamiliar medical terms; and ultimately, of course, the issues to be resolved.

It may well be that the plaintiffs are content to rest their case against Dr. Caira on matters of inattention which may have resulted in a better and more complete diagnosis. But the case for the defendant does not stop there.

They will no doubt prove the standards of approved practice expected of a general surgeon in a community hospital and what indeed would have been the outcome of more attentive care. Would there have been signs that would likely have changed the diagnosis? Would there have been tests that could have been performed? In other words, even if one could say the doctor was guilty of inattention (and for this purpose, of course, I make no such suggestion), what would be the probable outcome of greater attention? Would it have made any difference in the patient's treatment?

. . .

It is the accumulation of the many issues in this case as it relates to the liability of each of the participants and to the issue of damage which has led me to conclude that the issues require a scientific investigation which cannot be made conveniently with a jury. Furthermore, the issues are of an intricate and complex character so that the case ought not properly be heard by a court sitting with a jury.

**40**  As indicated earlier by counsel, the trial of this matter is scheduled for 25 days. If liability is found, apportionment will be necessary and the trier of fact will be required to weigh the conflicting expert evidence I have referred to which involves complex scientific matters. The apportionment of liability amongst the multiple defendants is by itself an intricate and complex issue.

**41**  I am satisfied that a jury trial in this proceeding is not convenient. A cursory review of the expert opinion material placed before me on the application confirms that the unhurried and thoughtful consideration of a judge sitting without jury will be required for justice to be dispensed in this case. In coming to this conclusion I am mindful of the comments McEachern, C.J. made in Wipfli, supra.

THE ISSUES ARE OF AN INTRICATE OR COMPLEX CHARACTER

**42**  The plaintiff's counsel has suggested that this is one of the more straightforward types of medical malpractice cases he has been involved in and that the use of medical experts by the parties would assist in reducing the complexity, which would otherwise flow from the introduction of the voluminous medical records into evidence. He further submits that the issues of liability and causation are relatively simple and capable of being explained in understandable terms to a lay jury. The plaintiff has, in my view, not really considered the impact of the multitude of issues in this case that make it more intricate or complex. These are issues of causation, apportionment of fault, and the issues relating to assessment of damages as they arise in this case. Relative to these issues I am satisfied that the comments of Chief Justice McEachern in Wipfli, supra, apply with equal force to this case where he said at pps. 350 to 351:

. . . I believe some of the issues in this case are intricate or complex or both. I need only mention three matters:

1. The issue of causation: What caused this child's overwhelming disabilities? Were they all caused by congenital or prenatal misadventure or by some other pre-existing distress causing the excretion of meconium (or was meconium excreted because of oxygen starvation resulting from labour), or by mismanagement in delivery of twin A, or by the injection of oxytocin, or by the inhalation of meconium after birth? Or were these disabilities caused partly by some of these agencies and partly by others? These are intricate or complex issues, involving a consideration of scientific evidence in many different disciplines of medicine.
2. The issue of apportionment of fault. Are all these disabilities properly attributable to the failure of some or all of the defendants . . ., or was it solely the fault of the obstetricians, or of the anaesthesiologist, or of the pediatricians, or of the hospital staff? And if some or all are liable, in what percentage should fault be apportioned?
3. The issues relating to the assessment of damages. How is the cost of future care and the prospective wage loss to be calculated, what economic factors must be considered, and what discounts should be applied for the various contingencies likely to affect this plaintiff?

In my view, these three issues, which I have inartistically stated, are all of an intricate or complex character whether they are considered separately or collectively. On this ground as well I exercise my discretion by ordering that the trial be heard by the court without a jury.

**43**  In this lawsuit I am satisfied that considering the issues surrounding the events of the first few days of the plaintiff's life, the length of trial, the numerous and conflicting expert reports, and the difficulties inherent in quantifying the plaintiff's claims, that these multiplicity of issues make it inconvenient to have the matter tried by a judge with jury.

**44**  It is clear that certain critical facts upon which the plaintiff's claim is made against the various defendants will need to be resolved. In particular the issue of whether there has been a breach of the applicable standard of care owed to him at the time and under the circumstances, and if so, by whom will need to be determined. I am satisfied from the cursory review of the medical evidence that the trier of fact will have to make factual findings regarding the clinical presentation of the infant plaintiff to Drs. Craven and Gniwesch during the first few days of his life. Factual findings will also have to be made with respect to the level of bilirubin reported on July 3rd, 1978 and whether that result was accurate. Apportionment of fault may or may not be required, but if it is required it will be dependent on the scientific and medical evidence accepted by the trier of fact.

**45**  Although the plaintiff has glossed over this element, it is of particular importance to each of the defendants in this case.

**46**  I also accept that because of the inter-relationship of the various defendants and their obligations there are complex causation issues that arise in this case. One critical issue is whether there was any culpable delay in transferring the infant plaintiff to a hospital equipped to perform phototherapy, and if so, did this cause or contribute to an adverse outcome.

**47**  Similarly if there was a breach of duty, when did it occur and who was responsible for it? This finding will be tied in by necessity with the trier of fact determining when irreversible damage to the infant plaintiff occurred, i.e. had the irreversible damage to the infant plaintiff already taken place by the time Dr. Gniwesch provided care and treatment to him, and if not, how much damage had the infant plaintiff sustained by that point and was that damage at that point reversible?

**48**  Similarly I have concluded that the assessment of damages in this case will also be very complex involving cost of future care, impairment of earning capacity, lost income, assessment of economic evidence, life expectancy, etc. The task of applying economic and actuarial concepts and the assumption in principles upon which they are based will be difficult particularly for individuals unfamiliar with them. The trier of fact will be required to comprehend and resolve evidence based on different underlying analyses regarding the plaintiff's life expectancy.

**49**  Mr. Justice Shaw, in setting aside a jury notice in LaFrance v. Prince Rupert Regional Hospital et al, [unreported] January 24, 1992, Prince Rupert Registry No. S.C. 5853 said this best at pps. 4 and 5 thereof:

The plaintiff's counsel has taken the position that the quite difficult and sophisticated damages issues can be handled by a jury. I do not think it is necessary nor advisable to isolate out each separate issue and pose to myself the question as to whether that issue is one that can be conveniently handled by a jury or is too complex to be handled by a jury. What appears to me to be the overriding consideration here is that the case as a whole is too complex, in my view, to be conveniently handled by a jury. One of the submissions made by defence counsel was that the case will involve the understanding and retention of the evidence which has been led up to any specific time during the course of the trial in order to fully appreciate the evidence which is coming in at that specific time. This, over the period of a long trial, in my view, is a proper consideration to take into account. Whereas the judge will have detailed notes and on a case of this nature will likely be reviewing his notes so that he or she will be alive and fully alive to each point as it comes out in evidence, it is far more difficult for members of a jury to take specific notes, detailed notes, and to retain nuances of evidence as that evidence comes in.

CONCLUSION

**50**  As indicated, I have concluded that this case will involve the scientific investigation which cannot be conveniently made by a judge sitting with jury. The fatality of the complex, intricate and interwoven factual, legal, medical and economic issues renders this case unsuitable for such a trial. I, therefore, order that the trial of this matter will be heard by a judge without a jury.

**51**  The costs of the motion will be in the cause.

CHAMBERLIST J.

**End of Document**

[***British Columbia v. Vancouver (City), [2005] B.C.J. No. 1140***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X10S-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Goepel J.

Heard: April 22, 2005.

Judgment: May 19, 2005.

Vancouver Registry No. S001722

**[2005] B.C.J. No. 1140** | 2005 BCSC 747 | 46 B.C.L.R. (4th) 324 | 11 M.P.L.R. (4th) 141 | 139 A.C.W.S. (3d) 572 | 2005 CarswellBC 1196

Between Her Majesty the Queen in Right of the Province of British Columbia, plaintiff, and City of Vancouver, defendant

(26 paras.)

**Case Summary**

**Municipal law — Liabilities of municipality — Tortious liability — Nuisance — Actions by or against municipalities — Types of actions against municipalities — Flooding — Capacity of municipality to be sued — Statutory interpretation — Statutes — Construction — Legislative intent — Tort law — Nuisance — Injury to property — Defences — Statutory authority — Defences — Disclaimer or exclusion or risk.**

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| Action by the Province of British Columbia for damages in nuisance against the City of Vancouver. A liquor store operated by the Province in the City was damaged by flooding that resulted from a sewer back-up. At issue was whether section 294(9) of the Vancouver Charter provided a defence to the claim. It stated that the City was not liable for any action based on nuisance that resulted from the breakdown or malfunction of certain named systems. One of those systems was a sewer system.  HELD: Action dismissed.  The legislative history of section 294(9) made it clear that it was enacted to protect the municipality from liability for nuisance claims. It did not provide blanket immunity from such claims but only those that resulted from the breakdown or malfunction of the specified systems. Section 294(9) provided a complete defence. The damages that gave rise to this action resulted from the malfunction of the sewer system. |

**Statutes, Regulations and Rules Cited:**

An Act to Amend the Vancouver Charter, S.B.C. 1987, c. 52

Interpretation Act, [*R.S.B.C. 1996, c. 238 s. 8*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-JC0G-61K8-00000-00&context=)

Local Government Act, R.S.B.C. 1996, c. 323 s. 288

Municipal Act, R.S.B.C. 1979, c. 290 s. 755.3

Municipal Amendment Act (No. 1), S.B.C. 1987, c. 14

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=)(9), s. 294(9)(a)

**Counsel**

Counsel for the Plaintiff: J.G. Morley

Counsel for the Defendant: F. LeTourneux

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| **GOEPEL J.** |

INTRODUCTION

**1**  On October 19, 1999, a sewer back-up caused flooding in a liquor store operated by Her Majesty the Queen in Right of the Province of British Columbia (the "Province"). The Province now brings this action in nuisance against the City of Vancouver (the "City"). The only issue is whether s. 294(9) of the Vancouver Charter, *S.B.C. 1953, c. 55* (the "Charter"), provides a defence to the claim. That section provides as follows:

The city or any officer or employee thereof is not liable in any action based on nuisance or the rule in Rylands v. Fletcher (1866), L.R. 1 Ex. 265, or in any claim or action for injurious affection where the damages giving rise to the action or claim arise directly or indirectly out of the breakdown or malfunction of:

1. a sewer system;
2. a water system;
3. a drainage facility or system; or
4. a dyke or road.

BACKGROUND

**2**  The action proceeded by way of agreed statement of facts.

**3**  The Province operates a liquor store at 3436 Kingsway, Vancouver, B.C. (the "store"). Next to the store runs a sewer main operated and maintained by the City. The store is connected to the sewer main by a lateral sewer connection.

**4**  On October 19, 1999, the store started to flood with water and sewage. The flood was caused by an obstruction in the sewer main. The exact nature and cause of the obstruction is unknown, other than the fact that members of the City's crew who saw it when it was finally freed referred to it as a "white mass." As a result of the flooding, the Province incurred damages of $30,978.18.

LEGISLATIVE HISTORY

**5**  The parties agree and the authorities have made clear that the back-up of water from an obstruction of the main line of a storm sewer constitutes an actionable nuisance: Royal Anne Hotel Co. Ltd. v. Ashcroft (Village), [*[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=) (B.C.C.A.).

**6**  In Royal Anne, the Court rejected the defence of statutory authority, concluding that it was only available if the escaped sewage was an inevitable consequence of the construction and operation of the sewer. The Court went on to note at p. 762:

... A municipal council enjoys no general immunity from an action for nuisance. There are many cases where municipal Governments have been held liable in nuisance notwithstanding the fact that the nuisance resulted from works done for the benefit of the community at large.

**7**  In 1987, subsequent to the decision in Royal Anne, the legislature amended the Charter and the Municipal Act, R.S.B.C. 1979, c. 290, to provide local governments with a defence to certain nuisance claims. Section 294(9) of the Charter was introduced by way of Private Bill 401 (An Act to Amend the Vancouver Charter, S.B.C. 1987, c. 52). Section 755.3 (the Municipal Act equivalent) was introduced as part of Bill 30 (The Municipal Amendment Act (No. 1), S.B.C 1987, c. 14).

**8**  The provisions were adopted without amendments. The amendments to the Municipal Act were introduced and commented on by the Minister of Municipal Affairs. In introducing Bill 30 at First Reading, the Minister said:

The liability provisions in this bill respond to the urgent requests of the Union of British Columbia Municipalities. Recent trends in liability insurance premiums have underscored the vulnerability of local governments and their officials. The liability provisions of this bill have been designed to balance increased protection for local government with adequate protection for individual citizens. This new balance should help to stabilize and perhaps eventually reduce municipal liability insurance costs without sacrificing fairness.

(Debates of the Legislative Assembly (Hansard), May 14, 1987, p. 1182.)

**9**  While the bill was in committee, the Minister was questioned by a member of the Opposition, who expressed concern that the provision might rob citizens of their recourse against municipalities in case of damage caused by municipal sewer systems. The Minister responded, in part:

In legal terms, "nuisance" is "interference with the use of enjoyment of property." "Nuisance" can occur even if there is no ***negligence***. It goes on to say that there are many kinds of nuisance. Bill 30 only deals with the kind of nuisance that results from the breakdown or malfunction of a public work which has been designed with care, built with care and maintained with care. Bill 30 seeks to balance the interests of the property owners and taxpayers, and we have a scenario here of how we see it working.

If property damage results from inadequate care in the design of a public work, the municipality can be liable by reason of ***negligence***. If property damage results from inadequate care in the construction of a public work, the municipality can be liable by reason of ***negligence***. If property damage results from inadequate care in the maintenance of a public work, and I think this is the situation you were referring to, the municipality can be liable by way of ***negligence***.

On the other hand, if there is no ***negligence***, a municipality cannot be held liable for property damage that results exclusively from nuisance.

(Debates of the Legislative Assembly (Hansard), May 26, 1987, p. 1359.)

JUDICIAL HISTORY

**10**  Section 294(9) of the Charter has not been judicially considered. The cognate section of the Municipal Act (now s. 288 of the Local Government Act, *R.S.B.C. 1996, c. 323*) has received judicial consideration on several occasions.

**11**  In Moffat v. White Rock (City) [*(1992), 13 M.P.L.R. (2d) 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2DM-00000-00&context=) (B.C.S.C.), roots and plastic bags blocked a sewer line. Macdonald J. held that such a blockage was a malfunction within the meaning of s. 755.3 of the Municipal Act and the section operated as a bar to the plaintiff's claim in nuisance. Macdonald J. distinguished the decisions in Medomist Farms v. Surrey [*(1990), 1 M.P.L.R. (2d) 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M14P-00000-00&context=) (B.C.S.C.) and Kerlenmar Holdings v. Matsqui [*(1989), 40 B.C.L.R. (2d) 230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B043-00000-00&context=) (S.C.) on the grounds that in those cases the systems were functioning as designed.

**12**  Kerlenmar dealt with the flooding of the plaintiff's land. The District of Matsqui had constructed a storm drainage system to accommodate surface run-off. As a result of urbanization, increased volumes of peak flows in the drainage system caused the creek located on the plaintiff's land to overflow and flood his agricultural land. The court held that the municipality could not rely on s. 755.3 of the Municipal Act because the district's drainage system had not suffered either a "breakdown" or a "malfunction" as it had been functioning as anticipated. The failure arose because the system's capacity could not handle increased flows of water.

**13**  The situation was similar in Medomist Farms. The plaintiff owned agricultural lands adjacent to a drainage ditch operated by the defendant district. As a result of residential development permitted by the district on lands located upstream from the drainage ditch, water which had previously been absorbed in the ground could no longer be absorbed in those areas covered by asphalt and houses, thereby increasing the water flow in the drainage ditch. Eventually the ditch overflowed and the plaintiff's lands were flooded.

**14**  The district unsuccessfully sought the protection of s. 755.3 of the Municipal Act. The trial judge concluded that the overflow was not caused by a breakdown or malfunction. The system performed under increased flow as expected.

**15**  Medomist Farms was appealed. The appeal was heard subsequent to the decision in Moffat and is reported at [*(1991), 62 B.C.L.R. (2d) 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JNY7-X389-00000-00&context=) (C.A.). The Court of Appeal upheld the findings of the trial judge. In dismissing the district's appeal, the Court stated at pp. 171-72:

In my opinion, it is not correct to say that the overtopping of the banks of Hook Brook resulted from the faulty functioning of that water course. On the evidence at trial, Hook Brook functioned as it was intended to function but the flow of water from the upland area of Sullivan Station so increased that although Hook Brook continued to function, it did not have the capacity to contain within its banks the increased flow of water. This incapacity did not result from any fault in the functioning of Hook Brook. Therefore, I conclude the trial judge arrived at the correct conclusion that s. 755.3 did not afford the Municipality a defence.

**16**  In Port Alberni (City) v. Moyer [*(1999), 65 B.C.L.R. (3d) 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21YJ-00000-00&context=) (S.C.), Burnyeat J. considered whether the section (by then s. 288 of the Municipal Act) provided statutory immunity to a municipality in the situation where gravel build-up in the sewer system had resulted in flooding. At [paragraph] 20, he held:

The question at issue in the case at bar is whether the build-up of gravel constituted a common occurrence within the sewer system and one which the system, if functioning properly, should have handled. The build-up of gravel was not something which a properly functioning sewer system would be expected to handle. In fact, gravel build-up was one of the primary reasons for inspection of lines which handled both sewage and street run-off. Had the sewer been inspected and the build-up located and cleared, it would have functioned properly and normally. The problem which caused the backup and subsequent damage was not a failure of the sewer "to function in a normal and satisfactory manner". The sewer system functioned as it was intended to, but it could not do so effectively clogged with gravel. There was no malfunction. Therefore, the City is unable to claim that the provisions of s. 288 create a defence to this claim.

**17**  In Port Alberni, the case came before the court as an appeal from a decision of a Provincial Court judge who had found the city liable in ***negligence***. The section does not apply to ***negligence*** actions. Burnyeat J.'s comments concerning the section are clearly obiter.

**18**  Burnyeat J.'s comments were referred to with apparent approval by Chamberlist J. in Form-Rite Contracting Ltd. v. Prince George (City) [*(1999), 69 B.C.L.R. (3d) 372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4D3-00000-00&context=) (S.C.) and Wong J. in Spika v. Port Alberni (City) [*(2002), 29 M.P.L.R. (3d) 261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G13F-00000-00&context=) (B.C.S.C.). Both of those cases involved applications under Rule 18A. In each case, the judge found that the matters were not suitable for determination by summary trial. Their comments on the section were obiter and are not binding on me. I note that Burnyeat J., Chamberlist J. and Wong J. were not referred to the legislative debates concerning the section. Further, neither Burnyeat J. nor Chamberlist J. was referred to Moffat.

DISCUSSION

**19**  The Supreme Court of Canada has endorsed E.A. Driedger's approach to statutory interpretation that "the words of an act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87): A.U.P.E. v. Lethbridge Community College, [*238 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B114-00000-00&context=) (S.C.C.).

**20**  Such an approach is consistent with s. 8 of the Interpretation Act, *R.S.B.C. 1996, c. 238*, which states:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

**21**  Although the legislative history cannot be used to interpret the specific provisions in the act, it is admissible for the purpose of showing the mischief that the legislature was attempting to remedy with the legislation: R. v. Heywood, [*[1994] 3 S.C.R. 761*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3G9-00000-00&context=); Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways), [*200 D.L.R. (4th) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F7G6-63G6-00000-00&context=) at [paragraph] 76 (B.C.C.A.).

**22**  In this case, the legislative history makes clear that the mischief that the legislative amendment was to attempting to remedy was municipal liability for nuisance claims. In providing that remedy the legislature did not provide local governments with blanket immunity from all nuisance claims. They chose instead to limit that immunity to claims that arose directly or indirectly from the breakdown or malfunction of certain named systems.

**23**  "Breakdown" and "malfunction" convey different meanings. The Canadian Oxford Dictionary defines "breakdown" as a "mechanical failure", while "malfunction" is defined as a "failure to function in a normal or satisfactory manner". "Function", in turn, is defined as an "activity by which a thing fulfils its purpose".

**24**  The purpose of a sewer system is to take sewage from point "A" to point "B". In this case, because of an unknown obstruction, the sewer system failed to take sewage from point "A" to point "B". The obstruction prevented the system from fulfilling its purpose in a normal or satisfactory manner, which by definition constitutes a malfunction. This situation can be readily contrasted with that in Medomist Farms where the drainage ditch continued to function.

**25**  I find that the damages giving rise to this action arose directly or indirectly out of a malfunction of the sewer system. Section 294(9)(a) of the Charter provides a complete defence to the claim. The Province's claim is dismissed.

**26**  Unless there are matters of which I am not aware, the City is entitled to its costs on scale 3. If either party seeks a different cost result, they should make submissions in writing within 30 days of the date of this judgment. Any response submission should be filed within 10 days thereafter.

GOEPEL J.

**End of Document**

[***Broom v. Royal Centre, [2005] B.C.J. No. 2532***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S2K6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Hood J.

Heard: September 30, 2005.

Judgment: November 23, 2005.

Vancouver Registry No. S030567

**[2005] B.C.J. No. 2532** | 2005 BCSC 1630 | 16 C.B.R. (5th) 167 | 26 C.P.C. (6th) 130 | 145 A.C.W.S. (3d) 408 | 2005 CarswellBC 2788

Between Lisa Broom, plaintiff, and The Royal Centre, The Business of, Brookfield Properties (Vancouver) Ltd., and 607201 B.C. Ltd., Brookfield Properties (Vancouver) Ltd., 607201 B.C. Ltd., Safeway Holdings (Alberta) Ltd., formerly known as Toby Creek Consulting Inc. and Focus Building Services Ltd., SMS Modern Cleaning Services, Inc. and John Does 2 to 10, defendants

(55 paras.)

**Case Summary**

**Civil procedure — Parties — Change of name — Appeal by Broom from an order setting aside her amended statement of claim as it related to SMS Modern Cleaning allowed.**

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| Appeal by the plaintiff Broom from an order setting aside her amended statement of claim as it related to SMS Modern Cleaning -- The statement of claim, in which Broom was claiming damages for injuries suffered in a slip and fall, had been amended without leave to replace the named defendant, John Doe 1, by the real name of SMS -- The Master determined Broom was required to obtain leave of the court to amend the statement of claim even though the requirements of Rule 24(1)(a) of the British Columbia Supreme Court Rules were met -- SMS had been assigned into bankruptcy -- HELD: Appeal allowed -- Leave was not required to correct the misnomer -- Broom was not amending to add a new party -- Reading the statement of claim as a whole and in the circumstances known to it, SMS would have had no doubt that it was being sued as the maintenance company responsible for the maintenance of the premises at the time of the accident, although being named at the time as John Doe -- Leave was granted nunc pro tunc to commence the action against SMS. |

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, [*R.S.C. 1985, c. B-3 s. 69.3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9P1-JF75-M109-00000-00&context=)

British Columbia Supreme Court Rules Rule 2, Rule 15, Rule 15(5), Rule 15(5)(a), Rule 19(24), Rule 24, Rule 24(1), Rule 24(1)(a), Rule 24(4), Rule 24(6), Rule 31, Rule 31(5)

Limitation Act, R.S.B.C. 1990, c. 266 s. 4

**Counsel**

Counsel for Plaintiff/Appellant: R.A. Holness

Counsel for Defendant SMS Modern Cleaning Services Inc.: S.A. Braun

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| **HOOD J.** |

**1**   This is an appeal from an order of a learned master of this Court setting aside the amended statement of claim dated April 14, 2003, as it relates to SMS Modern Cleaning Services Inc. ("SMS"). The statement of claim had been amended without leave pursuant to the provisions of Rule 24(1)(a) of the Rules of Court by which the named Defendant, John Doe 1, was replaced by the real name of that Defendant, SMS. In his brief oral Reasons, His Honour notes that the issue before him "is as to the application of the doctrine, if you will, of misnomer".

**2**  After considering two decisions of this Court where an application was before the Court, and Rule 24(1)(a) therefore was not considered, Happy Investments Management Ltd. v. Dorio et al [*(1988), 23 B.C.L.R. (2d) 245*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F06F-22MV-00000-00&context=), a decision of Madam Justice Southin, when in this Court, and Oldridge v. North and West Vancouver Hospital Society [*(1997), 44 B.C.L.R. (3d) 337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M241-00000-00&context=), a decision of my brother Edwards J., His Honour gave the following reasons for his decision:

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|  | [7] |  | The common ground appears to be that an application is contemplated being made to the Court, and the point by counsel for SMS is that no application was made in this instance. |  |
|  | [8] |  | Counsel on behalf of the Plaintiff points out that sub-rule (a) of Rule 24(1) was not considered by either of the judges as, of course, before them was an application. |  |
|  | [9] |  | I am satisfied that the decision of Madam Justice Southin in Happy Investments Management comes closer to reaching the conclusion that an application must be made where there is misnomer, then one should be satisfied that in an instance of misnomer there can be amendment made without leave of the Court, provided it is before delivery of the notice of trial. I am satisfied, therefore, that the application brought should be granted. |  |

**3**  Counsel agree that in order for the Appellant to succeed, she must show that the learned master was clearly wrong when he determined that the Plaintiff was required to obtain the leave of the Court to amend the statement of claim "where there is misnomer", even though the requirements of Rule 24(1)(a) were met. The only issue before me then, as stated by counsel, is whether Rule 24(1)(a) entitled the Plaintiff to amend the writ and statement of claim, to substitute SMS for John Doe 1, without leave of the Court.

**4**  There is a second issue involving the bankruptcy of SMS, which I will briefly return to in a moment.

**5**  It is conceded that when the amended pleadings were filed to replace John Doe 1 with the Defendant SMS, no notice of trial had been filed. It is also noted that at the time the writ and statement of claim were amended and served, no limitation period had accrued. A limitation issue only arises in the event that the master's decision is upheld, and, as submitted by counsel, the original pleadings are restored, effectively removing SMS as a party. In that event, it would seem that any proceedings against SMS under Rule 15(5)(a) would give rise to limitation considerations.

THE NARROW POSITIONS OF THE PARTIES

**6**  Mr. Holness, for the Plaintiff/Appellant, (the "Plaintiff") argues that Rule 24(1(a) was never considered by Madam Justice Southin in Happy Investments; that the case cannot stand for the proposition that amending a misnomer requires leave despite Rule 24(1)(a), thus extinguishing the rights of the Plaintiff under the Rule. He says that this is a case of misnomer. The Defendant SMS was named in the statement of claim by description. It is not a case of adding a new party which would require that an application be made under Rule 15(5)(a). Counsel relies on the decision of the Court of Appeal delivered by Bull J.A. in Jackson v. Bubela et al [*(1972), 28 D.L.R. (3d) 500*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFKM-627B-00000-00&context=) (B.C.C.A.), as the "closest case", a case which I understand was not referred to the master.

**7**  Ms. Braun, for the Defendant, SMS, submits that the amendment to the writ of summons and statement of claim, without leave of the Court, was a nullity, and therefore set aside. She says that the issue of whether the Plaintiff was attempting to correct a misnomer, or add a party, is not an issue on the appeal. It is a red herring. She says:

The Court has discretion to correct a misnomer substituting a named defendant for John Doe pursuant to Rule 24 or adding a party pursuant to Rule 15. However, in both cases, leave is required and it is up to the Court to determine whether it is a misnomer or adding a new party as that decision will impact a limitation period defence by the proposed defendant. The sole issue is whether the plaintiff required leave to amend her writ of summons and statement of claim to name SMS as a defendant.

(My emphasis added).

Counsel also relies on Jackson, as well as Happy Investments. It will be seen that I am unable to agree with the submission that leave is required, which seemingly is contrary to the plain meaning to be given to the words of the Rule, and would restrict its application. I am also unable to agree with the submission that the question of misnomer is a red herring and need not be considered on this application. In my view, I must determine whether or not the naming of John Doe in the case at Bar is merely a misnomer, as opposed to an application to add a party, in order to determine whether or not leave was necessary.

**8**  In Oldridge the important distinction between misnomer and an application to substitute a correct defendant is discussed at p. 340. It is noted that the distinction is often vital because a limitation period may have accrued in favour of a defendant sought to be added, which would not apply in the case of misnomer, where a defendant has been mis-described. An amendment to the style of cause to correct a misnomer of one of the parties will be allowed after the expiration of the limitation period. The correction of the misnomer does not prejudice the other party because he was an identifiable party in the pleadings at the time that the action was commenced. The amendment simply corrects the misnomer by setting out his actual name.

**9**  Happy Investments, in my view, does not support the position of SMS, and is clearly distinguishable. There Madam Justice Southin had before her an application pursuant to Rule 24(1) to substitute one Melvin Robinson as a defendant for John Doe, or, alternatively, under Rule 15(5) that he be added as a defendant. Her Ladyship commenced her Judgment as follows:

I approach the matter this way:

1. If the naming of John Doe is merely a misnomer, then its correction does not give rise to any limitation question, although the plaintiffs may have to bring an application under Rule 9(1) for renewal of the writ for if it is a misnomer then Mr. Robinson was a party to the action from the time John Doe was first named and the one year for service expired in 1986.
2. If it is not merely a misnomer and, in truth, this is an application to add Mr. Robinson, a question arises under s.4(1) of the Limitation Act as that section was explained by the Court of Appeal in Lui v. West Granville Manor Ltd. [*11 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3V4-00000-00&context=), [*[1987] 4 W.W.R. 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3V4-00000-00&context=), [*20 C.P.C. (2d) 166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-F7ND-G3V4-00000-00&context=).

(My emphasis added).

**10**  Her Ladyship then dealt with the correction application founded on misnomer. After noting that there was no rule relating to misnomer "as such", Her Ladyship pointed out that if there is a misnomer, the Court can grant leave under Rule 24(1). She did not say directly, or by implication, that where there is misnomer a plaintiff cannot amend his writ and statement of claim, without leave of the Court under Rule 24(1)(a) and substitute the defendant's real name for the misnomer. She then stipulated that the only issue before her on the application was: "... upon what considerations should the discretion under this Rule be exercised to make the change which the Plaintiffs seek". She answered the question:

In my opinion, these applications, whether there is a misnomer or not, upon which I make no finding, should not be granted simply because they are brought after the expiry of the limitation in circumstances where it is clear the plaintiffs could have discovered who the inspector was and if they had proceeded diligently before the limitation period expired.

(My emphasis added).

**11**  I pause to observe at this point that Madam Justice Southin was concerned with much unexplained delay and languor on the part of the applicant/plaintiff, which was seen as being tantamount to prejudice, which is not the case here. It will be seen that in this case the Plaintiff and her solicitor encountered difficulties in ascertaining SMS's name as the company responsible for the maintenance of the subject premises at the time that the accident occurred; and, perhaps even more importantly, that the problem was substantially contributed to by SMS. This is not a case where the Court can find that the amendments were made in circumstances where it is clear that the Plaintiff could have discovered earlier that SMS was the sought after maintenance company, if they had proceeded diligently at that time. On the contrary, the amendments were made less than three months after the original writ and statement of claim were filed, and after the Plaintiff's solicitor was finally able to ascertain that SMS was the maintenance contractor at the time of the accident.

**12**  It seems to me as well, on the basis of recent authorities, such as Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. [*(1996), 19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) (C.A.), that even if there has been some lack of diligence or delay on the part of the Plaintiff, that this should not necessarily be determinative and the amendment refused. These would be only some of the factors to be considered. The most important factor in my view would be whether or not the Defendant has been substantially injured by the misnomer and the correction of his name. And there is always the overriding question of what is just and convenient in the circumstances. The rationale for allowing amendments is still to enable the real issues between the parties to be determined. The practice fulfills the fundamental objects of the civil rules which is to ensure there is just, speedy and inexpensive determination of every proceeding on the merits. See the decision of the Court of Appeal, delivered by Rowles J.A. in Langrat 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=).

**13**  Finally, I refer to the decision of the Supreme Court of Canada in Ladouceur v. Howarth [*(1973), 41 D.L.R. (3d) 416*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B07Y-00000-00&context=) (S.C.), wherein Mr. Justice Spence, speaking for the Court, said at p. 420 that the prime principle in dealing with irregularities in the style of cause was that the Court should amend where the opposite party has not been misled, or substantially injured by the misnomer. There is no evidence before me that SMS has been misled in any way, or that it has been substantially injured. The evidence, and law, is to the contrary. At the material time SMS knew that since about 1999 it had the contract with the owners of the premises to do the maintenance work and in fact was doing the work using Focus Building Services Ltd., ("Focus") and the employees of Focus. SMS probably knew as well that the Plaintiff's solicitor was trying to ascertain the actual name of the company responsible for the maintenance work, having only named the previous maintenance companies in the action. And SMS, having been identified in the pleadings as a person "contracted by the owners at all material times to clean the premises in question" would not be substantially injured by the name "John Doe 1", given to him for the purposes of the action, being corrected to his proper name.

**14**  Returning to Happy Investments, Her Ladyship then dealt with the alternative application for leave to join Mr. Robinson pursuant to Rule 15(5). She granted leave on the basis that it was arguable that the limitation defence had not accrued.

**15**  While I have already expressed my opinion that Happy Investments is clearly distinguishable, I wish to make two further observations. First, in the case at Bar, no application was ever made to join SMS under the provision of Rule 15(5). Second, it seems to me that one of the factors a Court might consider, when deciding whether an amendment made without leave was appropriate, is whether leave probably would have been granted if an application had been brought. In my opinion, had the Plaintiff applied for leave in the case at Bar, instead of relying on the provisions of Rule 24(1)(a), she would have been successful.

BACKGROUND

**16**  Before turning to the Rules, I will review Jackson and refer briefly to the background leading to these proceedings, with particular regard to misnomer. In this regard I will say at this point that I am fully satisfied that this is a case of misnomer. It is not the case of an amendment to add a new party.

**17**  While Jackson was also a case where application was brought to correct the name John Doe by replacing it with the actual name of the person, the case is similar to the case at Bar, and contains the guiding principles which are applicable. In Jackson, a writ of summons was issued in a motor vehicle ***negligence*** action against the owner and the driver of a motor vehicle. Inquiries had failed to disclose the identity of the driver and he was named as "John Doe". Shortly after the writ was issued, and after the limitation period had expired, the identity of the driver was ascertained. The application to substitute his name was dismissed by the chambers judge.

**18**  The Court of Appeal held that the application should have been allowed. The amendment sought did not constitute an addition or substitution of a party, but only the correction of a misnomer. The name John Doe referred to a real and not a fictitious person, and in the endorsement of the writ was identified as the driver, and it was clearly stated that his real name was unknown except to the other Defendant. The Court emphasised that if the driver saw the writ of summons, he would know that John Doe referred to him.

**19**  At p. 502, Mr. Justice Bull, speaking for the Court said:

On the contrary, she was suing a living man whom she alleged was at a particular defined time and place operating the described motor vehicle in such a negligent manner as to cause her injuries then and there. Her litigation finger was pointing at the driver and no one else, but she did not know his name. For the purpose of suit (and it was necessary to act quickly because of the imminent expiry of the limitation period) she gave that identifiable and identified man a name, using one that would clearly connote to all that it did not purport to be his real name. And, further, in the endorsement it was clearly stated that the real name of the defendant driver was not "John Doe" but was unknown except to the other defendant, the female respondent.

Under these circumstances, I can see no elements of an addition of, or a substitution for, defendant. No new entity or person was involved. It was merely an application to change the name of a party from a patently incorrect one to his proper one.

(My emphasis added).

**20**  Mr. Justice Bull then went on to apply the proper test in such a situation as outlined by Devlin L.J., in Davies v. Elsby Brothers Ltd., [1960] 3 All E.R. 672 (C.A.) where he said at p. 676:

The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course, it must mean me, but they had got my name wrong". Then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make enquiries", then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate in the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer.

(My emphasis added).

**21**  Bull J.A. continued at p. 503:

Anybody in the world (except the driver of the offending vehicle) reading the writ would immediately say "John Doe is not I". But that driver reading the writ would immediately and without hesitation say "I am the John Doe" sued, I was driving the vehicle at the place and time as alleged, but that, of course, is not my real name.

(My emphasis added).

...

Although "misnomer" usually has reference to a wrong naming by mistake, whereas the wrong naming here was deliberate, I think the tests above set out with respect to misnomer generically have full application in this case. I can see no compelling reason why an advertent misnaming of a clearly identified person should be any less subject to the test relative subject to misnomer than an inadvertent one. This is particularly so when the conduct of that person has caused or contributed to the situation.

(My emphasis added).

And at p.504, in rejecting the submission of effective delay on the part of the plaintiff:

If anything, it could be fairly said that the cause or need of the misnomer **nomenclature** was the failure of the driver to make police reports and give his name to the appellant at the scene of the accident as bound to do, as well as the failure of the insurers of the offending motor vehicle which he drove to disclose his name when requested.

I only add that I fail to see how the female respondent or the defendant driver (by whatever name called) could be in any way prejudiced by the requesting amendment, notwithstanding it being made beyond the one year limitation period. Both were sued within the year, and the defendant clearly identified as the driver could certainly not be prejudiced by the manufactured name given him for the purposes of the action being corrected to his proper name.

(My emphasis added).

**22**  In the case at Bar, the Plaintiff's claims arise as a result of injuries she suffered when she slipped and fell at the Royal Centre in downtown Vancouver on February 1, 2001. I will observe at this point that one of the concerns or issues was who was responsible for the maintenance of the rug and surrounding area, where the slip and fall occurred, at the time of the accident. Difficulties which the Plaintiff's solicitor encountered in ascertaining the name of this person, both before and after the writ was issued, and to which SMS substantially contributed, primarily by doing the maintenance work in the name of Focus and using their employees, give rise to these proceedings.

THE PLEADINGS

**23**  I turn now to the terms of the statement of claim which obviously was drawn on the basis of some conflicting or confusing information. It will be seen that in my opinion, on reading the statement of claim as a whole, and in the circumstances known to it, SMS would have had no doubt that it was being sued as the maintenance company who was responsible for the maintenance of the premises at the time of the accident, although being named at the time as a John Doe.

**24**  The writ of summons and statement of claim were filed on January 31, 2003. The named defendants include "John Does 1 to 10".

**25**  It is alleged in the statement of claim that the Defendant, Safeway Holdings (Alberta) Ltd., ("Safeway") was formerly known as Toby Creek Consulting Inc. ("Toby Creek") and Focus; also that the Defendants, Brookfield Properties (Vancouver) Ltd., ("Brookfield") and 607201 B.C. Ltd., were the registered co-owners of the business building, including the shopping mall known as "The Royal Centre".

**26**  It is alleged that the Defendants, John Does 1-10 "are or were owners/operators, or employees and/or agents for any, all, or some of the named Defendants, and were employed, and/or were working in their respective capacities at all relevant times"; that the identities and addresses of the Defendants John Doe 1 through 10 were unknown to the Plaintiff, "but is or should be known to any one or all of the Defendants herein". In para. 8 it is alleged that at all material times the Defendant, Safeway, formerly known as Toby Creek and Focus, was contracted to provide cleaning services for the owners.

**27**  In paras. 10 and 11 it is alleged that on February 1, 2001 the Plaintiff was injured on the subject premises when she fell after tripping over a corner of a buckled carpet, and as a result of the ***negligence*** of the Defendants. In para. 12 particulars of the Defendants' ***negligence*** are set out as follows:

Particulars of the Defendants' ***negligence*** include:

1. Failing to take reasonable care to insure that the Plaintiff would be reasonably safe in using the premises including the exterior of the premises;
2. Exposing the Plaintiff to unreasonable dangers, a risk of damage, or injury on the premises;
3. Failing to take any or any adequate measures, whether by way of maintenance, repair or otherwise, to ensure that the premises and exterior of the premises were in a reasonably safe condition after having actual knowledge of its state of disrepair;
4. Failing to give the Plaintiff adequate warning of hazards and unusual dangers on the premises;
5. Any other ***negligence*** as may appear.

It is to be observed that the particulars of ***negligence*** focus on the physical state of the premises, including failing to take adequate measures, whether by way of maintenance, repair or otherwise, to ensure that the premises were in a reasonably safe condition after having actual knowledge of its state of repair.

**28**  In para. 13, it is alleged that the owners are vicariously liable for the ***negligence*** of the other Defendants, including John Does 1 to 10, all of whom were "contracted by the owners at all material times to clean the premises in question ...".

**29**  In para. 14 it is alleged that Safeway, formerly known as Toby Creek and Focus, as the employers of Major Candola, Amfik Dhillon and Marina Henriquez, the night crew working the shift of January 31/February 1, 2001, and John Does 1 through 10, are vicariously liable for the ***negligence*** of the three employees of that night crew.

ADDITIONAL BACKGROUND

**30**  In her affidavit sworn on October 6, 2003, Ms. C.A. Holland, a legal assistant with counsel for the Plaintiff, sets out information, and attaches documents received from an investigator retained by counsel, which demonstrates confusion as to the name of the person who was in charge of maintaining the area where the accident occurred at the time of the accident. The brief history appears that on December 10, 2002, the investigator received a copy of the "Liability Occurrence Report" from the Defendant, Brookfield, in which it is stated that the subject area was maintained by an outside contractor, Focus.

**31**  The investigator at the same time received the statement of a witness, S. Dynes, who said she saw the Plaintiff trip and fall. She also says:

I noticed that the carpet by the entrance one edge was buckled and it appeared as the cause of the fall. An unknown witness stated that Focus had just replaced the carpet. Focus Cleaners, Major and Amrik, then removed the carpet.

(My emphasis added).

This statement, for my purposes, seemingly bolsters the allegation that the contracted SMS was carrying on the work using the name of Focus, and Focus' employees who are named in the statement of claim; also that SMS probably was well informed about the incident.

**32**  On February 26, 2003, counsel for Safeway wrote to counsel for the Plaintiff advising:

Our client advises that Focus Building Services Ltd. did previously provide services to the subject property, however, our client sold the business of building maintenance on May 31, 1999, to SMS Modern Building Services. Accordingly at the time of your client's alleged injury Safeway Holdings (Alberta) Ltd. nor Focus Building Services Ltd. were providing services in respect of the subject property.

**33**  On March 3, 2003, counsel for the Plaintiff wrote to counsel for Safeway stating:

Our investigation reveals that Focus Building Services Ltd. was amalgamated to Toby Creek Consulting Inc. on August 16, 1999, and that Toby Creek Consulting Inc. was then amalgamated to Safeway Holdings (Alberta) Ltd. on March 5, 2002.

Kindly confirm your client's interest and/or ownership of Toby Creek Consulting Inc. at the material time, namely, February 1, 2001.

**34**  On March 6, 2003, counsel for Safeway wrote to counsel for the Plaintiff stating that Safeway was the successor to Toby Creek by virtue of an amalgamation, that Toby Creek was an Alberta company registered in British Columbia at the time of the incident, and that in May 1999, Safeway had sold the maintenance business for the building to SMS.

**35**  On March 12, 2003, counsel for the Plaintiff had a telephone conversation with counsel for Safeway in which counsel for the Plaintiff was advised that the name of the cleaning contractor was "SMS Modern Cleaning Services Inc.". After reviewing the matter, counsel for the Plaintiff left a message for counsel for Safeway that there was no such company, as SMS Modern Cleaning Services Inc. Subsequent to the message referred to, but on the same day, counsel for Safeway forwarded a facsimile to counsel for the Plaintiff advising that according to business cards used by SMS, who apparently by then had changed its name to "Omni Facility Services", the names being used for the cleaning services for the Royal Centre were "Focus Building Services Ltd." and "SMS Modern Building Cleaning Services". Also enclosed was a facsimile to counsel for Safeway, from that company, advising that it was its understanding that in Vancouver SMS continued to use the Focus Building Services Ltd. name. Enclosed with the facsimile is a copy of a business card of Focus with the name of SMS' general manager described as Focus' general manager.

**36**  It appears then it was not until March 2003 that counsel for the Plaintiff learned that the name of the company carrying on the maintenance work in the area in question at the time of the accident was the Defendant, SMS. On April 14, 2003, the amended writ and statement of claim were filed wherein the misnomer of John Doe 1 was corrected by replacing it with the name of the Defendant, SMS. SMS finally entered an appearance to the writ of summons in September 2003.

DISCUSSION

**37**  It seems to me, on the basis of Jackson, that in the case of an advertent misnaming of a party as John Doe, an amendment substituting the correct name should be almost automatic, provided, of course, that John Doe is sufficiently described in the pleading as an identifiable person or corporation, although not by name; for example, the driver of a motor vehicle involved in a particular accident, or a corporation responsible for the cleaning and maintaining of particular premises at the time that a person was injured allegedly as a result of the condition of those premises; provided also that the other party is not substantially prejudiced or injured, a situation which generally speaking is difficult to envisage. This Court has always considered misnomer to be an irregularity only, not a nullity, and has always allowed amendments which could be made without injustice to the other side. See for example B.C. Furniture Company v. Tugwell (1900), 7 B.C. Law Reports 361 (C.A.).

**38**  It is my view, as I have already indicated, that the amended writ and statement of claim simply corrected a misnomer of an existing party to the action, that is, the person responsible for the maintenance of the premises, and, in particular, the area of the premises where the accident occurred, at the time that it occurred. As in Jackson, there is no element of an addition of, or substitution for, a defendant. No new person was involved. The amendment simply changed the name of the party from a patently incorrect one to the proper one.

**39**  Applying the Davies test, as outlined in Jackson, the question is: How would a reasonable representative of SMS, reading the pleadings as a whole, and in all the circumstances, including the knowledge which SMS had, take them or understand them to mean.

**40**  SMS would know that the action was being brought as a result of the Plaintiff slipping and falling on February 1, 2001, on the Royal Centre premises, which at the time were being maintained by SMS, by virtue of its contract with the owners of the shopping centre, and using Focus and its employees. SMS would have known that the Plaintiff was suing the maintenance company and its employees who were responsible for the maintenance and repair of the premises at the time of the accident, namely SMS.

**41**  In my view, the representative would have said, of course it was SMS that they were naming as a John Doe because (as stated in the statement of claim), they did not know the correct name at the time, and it was clear that the Plaintiff was suing the maintenance company and its employees who were responsible for the maintenance and repair of the premises at the time of the accident. More importantly, the representative would have known at that time that there was no other entity to whom the description in the statement of claim applied, that is, the person contracted by the owners to do the maintenance work at the time of the accident; especially since all of the previous maintenance contractors, assuming that they are separate entities, had been joined in the action.

**42**  In my view, the Plaintiff's solicitor acted prudently in naming the John Does in the statement of claim which was filed, given the obvious uncertainty as to who was doing the maintenance work at the time of the accident, and in what capacity; while clearly designating an existing and identifiable person whose name was not known to the Plaintiff at the time. The evidence is that the Plaintiff had hired a private investigator and took reasonable steps in the circumstances to ascertain the identity of the appropriate defendants, and learned only at a later date that SMS was the true person sought. Initially the information received was that Focus was the maintenance contractor at the material time. Later the existence of, and the relationship between, Safeway, Toby and Focus became clouded, and still later it appeared that SMS was doing the work, pursuant to its contract with the owners, but using Focus and its employees. Whatever the true facts are will be determined by the trial judge. For my purposes the conflicting information alone justifies suing all of the maintenance contractors, including the John Doe who was said to have the cleaning and maintenance contract with the owners, and to have been doing the work using Focus and its employees.

**43**  I have already noted that SMS substantially added to the problem by carrying on the maintenance work in the name of Focus, and using Focus' former employees, rather than in its own name. I observe also that the evidence, actually it is information, of the witness Dynes, who appears to be knowledgeable, indicates that Focus and its employees were well aware of the accident, of its probable cause, and had actually removed the offending carpet after the accident. In this regard it is most difficult to avoid concluding on a balance of probabilities that SMS was familiar with the circumstances, could not possibly have been misled and could not have had any reasonable doubt as to the identity of the John Doe being sued with respect to the maintenance of the subject property at the material time.

**44**  I turn now to the specific rules in question. Rule 24 provides:

When amendment may be made

1. A party may amend an originating process or pleading issued or filed by the party at any time with leave of the Court, and, subject to Rules 15(5) and 31(5)
2. once without leave of the Court, at any time before the delivery of the notice of trial or hearing, and
3. at any time with the written consent of all the parties.

(My emphasis added).

**45**  Rule 15 is entitled "Change of Parties". Rule 15(5) provides:

... Removing, adding or substituting party

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

1. order that a party, who is not or has ceased to be a proper or necessary party, ceased to be a party,
2. order that a person, who ought to have been joined as a party or whose participations in the proceedings is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon, be added or substituted as a party, and
3. order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
4. With any relief claimed in the proceeding, or
5. With the subject matter of the proceeding,

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

1. No person can be added or substituted as a plaintiff or petitioner without the person's consent.

**46**  Rule 31 is entitled "Admissions". Rule 31(5) provides:

Withdrawal of Admissions

1. A party is not entitled to withdraw
2. an admission made in response to a notice to admit,
3. a deemed admission under sub-rule (2) or
4. an admission made in a pleading except by consent or with leave of the Court

**47**  In my opinion, Rule 24(1)(a) plainly says that a party is entitled to amend his pleadings, without leave of the Court, at any time prior to delivery of the notice of trial, with two exceptions, where the amendment is to add or delete a party to the action under Rule 15(5), or is to withdraw an admission under Rule 31(5), neither of which is applicable in the case at Bar. The entitlement is otherwise unfettered.

**48**  I do not find it necessary to attempt to define the width of Rule 24(1)(a) which is simply one of three methods of amendment, with leave, without leave, and by consent. It would seem that at the least the Rule was intended to avoid the costs and time involved in making an application early in the proceedings, and when the amendments are basically inconsequential, for example, correcting mistakes, errors, omissions and other irregularities such as a misnomer. This is sufficient for the purposes of this case.

**49**  It would seem also that heavier or more consequential amendments, in which the opposing party would have a substantial interest, require application under Rules 15 and 31, and under s. 4 of the Limitation Act, R.S.B.C. 1960 c.266. In the latter case see Allarcom Ltd., v. CanWest [*(1988), 28 B.C.L.R. (2d) 371*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JNY7-X2B6-00000-00&context=) (C.A.), and Teal.

**50**  It should be noted as well that the Court does have some control over amendments made without leave. Once the amendments without leave are made, and this is brought to the attention of the other party, through either Rule 24(4) or (6), the party can then apply to have the amendments struck if the amendments are considered to be inappropriate without leave; perhaps invoking Rules 2 or 19(24), or the substantial injury test.

**51**  In sum, it is my opinion that the plaintiff was not required to bring on an application to make the amendments which were to correct the misnomer. In this regard, I note that in Happy Investments Madam Justice Southin pointed out that there was no rule dealing specifically with misnomer, adding that accordingly the Court could grant leave under Rule 24(1) in the case of a misnomer. It follows, as well, in my opinion, that a party is equally entitled to amend his pleadings without leave, in the case of misnomer under Rule 24(1)(a), as in the case of any other irregularity. And the advent of the advertent misnaming of a party as John Doe does not change this entitlement in my view.

**52**  I therefore conclude that the learned master was clearly wrong in determining that leave was required. The appeal is allowed with costs.

**53**  This brings me to the bankruptcy issue. The Bankruptcy and Insolvency Act, R.S.B.C. 1985, c. B-3, is referred to in somewhat general terms in SMS's Outline. Ms. Braun advised me that while SMS was assigned into bankruptcy on December 20, 2002, SMS did not obtain leave of the Court before commencing action; that she argued the issue before the learned master, although he makes no reference to it in his Reasons for Judgment, and apparently did not deal with it. Ms. Braun says that by operation of s. 69.3 of the Act, once SMS went into bankruptcy there was an automatic stay of proceedings against all the ordinary creditors which remains in effect unless and until the trustee is discharged, or the Plaintiff obtains a declaration that the stay of proceedings no longer operates in respect of her claim which would lift the stay. Mr. Holness says that the master made no order because there was no evidence before him to confirm whether or not the trustee had been discharged. There was no evidence before him as to whether or not the Plaintiff was even an ordinary creditor.

**54**  The bankruptcy waters are a bit muddy for me to deal with the issue on this appeal. However, I would observe that any success by SMS on the issue would only be temporary, and in the end would not prevent the action from proceeding.

**55**  Assuming, but not deciding, that the claim for damages in a slip and fall case, which is probably covered by insurance, is a claim provable in bankruptcy, and that the Plaintiff is an ordinary creditor of the estate of SMS, the action commenced without leave of the Court is not a nullity, it is merely an irregularity and leave can be obtained from the Count nunc pro tunc. See for example Canada Wheat Board v. Krupski [*(1994), 26 C.B.R. (3d) 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6Y1-FBN1-21RS-00000-00&context=) (Sask. Q.B.). It seems clear to me that this is a case in which such an order should be granted. In fact, I will grant the order at this time, in order for the parties to get on with the action, if the order is by consent. If not, I leave the Plaintiff to take what steps are necessary to correct the situation and get on with her case.

HOOD J.

**End of Document**

[***Burke v. Sunshine Coast (Regional District), [2011] B.C.J. No. 2281***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22M9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.D. Burnyeat J. (In Chambers)

Heard: November 2, 2011.

Oral judgment: November 2, 2011.

Docket: S116016

Registry: Vancouver

**[2011] B.C.J. No. 2281** | 2011 BCSC 1636 | [*91 M.P.L.R. (4th) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFK1-JBDT-B3RK-00000-00&context=) | 2011 CarswellBC 3147

Between Gerald Andrew Burke, Petitioner, and Sunshine Coast Regional District, Jack Linder and Janice Revell, Respondents

(21 paras.)

**Case Summary**

**Municipal law — Bylaws and resolutions — Enforcement of bylaws — *Negligence* — Application by District to strike out petition for damages alleging that District was negligent in refusing to enforce a bylaw against his neighbours performing auto repairs for non-residents on lots zoned for single family use allowed — No cause of action available against District for its alleged refusal to enforce bylaw — Enforcement was within District's discretion — In absence of evidence of bad faith, the Court could not and should not interfere with District's decision.**

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| Application by the District to strike out the petition for damages for loss of quiet enjoyment of property. The petitioner alleged that the District was negligent in refusing to enforce a bylaw against his neighbours performing auto repairs for non-residents on lots zoned for single family use. The District alleged that the refusal to enforce the bylaw was a policy decision and the Court had no power to require the District to enforce its own bylaws.  HELD: Application allowed.  Pursuant to the Community Charter, the Court could not require the enforcement of a bylaw of the District. After a bylaw had been enacted, it was within the discretion of the District as to whether it would prosecute under that bylaw. The material facts upon which the claim was said to be based were also not set out in the petition. A petition was not the appropriate method to commence proceedings such as these. The claim should have been commenced by a notice of civil claim. |

**Statutes, Regulations and Rules Cited:**

Community Charter, [*SBC 2003, CHAPTER 26, s. 260*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61H0-00000-00&context=), s. 263, s. 263(1)

**Counsel**

Appearing on his own behalf: G. Burke.

Counsel for Sunshine Coast Regional District: S.H. Haakonson.

Appearing on his own behalf: J. Linder.

Appearing on her own behalf: J. Revell.

**Oral Reasons for Judgment**

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| **G.D. BURNYEAT J. (orally)** |

**1**   As Petitioner, Mr. Burke is seeking the following orders: damages of $50,000 against the Defendant, Sunshine Coast Regional District ("District") for the loss of quiet enjoyment of his property; damages of $35,000 against the Defendant Jack Linden for the loss of quiet enjoyment of his property; damages of $15,000 against the Defendant Janice Revell for the loss of quiet enjoyment of his property, and injunctive relief that Mr. Linder and Ms. Revell cease and desist in engaging on their properties of the repair of any motor vehicles not owned by a resident of the Linder and Revell properties in Gibsons, British Columbia.

**2**  The factual basis for the relief sought is described as two-part: first, that the bylaw department of the District negligently refuses to enforce Bylaw 310 against his neighbours performing auto repairs for non-residents on lots zoned for single family use; and, second, that Mr. Linder and Ms. Revell engage in and allow others to engage in automobile repair for non-residents on lots zoned for single family residential use.

**3**  The District applies to strike out the claim against it on the basis that the claim cannot be maintained at law on the basis that the refusal to enforce Bylaw 310 is a policy decision and the Court has no power to require the District to enforce its own bylaws. In support of that submission, the District relies on two authorities.

**4**  The first authority is *Powell River City v. Sliwinski*, [*2011 BCSC 748*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S23Y-00000-00&context=), where Rogers J. stated:

I would say, as a proposition of law, that a statutory authority, such as the City of Powell River, is entitled to decide when and under what circumstances it wishes to enforce its bylaws. Except under very unusual circumstances, those decisions are not reviewable. (at para. 10)

**5**  The second authority is the decision of the Ontario Court of Appeal in *Toronto v. Polai*, [*[1970] 1 O.R. 483*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-F8D9-M05J-00000-00&context=), where Brooke J.A. stated:

Municipal council has a discretion as to when it will prosecute for a breach of or sue to enforce the provisions of the zoning by-law. To deny the discretion in municipal council would be to place the most technical breach of the by-law beside the most blatant and to remove from consideration the harm done to the offender and the value to the community of the proposed proceedings when considering when they ought to be taken. The discretion when to prosecute or when to sue which rests with the municipal corporation or the comparable discretion which rests with public authorities charged with the responsibility of enforcing the rights of the public when they are violated, is one of the great strengths of our system of justice. It is true that the Court cannot interfere with that discretion and the remedy by way of injunction provided by s. 486 of the *Municipal Act* [of Ontario] should not be used for this purpose. (at para. 14)

**6**  And where Schroeder J.A. stated:

As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provisions of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and its duly [elected] ... officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as *parens patriae* charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief. (at para. 40)

**7**  In reviewing the *Community Charter* which governs the District, I am satisfied that the Court cannot require the enforcement of a bylaw of the District. Reviewing the *Community Charter*, the District may make bylaws (s. 260), may establish penalties (s. 263), and may enjoin an action after a conviction has been entered (s. 263(1)). However, there is no requirement that the District do any of those acts. The provisions are permissive. In the absence of a requirement under the *Community Charter* that the District undertake a particular action, the Court is not in a position to require them to do so. Rather, it is left in the discretion of the District to decide whether they are going to enact a bylaw. After a bylaw has been enacted, it is within the discretion of the District as to whether they will prosecute under that bylaw.

**8**  As counsel for the District has stated, there are a number of matters which go to exercising that discretion, including budgetary constraints and the evidence available. In that regard, the District states that it does not have the necessary evidence to result in a successful enforcement of Bylaw 310 against Mr. Linder and Ms. Revell. I am not in a position to "second guess" that decision. It is up to the District to decide whether it will prosecute or not, just as it is up to the electorate to decide who will be on the Council of the District.

**9**  In the absence of evidence of bad faith, it is not available to the Court to review the decision taken by the District. Bad faith is not alleged here. The enforcement of a bylaw is a matter of discretion. The Court cannot force the District to enforce its bylaw in the absence of a requirement that the District is required at law to do so. I cannot find that here.

**10**  The District also points out that the material facts upon which the claim is said to be based are not set out in the Petition. I agree. The particular activities of the District and the particular activities of Mr. Linder and Ms. Revell are not set out in the Petition as facts. The Petitioner has not provided what must be set out in a petition. He has failed to set out the facts upon which the relief sought is based. The Petition is in a standard statutory form which includes: "Part 2: Factual Basis". Using numbered paragraphs, it is mandatory to set out the material facts upon which a petition is based. That has not been done by the Petitioner.

**11**  The District also submits that a petition is not the appropriate method to commence proceedings such as these. I agree. Those contemplating litigation are faced with a choice: to commence proceedings either by a petition which relates to particular provisions in the *Supreme Court Civil Rules* or by a notice of civil claim. The claim of Mr. Burke should have been commenced by a notice of civil claim. Therefore, the Petition is ill-founded. It is not the appropriate vehicle to launch the claim that has been made.

**12**  In order to eliminate the cost of new proceedings, I order that the Petition be converted to a notice of civil claim. Mr. Burke will have 30 days to prepare his notice of civil claim. Once the notice of civil claim has been provided to the parties, they will have the time limits under the *Rules* to produce their response to the notice of civil claim. In the notice of civil claim, Mr. Burke will then have an opportunity to cure the second matter raised by the District, being that the factual basis upon which the relief is sought was not set out.

**13**  On the question raised as to whether there is a cause of action that is available to Mr. Burke and whether I should strike out the claim against the District, I have asked the District to proceed on the assumption that this matter was commenced by notice of civil claim so that I can deal with the substance of the question as if it was appropriate to have the matter commenced by petition. If I only made an order that it was appropriate to have commenced this proceeding by a notice of civil claim, that decision would then produce a time lag and the parties would eventually be back before the Court on the question of whether it was appropriate to proceed against the District.

**14**  Whether the action of Mr. Burke was commenced by petition or whether the matter was more appropriately and properly commenced by way of a notice of civil claim, there is no cause of action available against the District for its alleged refusal to enforce Bylaw 310, for its alleged ***negligence*** in refusing to do so, or for its alleged negligent enforcement. It was up to the District to decide whether or not the evidence before it justified a prosecution, justified seeking injunctive relief, or justified entering onto the property as it could under Bylaw 303. In the absence of evidence of bad faith, the Court cannot and should not interfere.

**15**  The Petitioner relies on the decision in *Westcoast Landfill Diversion Corp. v. Cowichan Valley*, [*2009 BCSC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B119-00000-00&context=), and, in particular, the following statement:

A government body, including a municipality or regional district, can only owe a duty of care when engaged in operational decision making. When making policy decisions, "a government agency will be exempt from the imposition of a duty of care" regardless of whether a relationship of proximity exists that would ground a duty of care in other situations. If a government body engages in operational decision making and a ***negligence*** suit ensues, a traditional torts analysis ought to follow, being that if sufficient proximity exists and a duty of care applies, then the courts must go on to inquire into the requisite standard of care in the given circumstances: see *Just v. British Columbia*, [*[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 paras. 28 to 30. (at para. 354)

**16**  I am satisfied the decision in *Westcoast Landfill* is of no assistance to the Petitioner. As indicated in that decision, when a District makes a policy decision (in this case whether to prosecute or not), the District is exempt from the imposition of a duty of care and from any claim in ***negligence***.

**17**  I accede to the application of the District. The action against the District is struck. At the same time, I allow the amendment of the style of cause to reflect the deletion of the Sunshine Coast Regional District as a party. The action may be maintained against Jack Linder and Janice Revell but subject to their ability to bring on any applications they think are appropriate.

**18**  These proceedings were originally commenced by Mr. Burke in the Provincial Court. That was inappropriate. Only the Supreme Court of British Columbia has the power to grant the injunction that Mr. Burke requests. The power to grant an injunction is not available to a Judge of the Provincial Court.

**19**  There is a second advantage of proceeding in the Supreme Court, being the ability to get before the Supreme Court in an expeditious manner. I take judicial notice of the fact that there is a significant backlog and a significant inability of the Provincial Court to deal with matters on an expedited basis as a result of the failure of the Provincial Government to appoint a full complement of judges.

**20**  Rule 9-7 of the *Supreme Court Civil Rules* provides for the hearings of claim on a summary basis so that there is not a significant delay in having the issues between parties determined. I would anticipate that, once the notice of civil claim has been served, either Mr. Burke or Mr. Linder or Ms. Revell will be in a position to be back before this Court within weeks or months rather than years to have a summary determination of the entitlement of Mr. Burke to the relief he seeks. As well, the Court is always available to deal with any injunctive relief that Mr. Burke might seek. Having dismissed the claim against the District, I will now deal with any submissions regarding costs.

[SUBMISSIONS RE COSTS]

**21**  THE COURT: The ordinary assumption is that the successful party will be entitled to their assessable costs because they have been removed from the action. It may be viewed as unfair that the taxpayers of the District should bear the costs of dealing with an action where the Court has made an order that it was not appropriate for the District to be joined as a party. It may be viewed as more appropriate for the party that brought the action to bear the assessable costs of the District. However, I am satisfied that there are unusual circumstances relating to this application. I rule that both parties will bear their own costs. So costs will not be available to the District.

G.D. BURNYEAT J.

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[***Capilano Fishing Ltd. v. Qualicum Producer (The), [2001] B.C.J. No. 517***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2MR-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Warren J.

Heard: April 27, 2000.

Judgment: March 16, 2001.

Vancouver Registry No. C972709

**[2001] B.C.J. No. 517** | 2001 BCSC 410 | 103 A.C.W.S. (3d) 681

Admiralty action in rem against the ship "Qualicum Producer" and in personam Between Capilano Fishing Ltd., and all others interested in the production of the F/V "Franciscan No. 1" and J.S. McMillan Fisheries Ltd., plaintiffs, and The owners and all others interested in the ship "Qualicum Producer", Arnold Patrick Recalma and Mark Recalma, defendants

(23 paras.)

**Case Summary**

**Practice — Costs — Party and party costs — Entitlement to party and party costs — Successful party — Special orders — Increase in scale of costs, difficulty and complexity of proceedings — Where quantum of damages limited by statute.**

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| Determination of costs. Capilano Fishing and other plaintiffs obtained judgment against the vessel, Qualicum Producer, for losses suffered as a result of the ***negligence*** of the master of the vessel. However, as a result of the provisions of the Canada Shipping Act, their recovery was limited to $40,000. The plaintiffs argued that they should be entitled to increased costs because there would be a significant disparity between costs under the tariff and the actual costs they spent to prosecute the action. They also argued that the matters were complex and the damages were limited only as a result of the statutory provision which was subsequently amended. The trial was held before a judge alone as a result of its complexity. There were four experts called to deal with the shipping issues. One of the plaintiffs added later in the action had been unsuccessful. The plaintiffs had a contingency agreement for their legal fees.  HELD: The plaintiffs were entitled to their ordinary costs to the date when the unsuccessful plaintiff was added and thereafter for that part of their costs not related to any issues raised by the addition of the unsuccessful plaintiff.  The defendants were entitled to their costs against the unsuccessful plaintiff for their counterclaim. The plaintiffs were not entitled to any increased costs, as this was a matter of ordinary complexity with no unusual features or misconduct which justified an increase. Ordinary costs were not unjust because the plaintiff's exposure to legal costs was limited by the contingency arrangement. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 57(7).

Canada Shipping Act, R.S.C. 1985, c. S-9, s. 574.

**Counsel**

M.L. Smith, for the plaintiffs. S. Nossal, for the defendants.

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| **WARREN J.** |

Introduction

**1**  On January 17, 2000 I delivered my reasons for judgment, [*[2000] B.C.J. No. 72*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TY-00000-00&context=), in which I found the defendants liable to some of the plaintiffs for the losses suffered as a result of the ***negligence*** of the master of the vessel Qualicum Producer. I did not allow the claim for punitive damages, finding that there was not the required degree of wanton or wilful invasion of the plaintiffs' rights. The recovery of the plaintiffs was, however, limited to approximately $40,000 by the provisions of the Canada Shipping Act, R.S.C. 1985, c. S-9, s. 574ff. I concluded that the plaintiffs, other than McMillan, were entitled to costs but permitted submissions on that issue. These reasons deal with the submissions on costs.

Plaintiffs' Submissions

**2**  The plaintiffs argue that they should be entitled to increased costs under R. 57(7) as ordinary costs would lead to an unjust result because there would be a significant disparity between the costs under the tariff and the actual cost of the time spent to prosecute the action; the matters were of more than ordinary difficulty; and the damages were limited only by the application of an old statutory provision which was amended shortly after the act of ***negligence*** and before the matter came on for trial.

**3**  The plaintiffs say there would be an unjust result if they were limited to the tariff and rely on National Hockey League v. Pepsi-Cola Canada Ltd. [*(1995), 2 B.C.L.R. (3d) 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M231-00000-00&context=) (C.A.); Rec Holdings Co. v. Peat Marwick Thorne, [*[1998] B.C.J. No. 300*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1NB-00000-00&context=) (B.C.S.C.); and Barnet Properties Ltd. v. Commonwealth Insurance Co. [*(1997), 34 B.C.L.R. (3d) 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0X6-00000-00&context=) (C.A.). Under the tariff at Scale 3 the recovery of costs would be approximately $26,000 and under Scale 5, would only amount to $39,000. The plaintiffs' counsel says that by the end of the 14-day trial the total hours expended multiplied by the standard hourly rate resulted in an expense of $183,222.75.

**4**  The claim was primarily for damages for a negligent act and for an accounting for unjust enrichment which required proof of complex liability and damages issues. When the defendants were successful in striking the jury notice, Sigurdson, J. noted the complexity of the issues of unjust enrichment, pure economic loss and limited liability under the Canada Shipping Act. In the May 11, 1999 order it was concluded that "the combination and interaction of the issues are of an intricate or complex character such that it is not appropriate that this proceeding be tried by a judge with a jury" (11 May 1999), Vancouver Registry, C972709 (B.C.S.C.) at para. 28).

**5**  The plaintiffs say the complexity of the case is illustrated by the fact there were four experts called to deal with navigation, vessel operation, fishing practice, fishing estimates and the operation of electronic and mechanical equipment. Further, they were successful on the issue of liability and even though they failed on certain issues such as unjust enrichment and pure economic loss, the arguments advanced were cogent and did not waste the Court's time because the evidence was essentially the same for all issues and only a small amount of time was devoted to the issue of unjust enrichment.

**6**  In striking the jury trial, Sigurdson J. wrote at para. 30:

[I]f at the end of the day Mr. Smith is entitled to costs and is taxing his bill of costs, it is appropriate that he be awarded costs up to this point in time on the basis of having prepared to conduct a jury trial. If, in fact, he has incurred greater costs than he would have had he only been preparing for a trial before a judge alone, it is my view that he nevertheless should be entitled to those costs if ultimately he is entitled to costs in this litigation.

**7**  Finally, and with regard to the apportionment of costs of McMillan which was not part of the pool and was denied recovery, Mr. Smith relies on the judgement of Satanove J. in Rec Holdings, supra, in which she held that, while costs usually go to the successful litigant, the exercise of this discretion by the trial judge is not absolute. It must still be exercised judicially and be based upon the generally recognized criteria such as admissions of liability, settlement offers and the award, the relationship between the recovery and the amount claimed, the reasonableness of issues raised, whether a discernable issue was decided against the party, whether the litigation involved a major commercial matter and finally, which party could be said to have succeeded.

**8**  Because one-half of the $240,000 cost of the licenses was borne by the plaintiff McMillan, counsel submits that it was reasonable to include McMillan as a party, particularly as it would have benefited substantially by the size of the catch. Further, Sigurdson J. was satisfied that there was sufficient validity for the joinder of McMillan. Finally, the defendants only required one day to examine McMillan, the issues took little time at trial and at the most one-half day of argument with minimal cost to the defendants in the context of the complex litigation.

**9**  In any event, as Satanove J. noted in Rec Holdings, supra, a trial judge should be cautious to second guess the strategy and tactics or manner in which counsel conduct the case, particularly in large commercial cases. While in hindsight, an issue may have been raised unnecessarily or too much time spent on what turns out to be peripheral matters, "the trial process is a spontaneous and dynamic one and the outcome is often difficult to predict" (at para. 10).

Defendants' Submissions

**10**  The defendants argue that the Court ought not to exercise its discretion to award increased costs and that they should be entitled to their costs against the unsuccessful plaintiff McMillan and in the counterclaim.

**11**  They argue that the burden is on the plaintiffs to establish there would be an unjust result if costs were based on costs under Scale 1 to 5. A significant disparity between what might be awarded as ordinary costs and 50% of special costs is but one factor, and by itself is not decisive when the Court considers an application for increased costs: Rieta v. North American Air Travel Insurance Agents Ltd. [*(1998), 21 C.P.C. (4th) 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S26M-00000-00&context=) at 324 (B.C.C.A.). As Donald J.A. observed, the law of costs has evolved to a point where a discrepancy must be accompanied by some reason in order to justify increased costs. Later, at 326, Donald J.A. stated that increased costs will only be awarded if there is some unusual feature in the case or there is misconduct justifying greater indemnity than would be provided by ordinary costs. This view, it is submitted, appears to depart from the earlier view expressed in National Hockey League, supra, relied upon by the plaintiffs.

**12**  The defendants also argue that where increased costs are sought the court is required to consider what the actual exposure to legal costs is, and if the applicant has a contingency agreement with its counsel, then it cannot be said that an award of ordinary costs would be unjust: Lankenau v. Dutton [*(1991), 57 B.C.L.R. (2d) 327*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNR1-JKPJ-G0C7-00000-00&context=) (S.C.).

**13**  The defendants also rely on McPhillips v. British Columbia Ferry Corp. (1996), 47 C.P.C. (3d) 73 (B.C.S.C.). In that case, the litigants' fees were based on a contingency agreement. The award of increased costs was calculated on the basis of the amount payable under the contingency agreement, then divided by 80% or 90% to get an idea of the special costs and then divided again by 50% in order to get an estimate of the increased costs. The result was then compared with what ordinary costs would bring in order to determine if there was a significant disparity.

**14**  Because the affidavit in support of the application or increased costs deposes to what the legal fees "would be" rather than what they actually were, the defendants argue that there is no evidence of any actual unjust result because there is no evidence that legal fees of $183,222 were actually billed and paid. In any event, a significant disparity on its own will not justify increased costs and there must be some unusual feature or misconduct.

**15**  Further, the matters in issue at trial were not of extraordinary complexity notwithstanding the judgement of Sigurdson J. While issues of unjust enrichment and limitation of damages under the Canada Shipping Act may have been too complex for a jury, they certainly were not too complex for a judge alone.

**16**  The plaintiffs knew throughout the proceeding of the effect of limitation under the Canada Shipping Act and proceeded in spite of that knowledge. It would be inappropriate to award increased costs in these circumstances where such an award would circumvent the substantive law. The fact the Act was later amended is irrelevant to the issue of increased costs and the plaintiffs ought not to be able to obtain indirectly what they could not obtain directly.

**17**  The defendants also argue that the plaintiffs relied on a number of claims which complicated the action when in fact it was essentially a simple matter: a determination of the defendants' liability; a determination of whether there was any contributory ***negligence***; and an assessment of damages and the effect of the Canada Shipping Act on those damages. The plaintiffs lost on a number of issues and the plaintiff McMillan lost on the issue of pure economic loss. Further, each of the issues raised by the plaintiffs [ie. unjust enrichment, constructive trust] had been raised and defeated in an earlier trial by a judge and jury: See Networth Industries Ltd. v. The Cape Flattery [*(1998), 61 B.C.L.R. (3d) 357*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2W4-00000-00&context=) (C.A.).

**18**  The defendants also argue that the late addition of McMillan complicated the conduct of the litigation coming as it did four weeks before the trial. It also resulted in an additional Chambers application, requests for production of documents and an examination for discovery with the risk of an adjourned trial.

**19**  The defendants say that the plaintiffs' costs should be on a scale 3 as dealing with matters of ordinary complexity, difficulty or importance. The defendants also say they should be entitled to the costs of their own counterclaim because that was the proper procedure for invoking the provisions of the Canada Shipping Act [see Oak Bay Marine Group v. Jackson, [*[1994] 3 F.C. 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-F873-B0HH-00000-00&context=) at para. 11 (F.C.T.D.)] and as against McMillan for their successful defence of the issue of pure economic loss.

**20**  In the end, the defendants say that the successful plaintiffs are entitled to 100% of their costs at Scale 3 up to the date when McMillan was joined and two-thirds thereafter except to the extent that their costs were increased by the addition of McMillan. Furthermore, the defendants say they are entitled to their costs against McMillan, one-third of their costs after McMillan was joined, and the costs of the counterclaim.

Conclusion

**21**  I conclude that the successful plaintiffs are not entitled to any increased costs because not only was this a matter of ordinary complexity in my view, but also there was neither any unusual feature nor any misconduct which would justify an increase. As for the argument that it would be unjust not to award increased costs, I note and agree with the submissions of the defendants that where there is a contingency arrangement it cannot be said that ordinary costs would be unjust because the plaintiffs' exposure to legal costs is limited.

**22**  In approaching the issue of apportioning costs where there are both successful and unsuccessful plaintiffs, I am assisted by the judgment of Saunders J. [as she then was] in Seaport Crown Fish Co. v. Vancouver Port Corp., [*[2000] B.C.J. No. 64*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TX-00000-00&context=). (B.C.S.C.); [*2000 BCSC 68*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X1TX-00000-00&context=). At par. 31-34 Saunders J. said:

...[T]he defendant referred to what it termed three lines of authority [where there was divided success with multiple plaintiffs]. The first divides the costs by the number of parties, as is [sic] Keen v. Towler (1924), 41 Times L.R. 86 (K.B.) and Ellingsen v. Det Skandinaviske Compani, [1919] 2 K.B. 567. The second line of authority is represented by Duchman v. Oakland Dairy Co., [*[1930] 4 D.L.R. 989*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SBV1-JXNB-6392-00000-00&context=) (Ont. S.C.) in which the successful plaintiffs were entitled to one set of costs less only costs attributable to the unsuccessful plaintiffs, and the defendants were entitled to only those costs attributable to the claims of the unsuccessful plaintiffs.

The third line is represented by the New England Fish Company of Oregon v. Britamerican Limited, [*[1959] Ex. C.R. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7D-YKB1-F5KY-B026-00000-00&context=), a case of two plaintiffs in which the successful plaintiff recovered a portion of the costs of trial plus full pre-trial costs less those costs solely attributable to joinder of the unsuccessful plaintiff, and the unsuccessful plaintiff was liable for one-half the defendant's costs throughout.

The variety of orders, or lack of consensus, on a formula for costs in multi-party litigation illustrates the scope of discretion available to a court seeking to fashion an order of costs consistent with the firm rules and responsive to the circumstances of the case. The variety of potential circumstances makes a firm rule impossible of formulation.

Any award must be governed by the principle that a successful party is usually entitled to costs reflecting its success.

**23**  The appropriate disposition of the issue of costs in this case is that the plaintiffs, save for McMillan, are entitled to their costs against the defendants to the date when McMillan was added as a party and to that part of their costs thereafter which are not related to any issues raised by the addition of McMillan. I agree that the amount of trial time devoted to McMillan's claims and pure economic loss was minimal. As a rough estimate and guide to the parties I would allow the plaintiffs' their costs after the date of adding McMillan less 20%. The defendants are entitled to their costs against McMillan for their successful counterclaim on the limitation raised by the Canada Shipping Act. Because of the divided success on the issue of costs, each side should bear their own costs with respect to this issue.

WARREN J.

**End of Document**

[***Castle Management Ltd. v. Schwann, [2000] B.C.J. No. 2181***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B1JK-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Blair J. (In Chambers)

Heard: October 20, 2000.

Judgment: November 1, 2000.

Vancouver Registry No. L002529

**[2000] B.C.J. No. 2181** | 2000 BCSC 1569 | 81 B.C.L.R. (3d) 289 | 100 A.C.W.S. (3d) 681

IN THE MATTER OF the Judicial Review Procedure Act R.S.B.C. 1996, C241 AND IN THE MATTER OF a decision and order of the Arbitrator, H. Pinsky, dated August 24, 2000, Arbitration Number 431470 pursuant to the Residential Tenancy Act R.S.B.C. 1996, C406 Between Castle Management Ltd. and Orient Merchandise Ltd., petitioners, and Douglas Schwann and Joan Schwann, respondents

(15 paras.)

**Case Summary**

**Landlord and tenant — The lease — Arbitration — Judicial review — Jurisdiction of arbitrator — Excess of jurisdiction.**

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| Application by Castle Management and Orient Merchandise for judicial review of an arbitrator's decision that Castle was liable to the Schwanns for damages of $600 incurred in a break and enter of the Schwanns' car. The Schwanns were tenants of an apartment in a strata corporation owned by Orient. Castle, designated as Orient's agent, signed the lease with the Schwanns. A security guard employed by a security company watched two men loitering near the Schwanns' vehicle. The men were assumed to have broken into the vehicle, causing damage. Colyvan, the company that took care of the strata corporation's common areas, had hired the security company. Castle and Orient claimed that the arbitrator erred in finding that Castle was a landlord, and that the landlord owed a duty of care to protect the Schwanns' vehicle.  HELD: Application allowed.  The arbitrator's decision was set aside. The arbitrator did not err in concluding that Castle was a landlord, as Castle had held itself out as agent and signed the lease on behalf of Orient. However, as the arbitrator was unable to find a link between the security company and the landlords, she erred in finding jurisdiction to assess damages against the landlords for the ***negligence*** of the security company. This issue went beyond a landlord and tenant dispute, and thus exceeded the arbitrator's jurisdiction. |

**Statutes, Regulations and Rules Cited:**

Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241*. Residential Tenancy Act, [*R.S.B.C. 1996, c. 406*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JK4W-M0GT-00000-00&context=).

**Counsel**

R. Liu, for the petitioners. The respondents appeared on their own behalf.

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| **BLAIR J.** |

**1**   The petitioners, Castle Management Ltd. and Orient Merchandise Ltd., pursuant to the Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241* as amended, seek to set aside the decision of an arbitrator appointed pursuant to the Residential Tenancy Act, [*R.S.B.C. 1996, c. 406*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JK4W-M0GT-00000-00&context=), ("the Act")

**2**  The arbitrator, H. Pinsky, in her decision of August 24, 2000, found Castle Management Ltd. ("Castle") liable to the respondents, Douglas and Joanne Schwann, for $600 damages incurred in the break and enter of the respondents' motor vehicle.

**3**  Mr. and Mrs. Schwann are tenants occupying an apartment owned by the petitioner, Orient Merchandise Ltd. ("Orient"), in a 196-unit complex in downtown Vancouver known as the Pointe Claire Strata Corporation, legally described as Strata Corporation LMS2080 ("the Strata Corporation"). The Strata Corporation hired Colyvan Pacific Real Estate Service Ltd. ("Colyvan") to manage the common areas of the Pointe Claire complex. Colyvan in turn hired Inner-Tech Security Consultants Ltd. ("Inner-Tech") to provide security for the Pointe Claire complex, including the parking areas. Castle, designated as the landlord's agent, signed on behalf of Orient the Residential Tenancy Agreement executed by Mr. and Mrs. Schwann on June 6, 1999.

**4**  The tenancy agreement, in addition to establishing the rental terms, also provided the respondents with a parking stall located in the complex, the use of which was described in Schedule A to the tenancy agreement. The Act provides that a tenancy agreement may contain terms respecting the tenant's use, occupation and maintenance of a service or facility used in connection with the residential premises. A service or facility includes parking facilities.

**5**  At approximately 3:30 a.m. on June 28, 2000, a security guard employed by Inner-Tech noticed, but did nothing to stop, two individuals described as well-dressed and calm in their dealings with the guard, whom he found in and around the respondents' vehicle. The two are assumed to have broken into the respondents' vehicle causing the damage for which the arbitrator awarded $600 damages. Mr. and Mrs. Schwann sought arbitration under the Act, seeking recovery from both Castle and Colyvan as landlords. The arbitrator heard the matter on August 24, 2000, and gave her decision and reasons the same day.

**6**  The petitioners submit that the arbitrator erred in finding Castle to be a landlord, that the landlord owed a duty of care to protect the respondents' vehicle from damage, that Inner-Tech was an agent of the landlord, that the respondents suffered damages of $600, and that she, the arbitrator, had jurisdiction to determine the respondents' claim.

**7**  Before addressing the petitioners' claim, I note that I do not have before me the evidence upon which the arbitrator came to her conclusion. I have her decision and the affidavits filed with the petition, but no transcript or record of what transpired at the arbitrator's hearing, an omission which generally renders more difficult the review process. The arbitrator found that the landlord was responsible for its agents, Inner-Tech, which she held failed to exercise their duty of care in a proper manner.

**8**  The petitioners submit that the arbitrator erred in finding Castle to be a landlord within the meaning of the Residential Tenancy Act. However, the Act defines landlord to include an "owner or other person permitting the occupation of residential premises". Castle held itself out as agent and signed the tenancy agreement on behalf of Orient, the owner. I conclude the arbitrator did not err in concluding Castle to be a landlord. I will hereinafter refer to Castle and Orient singly or jointly as the "Landlord".

**9**  The petitioners submit that the arbitrator erred in finding the Landlord owed a duty of care to the respondents to protect the respondents' vehicle from damage resulting from criminal action. The Strata Corporation retained control of the common areas of the complex, including the parking lot, and hired Colyvan to manage those portions of the complex. Colyvan, in turn, hired Inner-Tec whose employee was on duty when Mr. and Mrs. Schwann's vehicle was damaged. The arbitrator found, to use her words, that she did not have jurisdiction to consider actions against Colyvan as they represent the Strata Corporation which has a legal relationship with the Landlord, but not the tenant.

**10**  The arbitrator found the security guard acted negligently in not questioning the two individuals found near Mr. and Mrs. Schwann's vehicle and concluded that the Landlord was responsible for its agents, Inner-Tech, who, she determined did not exercise the requisite duty of care. It is in linking the apparent ***negligence*** of Inner-Tech to the Landlord that I apprehend the arbitrator erred. Colyvan, which hired Inner-Tech, contracted with the Strata Corporation which, as the arbitrator noted, had a legal relationship with the Landlord, although that relationship was not described.

**11**  The purpose of the Act, in part, is to regulate and assist persons involved in residential tenancy relationships. The arbitration process included in the Act is designed to address disputes between landlords and tenants. The difficulty here is that the acts -- or in this situation, the failure to act -- with which Mr. and Mrs. Schwann were concerned involved the actions of a third party, Inner-Tech.

**12**  The arbitrator found Inner-Tech to be an agent of the Landlord, but such an agency required a linkage, presumably by contract, from the Landlord to the Strata Corporation to Colyvan and then to Inner-Tech. The arbitrator concluded she could not consider action against Colyvan finding

... I do not have jurisdiction to consider actions against Colyvan in any event as they represent the strata corporation, who have a legal relationship with the landlord and not the tenant, and are not the landlord.

(emphasis added)

**13**  In those words, the arbitrator acknowledged the essential ingredient which she had to find in order to exercise jurisdiction: the existence of a relationship between the Landlord, the Strata Corporation, Colyvan and Inner-Tech, of such a nature that the Landlord could be held accountable for the acts or omissions of Inner-Tech. That relationship, in the circumstances, had to flow through Colyvan and the Strata Corporation and back to the Landlord. The arbitrator did not or was unable to make that linkage and, absent that linkage, erred in finding jurisdiction to assess damages against the Landlord for the ***negligence*** of Inner-Tech.

**14**  The arbitrator, in the absence of a linkage between the Landlord and Inner-Tech, embarked on a determination of the responsibility of a third party, Inner-Tech, for its apparent ***negligence***, including any duty of care it owed to Mr. and Mrs. Schwann. Such an issue went beyond the resolution of a dispute between landlord and tenant and therefore went beyond the Act and the jurisdiction of an arbitrator appointed under the Residential Tenancy Act.

**15**  The arbitrator's decision is set aside. I have considered the issue of costs in the context of Mr. and Mrs. Schwann's efforts to resolve this dispute. The parties will bear their own costs.

BLAIR J.

**End of Document**

[***C.B. (Guardian ad litem of) v. McEwen (Guardian ad litem of), [2005] B.C.J. No. 116***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S10B-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Cranbrook, British Columbia

Master Groves (In Chambers)

Oral judgment: January 4, 2005.

Released: January 26, 2005.

Cranbrook Registry No. 11312

**[2005] B.C.J. No. 116** | 2005 BCSC 57 | 137 A.C.W.S. (3d) 505

Between C.B., by his next friends and guardians ad litem K.B. and M.B., plaintiff, and Aaron McEwen and Amber McEwen by their next friend and guardian ad litem Gaylene McEwen, and the said Gaylene McEwen, defendants

(10 paras.)

**Case Summary**

**Civil procedure — Applications and motions — Evidence — Discovery — Examination for discovery — Order to reattend — Production and inspection of documents — Inspection by court — Reports and records — Tort law — *Negligence* — Motor vehicles.**

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| Motion by the defendant, McEwen, for a review of redactions in Ministry of Children and Family records, for an order that CB attend further examination for discovery to answer questions related to incidents involving CB's sisters, and for an order that CB attend at a further work capacity evaluation. The plaintiff, CB also moved for production of a statement made by McEwen's sister to McEwen's claims adjustor. CB was injured in a motor vehicle accident in which a vehicle driven by McEwen hit CB and slammed him into a brick wall. McEwen's sister had exited the vehicle before the accident and McEwen may or may not have been both intoxicated and in the passenger seat of the vehicle at the time of the accident. CB brought the personal injury action against McEwen claiming damages for, among other things, depression. McEwen raised the issue of contributory ***negligence*** on the basis that at the time of the accident CB had been removed from his home as there had been allegations of inappropriate sexual behaviour between CB and his sisters. McEwen submitted that the depression claimed by CB might have had its origin in CB's inappropriate sexual behaviour towards his sisters.  HELD: Motion allowed in part.  The redactions concerning the Closing Record Recording in the Ministry records were attended to by the Master, who reviewed the original record, redacted it himself, and provided this revised document to the parties. CB was ordered to attend further discoveries and answer questions regarding the allegations concerning his behaviour with his sisters. The fact that CB was on different medication since his initial work capacity evaluation did not justify requiring him to attend a different work capacity evaluation. Finally, it was ordered that the statement made by McEwen's sister to the adjuster be forwarded to CB. |

**Counsel**

Counsel for the Plaintiff: R. Buddenhagen

Counsel for the Defendants: D. Ertl

Counsel for the Ministry of Children and Families: R.E. Apps, Q.C.

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| **MASTER GROVES (orally)** |

**1**   This is a relatively complex personal injury action for a number of reasons. Mr. C.B., the plaintiff, was injured in a motor vehicle accident which was driven by the defendant, Aaron McEwen, while he may or may not have been intoxicated and in the passenger seat of the vehicle in question. The defendant, Amber McEwen, had earlier been driving the vehicle, but had exited the vehicle leaving her intoxicated brother in the vehicle.

**2**  Mr. C.B. was injured when the vehicle in question apparently driven by Mr. McEwen hit him and slammed him into a brick wall of a coffee shop. I believe, from reviewing the file, he had serious and significant leg injuries, such that he had to be air ambulanced from, I believe, Sparwood, to a hospital in Calgary and spent some time recovering there after surgery. It is alleged that he has permanent ongoing difficulties with his legs which are as a result of the accident.

**3**  The defendants have raised an issue of contributory ***negligence*** which I will just say is an interesting issue. That has complicated the matter, but a major complication to the matter is that the claim by the plaintiff that he suffered psychological injuries, depression and the like as a result of the injuries, that in and of itself is not an uncommon circumstance. What is uncommon here is that around the time of the accident, which was November 11th of 2000, the plaintiff was not living at his parents' home. He was in foster care. The circumstances surrounding that were that there were allegations of inappropriate sexual behaviour between the plaintiff and his sisters in the home which resulted in him being removed from the home.

**4**  It is the position of the defendants that the depression alleged to have been suffered by the plaintiff as a result of the accident may, in fact, have its origins in either a psychiatric or psychotic difficulty that the plaintiff had which manifested itself in the inappropriate sexual behaviour towards what appears to be his sisters. That is the relatively complex factual background.

**5**  There are four issues before the court by way of motions. The first is an application by the plaintiff and that is an application that a statement made by Amber McEwen in the month of January, 2001, to a Mr. Len Ankers, who was an adjustor at the time with the defendants' insurer, that that statement be made available to the plaintiff. Initially, the defendants had resisted that application. They now concede that the statement should be provided. They note for the court that the statement is unsigned and undated but all seem to be aware of what document we are talking about. I am going to direct that the document which is believed to be a statement of Amber McEwen given in or about the month of January, 2001, to Mr. Len Ankers, be forwarded to the plaintiff forthwith.

**6**  The second issue relates to the Ministry of Children and Family and Community Services records. The records have been provided to Mr. Buddenhagen, who is counsel for the plaintiff it appears, who then provided them to counsel for the defendants. The defendants, upon reviewing the records, are concerned about redacted portions of the records. The records appears to have been redacted in a significant way, particularly, what appears in the documents before me at pages 5 through 8, the Closing Records. There are also a number of other redactions in the records which I believe for the most part relate to protecting the identity of persons who may have made complaints or protecting the identity of innocent third parties who may be involved in the matter peripherally. I note that there are a number of redactions related to telephone conversations with third parties.

**7**  In my view, the records that have been received are sufficient, save and except, in regards to pages 5 through 8, and I should specify that pages 5 through 8 start with the term, "Closing Record Recording," and appear to continue for four pages of a closing recording. In regards to that Closing Record Recording I am going to direct that it be delivered to me and I will review it in its original form, redact it myself for concerns of privacy and concerns of the identity of third parties and general concerns of relevance, and will then provide it to all counsel in my redacted form. With that exception, I am not going to allow any further release of the Ministry records.

**8**  There is a third request and that is that the plaintiff attend at a further examination for discovery and answer questions related to incidents with his sisters which are the incidents of alleged inappropriate sexual behaviour. I cannot help but conclude that as the plaintiff is making a claim for depression and other issues associated with the accident, that the actual psychological state of the plaintiff at the time of the accident is very much in issue. As a result, and although it may clearly be unpleasant, it is necessary that the plaintiff answer questions concerning his psychological state around the time of the accident. It is within the bounds of relevance that he be required to answer questions related to the incidents in his parents' home which resulted in his removal from that home, which are contemporaneous with the accident. I am going to require him to attend at a further examination for discovery and answer questions related to the allegations which were made concerning his behaviour in his parents' home.

**9**  The third aspect of the defendants' request which is the fourth aspect of the motions before me today, is a request that the plaintiff attend at a further work capacity evaluation. He attended one on that 11th of January, 2003. At that time the evidence seems clear that he was on medication for depression, but that he may or may not have been on antipsychotic medication. There is before me no evidence, really, that the antipsychotic medication was necessary for or was crucial to a proper functional capacity evaluation and work capacity evaluation. It would seem to me to stretch the parameters of what is usually ordered for independent medical examinations to require a further, in this case, work capacity evaluation simply because the person in question here, the plaintiff, is now on a different sort of medication. The defendants have had their opportunity to have a work capacity assessment and simply because the plaintiff is on different medications now, does not, in my view, require that he attend at a different work capacity evaluation. That application is dismissed.

**10**  There has been mixed success. I am going to order that costs of this application be costs in the cause.

MASTER GROVES

**End of Document**

[***Central Mountain Air Ltd. v. Prince George (City), [2012] B.C.J. No. 1710***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2CV-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

R.S. Tindale J. (In Chambers)

Heard: April 2, 2012.

Judgment: August 15, 2012.

Docket: 1139864

Registry: Prince George

**[2012] B.C.J. No. 1710** | 2012 BCSC 1221

Between Central Mountain Air Ltd. and Northern Thunderbird Inc., carrying on business as NT Air, Plaintiffs, and Corporation of the City of Prince George, Prince George Airport Authority Inc., Joe Martin & Sons Ltd., PGBC Consulting Group Inc., Bluewater Business Solutions Ltd., Paul J. Klotz, 623328 British Columbia Ltd., Leslie Joseph Martin, George Roderick Martin and Brian Kirk Martin, personally, and in their capacity as litigation guardian and curator for Vernon Michael Martin, Vernon Michael Martin, and John Doe, Defendants

(27 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Disposition without trial — Application by defendant, Klotz, to dismiss plaintiffs' claim as against him dismissed — Plaintiffs sued multiple defendants for damages for *negligence* in connection with fire at place of business — Evidence existed that fire started in office of corporate defendant of which applicant was an officer and in office he had occupied — It would be unjust to decide application without allowing plaintiffs opportunity to further investigate applicant's role in fire and to conduct examinations for discovery and obtain discovery of documents.**

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Civil Rules, Rule 9-5, Rule 9-7, Rule 9-7(11)

**Counsel**

Counsel for the plaintiffs: R.P. Saul.

Counsel for the Corporation of the City of Prince George: N.C. Carfra.

Counsel for the defendant, Paul J. Klotz: R.J. Stewart, Q.C.

**Reasons for Judgment**

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| **R.S. TINDALE J.** |

**INTRODUCTION**

**1**  This is the defendant Paul J. Klotz's (the "applicant") application to dismiss the plaintiffs' claims against Paul J. Klotz and PGBC Consulting Group Inc. pursuant to Rule 9-7.

**2**  The plaintiffs and the defendant, Corporation of the City of Prince George (the "City"), oppose this application. The plaintiffs have brought their own application to dismiss the summary trial application of the applicant, or in the alternative adjourn this hearing until examinations for discovery and the production of documents by the applicant have been completed. There were no other parties that attended this application.

**BACKGROUND**

**3**  The plaintiffs carry on the business of a scheduled and charter air carrier. The plaintiffs occupied a part of the building located at 4245 Hangar Road in the City of Prince George, Province of British Columbia (the "building"). The building is located on the Prince George Airport lands.

**4**  The defendant Bluewater Business Solutions Ltd. ("Bluewater") carried on business in the building. The applicant was an officer of Bluewater.

**5**  The applicant, in his personal capacity, also occupied space in the office of Bluewater.

**6**  On December 19, 2009, a fire broke out in a portion of the building which was occupied by Bluewater.

**7**  The plaintiffs filed their notice of civil claim on October 3, 2011. The applicant filed his response to civil claim on February 27, 2012.

**8**  The defendant PGBC Consulting Group Inc. has not filed a response to civil claim. There is evidence from the applicant that the defendant PGBC Consulting Group Inc. was dissolved on October 19, 2009, prior to the fire in December 2009.

**9**  The plaintiffs have not conducted an examination for discovery of the applicant as he takes the position that he will not be examined until after this application has been heard. He has not produced a list of documents for the same reason.

**POSITION OF THE PARTIES**

**10**  The applicant argues that there is no reasonable cause of action disclosed in the notice of civil claim.

**11**  The applicant argues that there are no material facts in the notice of civil claim that support any claim in ***negligence*** against the applicant. He also argues that he has provided affidavit evidence to support his position that there is no ***negligence*** on his part with regard to this fire.

**12**  The plaintiffs argue that really what the applicant is arguing is similar to a Rule 9-5 application to strike pleadings. The plaintiffs argue that the court is obliged to read the notice of civil claim as generously as possible in determining whether it discloses a cause of action.

**13**  The City also opposes the defendant's application and adopts the arguments of the plaintiffs.

**14**  Both the plaintiffs and the City take the position that I should be cautious to dismiss the claim at this point. They argue I should consider the nature of the claim, the fact that there are numerous defendants involved in this claim and the fact that there has not been any examinations for discovery of, or any disclosure made by, the applicant pursuant to the *Rules of Court*.

**DISCUSSION**

**15**  Rule 9-7 (11) states as follows:

On an application heard before or at the same time as the hearing of a summary trial application, the court may

1. adjourn the summary trial application, or
2. dismiss the summary trial application on the ground that
3. the issues raised by the summary trial application are not suitable for disposition under this rule, or
4. the summary trial application will not assist the efficient resolution of the proceeding.

**16**  In the decision of *Dahl et al. v. Royal Bank of Canada et al.* [*2005 BCSC 1263*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1DT-00000-00&context=) the Court, at paragraph 10, states the following:

The test for granting summary judgment is set out in Rule 18A (11). The court may grant judgment in favor of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues or fact, or it would be unjust to decide the issues on the application.

**17**  The issue before me is whether or not it would be unjust to decide this application without allowing the plaintiffs the opportunity to further investigate the applicant's role in this fire.

**18**  The applicant correctly argues that he has provided affidavit evidence disputing his ***negligence*** or role in the fire which has not been directly contradicted by affidavit evidence filed on behalf of the plaintiffs.

**19**  There is evidence, however, that the fire started in the office of the defendant Bluewater. The applicant was not only an officer of that company, but he was also occupying that office in his personal capacity.

**20**  There are a number of parties involved in this litigation. It is complex on its face and the applicant has not provided a list of documents pursuant to the *Rules of Court* nor allowed the plaintiffs to conduct an examination for discovery of him.

**21**  In the decision of *Coast Foundation Society (1974) v. John Currie Architect Inc.,* [*2003 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TS-00000-00&context=), the Court, at paragraph 12, states the following:

A summary trial can serve as an efficient manner of disposing of issues or claims in appropriate circumstances. Where the court has the entire claim before it on a summary trial application, it will generally endeavour to grant judgment unless credibility issues preclude the fair adjudication of matters on affidavit evidence. There are, of course, exceptions. Discoveries, for example, may not have progressed to the point where the court is satisfied that each side has had an opportunity to uncover all of the evidence that might be important to its case. In such a case, it might be unjust to grant judgment: *Bank of British Columbia v. Anglo - American Cedar Products Ltd.* [*(1984), 57 B.C.L.R. 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F7ND-G2GK-00000-00&context=) (B.C.S.C.). The court will also decline to grant judgment where the complexity of the issues is such that the court is unable to absorb all of the evidence and legal argument in the compressed time available within the Rule 18 A procedure: *Chu v. Chen*, [*2002 BCSC 906*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2VY-00000-00&context=), [*22 C.P.C. (5th) 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2VY-00000-00&context=) (B.C.S.C.).

**22**  I am not satisfied that the plaintiffs or the City has had an opportunity to uncover all of the evidence that might be important to their respective cases. The applicant has refused to provide production of documents to the plaintiffs or submit to examinations for discovery prior to this application.

**23**  In the circumstances of this case it would be unjust to grant the applicant's application without giving the plaintiffs any opportunity to conduct examinations for discovery or obtain any discovery of documents.

**24**  The plaintiffs have filed a notice of application to dismiss the summary trial application of the applicant, or in the alternative adjourn the summary trial application pending production of documents and the completion of discoveries.

**25**  A summary trial application is meant to be an efficient way of disposing of issues or claims. The applicant intentionally decided not to produce documentation pursuant to the *Rules of Court* or to be examined for discovery. To bifurcate this proceeding by adjourning it would defeat the purpose of a summary trial as a means of efficiently resolving the matter.

**26**  For the above noted reasons I dismiss the applicant's notice of application.

**27**  The plaintiffs and the City are entitled to their costs of this application on Scale B.

R.S. TINDALE J.

**End of Document**

[***Central Realty Ltd. (c.o.b. RE/Max Central) v. Holmes, [2003] B.C.J. No. 636***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2B2-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Josephson J.

Heard: February 25 - 27, and March 3, 2003.

Judgment: March 24, 2003.

Vancouver Registry No. S020693

**[2003] B.C.J. No. 636** | 2003 BCSC 436 | 121 A.C.W.S. (3d) 200

Between Central Realty Ltd. doing business as RE/Max Central, plaintiff/defendant by counterclaim, and Arthur Henry Holmes and Kathleen Holmes, defendants/ plaintiffs by counterclaim, and Howe Yet Lee, third party by counterclaim

(58 paras.)

**Case Summary**

**Agency — Relations between principal and agent — Particular agencies — Real estate agents — Agent's duty to disclose — Agent's duty — Fiduciary duty — Agent's duty of care.**

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| This was an action by Central Realty against Holmes for commission in relation to the sale of Holmes' property by its agent, Lee and a counterclaim by Holmes for ***negligence*** and breach of fiduciary duty in relation to Lee's conduct in selling his property. The property was listed on May 15, 2001 for $748,000 despite Lee's advice that the price was too high. Baggoo viewed the property twice in July and told his realtor that he would be interested if the price was in the range of $560,000 to $580,000. Lee told Baggoo's realtor that Holmes was not interested in selling at that price range. By September 6, 2001, the price had been reduced to $519,000 and on September 7, 2001, Wong made an offer for $480,000 that was open for acceptance for 24 hours. Lee informed Holmes that there had been no MLS exposure of the latest price reduction and that prospective buyers were viewing the property shortly but Holmes instructed him to accept the offer. The Wong offer was accepted and a second offer was made on September 10, 2001 of $519,000. When Baggoo learned that the property had been sold, he made a back up offer on September 12, 2001 in the amount of $558,900. The transaction was completed and title transferred to Wong on October 1, 2001. When the price had been reduced, Lee called the realtors who had clients with interest in the property but he did not call Baggoo's agent. Holmes argued that Lee breached his fiduciary duty by failing to advise him of Baggoo's interest in the property and failing to contact Baggoo's agent at the time of the price reduction. Lee argued that he had no duty with regard to Baggoo's interest as there was no indication that he was prepared to make an offer.  HELD: Action allowed, counterclaim dismissed.  Lee did not breach his duty of care or fail in his fiduciary relationship to Holmes. He kept Holmes fully informed of relevant circumstances as they unfolded and withheld nothing that a reasonable realtor would have disclosed. The interest of Baggoo was little more than an expression of opinion as to the actual market value of the property and did not create a duty requiring Lee to do more than he subsequently did. |

**Counsel**

G. McDade, Q.C., for the plaintiff. N. Vlahos, for the defendants.

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| **JOSEPHSON J.** |

Overview

**1**  The plaintiff ("Re/Max") claims a commission in the amount of $17,655.00 earned by its licensee, third party Howe Yet Lee ("Mr. Lee"), in relation to the sale of the defendants' ("the "Holmeses") residential property located in West Vancouver, British Columbia (the "Shafton property"). This claim is admitted by the Holmeses subject to their counterclaim for ***negligence*** or breach of fiduciary duty in relation to Mr. Lee's conduct as their realtor in selling the Shafton property.

The Parties

**2**  The Holmeses are an elderly couple in their eighties. They had lived in the Shafton property for approximately twenty-five years. In or about May 2001, Mr. and Mrs. Holmes decided to sell their home and move to Vernon to be closer to a friend who had become ill. Prior to listing the Shafton property for sale, they entered into an agreement to purchase a new home being built next to their friend in Vernon (the "Vernon property") with an ultimate closing date at the end of August 2001.

**3**  The Shafton property was subject to a Canadian Home Income Plan 'C.H.I.P.' Reverse Mortgage (the "reverse mortgage").

**4**  Mr. Lee is a 70 year old retired teacher who became a realtor in 1990, working primarily as a listing agent. In order to accommodate his community activities, he has carried an average of six to nine listings per year.

**5**  In May 2001, the Holmeses retained Mr. Lee as their real estate agent to sell the Shafton property.

Factual Background

**6**  The following relevant facts are not in issue:

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|  | May 15, 2001 |  | The property was listed by Re/Max pursuant to a Multiple Listing Contract (the "MLS Contract") for $748,000. |  |

The MLS contract expired on July 31, 2001.

The property was subject to a Canadian Home Income Plan 'C.H.I.P.' Reverse Mortgage for approximately $278,000.

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|  | June 25, 2001 |  | The property listing price was reduced from $748,000 to $738,000. |  |
|  | July 8, 2001 |  | The property listing price was reduced to $719,000. |  |
|  | July 16, 2001 |  | The property listing price was reduced to $699,000. |  |

The MLS Contract was extended to September 30, 2001.

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|  | August 18, 2001 |  | The property listing price was reduced to $629,000. |  |
|  | August 31, 2001 |  | The Holmeses completed the purchase of a new home in Vernon, British Columbia. |  |
|  | September 6, 2001 |  | The property listing price was reduced to $519,000. |  |
|  | September 7, 2001 |  | Jack Wong ("Mr. Wong") provided Mr. Lee with an Offer to Purchase the property, open for acceptance for 24 hours, in the amount of $480,000, with a completion date of October 1, 2001 (the "Wong offer"), subject to Mr. Wong accepting a feasibility study. |  |

Mr. Wong signed a Limited Dual Agency Agreement, disclosed and explained to the Holmes, permitting Mr. Lee to act as agent for both vendor and purchaser.

At 9:35 p.m., Mr. Lee faxed the Wong offer to the Holmeses.

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|  | September 8, 2001 |  | The Holmeses informed Mr. Lee by telephone that they wished to accept the Wong offer and that they were prepared to enter into a Limited Dual Agency Agreement. Both agreements were executed by them and faxed to Mr. Lee at approximately 12:52 p.m. |  |
|  | September 10, 2001 |  | A second offer to purchase the property in the amount of $519,000 was made by Mr. and Mrs. Hendren (the "Second offer"). This offer was valid until 1:00 p.m. on September 14, 2001. |  |
|  | September 19, 2001 |  | Mr. Wong removed the subject clause contained in the Wong offer. |  |
|  | October 1, 2001 |  | The transaction for the property was completed and title was transferred to an assignee of Mr. Wong. |  |

**7**  Mr. Lee met with the Holmeses on May 2, 2001 to discuss a sales strategy for the home and a competitive market analysis.

**8**  The Holmeses based the initial listing price for the Shafton property on the price of a neighbour's home which had sold for $719,000. They were of the opinion that their home had a higher market value based on a better view and decided on an initial listing price of $748,000. Mr. Lee advised them that this price was too high and suggested a price range of $675,000 to $705,000. However, the Holmeses wished to test the market at the higher price.

**9**  Mr. Lee, a thorough and careful agent, took copious notes of his involvement in the selling of the Shafton property. In addition to his general appointment book in which he diarized telephone calls and meetings, he maintained a comprehensive document entitled "Record of Action" which contained detailed notes of his marketing actions and responses in relation to the Shafton property.

**10**  A number of people viewed the Shafton property after it was placed on the market. The Record of Action and Mr. Lee's calendar reveal that at least six real estate agents visited the property twice, though it is not known if they were with the same client on each occasion. Mr. Lee contacted the Holmeses every week to keep them apprised of the developments and feedback from the market. Despite a considerable amount of passing interest in the Shafton property, there were no written offers until the Wong offer on September 7th.

**11**  As the summer progressed without any offers, the Holmeses became increasingly concerned. The Vernon property purchase was to close at the end of August, Mr. Holmes had become ill and they were under pressure in relation to the reverse mortgage. As a result, they instructed Mr. Lee to reduce the price of the listing a number of times, culminating in the final drop from $629,000 to $519,000 on September 6, 2001.

**12**  In mid-August, having received the Holmes's approval to contact builders who might be interested in the Shafton property for land value, Mr. Lee contacted Mr. Wong. Mr. Lee also called other developers, but they expressed no interest.

**13**  After twice viewing the Shafton property, Mr. Wong had his engineering consultant view the property on September 3rd. He also had Mr. Lee provide him with information regarding comparable properties.

**14**  Mr. Lee met with the Holmeses on September 5th at which time they signed an amendment to the listing agreement reducing the price to $519,000, effective the following day. The Holmeses also left for Vernon on September 5th.

**15**  On September 6th, Mr. Wong informed Mr. Lee that he intended to offer $480,000 with an expiry date of September 8th at 9:00 p.m. Mr. Wong was not then aware of the price drop to $519,000. Despite efforts by Mr. Lee to obtain a higher offer, Mr. Wong stated that, due to the cost of demolition, he was only prepared to offer $480,000. Mr. Wong also rejected Mr. Lee's efforts to provide more time for acceptance. Mr. Lee did not inform Mr. Wong of the pressure on the Holmeses to sell the Shafton property.

**16**  In addition to working on Mr. Wong's offer on September 7th, Mr. Lee showed the Shafton property to a potential purchaser. He also made telephone calls during the day to some of the realtors who he believed had shown more serious interest in the Shafton property to inform them of the most recent price reduction to $519,000.

**17**  Mr. Wong's offer was made on September 7th. Very shortly thereafter, Mr. Lee faxed it to the residence where the Holmeses were staying in Vernon. Mr. Lee then phoned that residence and was told they were asleep. Mr. Lee left a message for the Holmeses that they should review the offer and that he would call them at noon the next day to discuss the matter.

**18**  Mr. Lee spoke with Mrs. Holmes by telephone on September 8th, and explained the terms of the offer in detail and their available options, including possible counter-offers. Mr. Lee reminded the Holmeses that the latest price reduction had only been processed by the MLS on September 7th and informed them that he had booked two further showings of the Shafton property the following day. He also relayed to them Mr. Wong's instructions that he was not prepared to entertain counter-offers or extend the time the offer was open. The Holmeses instructed Mr. Lee that they had decided to accept Mr. Wong's offer and then faxed back their acceptance shortly after the phone call ended.

**19**  Mr. Lee continued to show the Shafton property and speak to other realtors in the days following the Holmes's acceptance of Mr. Wong's offer in an effort to secure a back-up offer in the event that the sale to Mr. Wong did not complete. As a result, a back-up offer in the amount of $519,000 was received by Mr. Lee on September 10, 2001.

Facts Primarily in Issue

1. The Interest of Dr. Baggoo in the Shafton Property

**20**  A Dr. Baggoo had expressed an interest in the Shafton property. He viewed the Shafton property with his wife around July 8th and again on July 23rd. He was very interested in the property, but not at the listed price.

**21**  Dr. Baggoo informed his realtor, Danny Lynge, that he would be interested in the Shafton property if it were priced in the range of $560,000 to $580,000. Mr. Lynge subsequently told him that he had spoken to Mr. Lee about his interest in the property and had been told that the Holmeses were not interested in selling in that price range.

**22**  Dr. Baggoo continued looking at other properties throughout the summer. He became aware of the fact that the price of the Shafton property had been reduced below $650,000. Dr. Baggoo next contacted Mr. Lynge in relation to the Shafton property in early September, at which time he indicated that he wanted to make an offer in the amount of $560,000. Mr. Lynge later replied that the property had been sold.

**23**  Dr. Baggoo became aware of the price reduction to $519,000 within a day or two of learning that the Shafton property had been sold. He then contacted the Holmeses directly and learned that the sale price was $480,000.

**24**  Dr. Baggoo testified that he spoke to Mr. Lynge who suggested that he would investigate the situation and that he could prepare a back-up offer in the event that the first offer fell through. There was some dispute in the evidence regarding what Mr. Lee told Mr. Lynge about the status of the back-up offer. Nevertheless, Dr. Baggoo had been informed by the Holmeses that they had not accepted a back-up offer of $519,000.

**25**  On September 12th, despite a listing price of $529,000, Dr. Baggoo made his own back-up offer in the amount of $558,900, equal to the assessed value.

**26**  Mr. Lynge testified that Mr. Lee contacted him a few days after Dr. Baggoo's second showing, at which time he indicated that his client would be interested in the property if it was priced in the range of $575,000 to $585,000. Mr. Lee responded by relaying his instructions that the Holmeses were not interested in selling at that price.

**27**  Mr. Lee testified that he was not left with the impression that Dr. Baggoo had any special interest in the property. He agreed that it was possible that Mr. Lynge had made some mention of a price range as a possible market value for the property, but Mr. Lee considered this to be nothing more than an opinion. Even if he had been informed by Mr. Lynge that his client was interested in purchasing the Shafton property within a specific price range, he would have responded by asking for an offer in writing. Mr. Lee also testified that had a specific price for the property been mentioned instead of a range he would have considered the interest to be more serious in nature.

**28**  Mr. Lee testified that Mr. Lynge never indicated that his client might be prepared to make a written offer. As a result, Mr. Lynge was not one of the realtors who received a call from Mr. Lee on September 7th in relation to the price reduction of the Shafton property.

1. The Expert Evidence

**29**  Mr. Satnam Sidhu offered expert opinion regarding reasonable standards of conduct by real estate agents.

**30**  In his report, Mr. Sidhu opined that "Mr. Lee did not act in the best interest of the sellers and did not act in a manner of what would be reasonably expected of a real estate licensee in British Columbia." In particular he stated that:

If Mr Lee had been acting in the best interests of the sellers he would have contacted the other real estate agents that had shown the property during the last several weeks as well as those agents that had shown the subject property on more than one occasion to inform them of the substantial price reduction from $629,000 to $519,000 prior to him selling it to his own buyer for the price of $480,000.

...

Or, Mr. Lee should have held off for several days before presenting his own offer after reducing the price to allow full exposure through MLS to the market price at the new price.

**31**  Under cross-examination, Mr. Sidhu resiled from his opinion regarding the appropriateness of withholding the presentation of an offer to a seller. He acknowledged that there is an obligation on a realtor to present offers immediately to a seller, but maintained that in this case, Mr. Lee should have advised the Holmeses to wait several days to allow for greater market exposure of the price reduction. He agreed that the decision is always that of the sellers.

**32**  Under cross-examination regarding the issue of contacting other realtors who had seen the property prior to the price reduction, Mr. Sidhu conceded that the decision as to who to call back is dependent on the circumstances of the particular listing and a subjective assessment of the level of interest that has been expressed. In the situation of a substantial price reduction, he testified that there would be an obligation to call back a greater number of realtors. He conceded that this was simply his own opinion and that none of the real estate practice manuals, guides or courses he was aware of provided any guidance on this practice.

**33**  Mr. Lee called Mr. William Phillips as an expert in real estate practice and conduct. He testified that it was not a standard practice in the industry for a real estate agent to contact other agents following a listing price decrease. Each situation is governed by market conditions relating to the property and the specific needs and interests of the seller. Specifically, Mr. Phillips testified that he did not agree with the opinion of Mr. Sidhu that failing to call back realtors was not in the best interest of the seller, explaining that there is a heavy reliance placed on the MLS listing service in relation to the sale of residential properties.

**34**  Mr. Phillips explicitly disagreed with Mr. Sidhu's opinion, ultimately abandoned by Mr. Sidhu. Industry rules and standard practice require realtors to communicate and present all written offers to their clients as soon as possible.

The Issues

**35**  The primary issue as contained in paragraphs 8 to 11 of the Holmes's counterclaim is whether Mr. Lee breached the standard of care required of a real estate agent or breached the fiduciary duty owed to the Holmeses by failing to either:

1. inform the Holmeses of Dr. Baggoo's interest in the Shafton property in the price range of $575,000 to $585,000; or
2. contact Dr. Baggoo's agent at the time of Mr. Wong's offer.

The Position of the Holmeses

**36**  The Holmeses submit that the Shafton property was undersold as a result of Mr. Lee breaching the standard of care required of a realtor and the fiduciary duty owed to them. (No submissions were advanced by the Holmeses regarding breach of contact as pleaded in the statement of claim.)

**37**  Mr. Lee, it is submitted, had a duty to follow up with realtors who had expressed significant interest in the Shafton property over the course of the listing period of four months. While the determination as to whether an expression of interest is genuine or significant is subjective, a realtor is required to collect information and make reasonable decisions throughout his or her dealings with a property.

**38**  An example of such a significant interest, they submit, is the visit to the property by a realtor on more than one occasion. In the present case, there were less than ten such realtors, including Mr. Lynge with Dr. Baggoo.

**39**  The Holmeses submit that Mr. Lee breached the standard of care required of him and the fiduciary duty owed to them when he failed to contact Mr. Lynge after the price reduction to $519,000 on September 7, 2001. Mr. Lee only had to contact a small number of realtors who had been to the property more than once over the previous four months and advise them of the price drop. This is especially important when the last significant price reduction had not yet been disseminated on the MLS. Given the fiduciary relationship that existed between Mr. Lee and the Holmeses, he was required to make it clearer than he did that the dramatic drop in the price of the Shafton property could result in considerable interest once it was exposed on the MLS.

**40**  The Holmeses submit that Mr. Lee's evidence contained some inconsistencies and was not always credible, particularly with regard to his dealings with the back-up offer and with Mr. Lynge after the acceptance of Mr. Wong's offer.

The Position of Mr. Lee and Re/Max

**41**  Mr. Lee submits that his conduct was entirely appropriate throughout his dealings with the Shafton property and the Holmeses. He acted with loyalty and integrity throughout the transaction and is deserving of the commission that he contracted and worked for.

**42**  The Holmeses were actively involved in all aspects of the sale of their home and were satisfied with his work as their agent. Their disappointment only arose in hindsight when Dr. Baggoo contacted them in the days following their acceptance of the Wong offer. Mr. Lee followed the orders of his principals and gave them his best advice throughout the transaction. The fact that they made a poor decision or chose not to follow that advice does not render him liable.

**43**  With respect to the allegation that Mr. Lee failed to inform the Holmeses of Dr. Bagoo's interest in the property at a range of $575,000 to $585,000, it is submitted that there is no evidence that Mr. Lee did so for any improper motive. Mr. Wong was not in the picture as a potential purchaser at the time of the alleged conversation and Mr. Lee was not working with other potential purchasers such that he might be in a position to "double end" his commission.

**44**  It is further submitted that if the conversation with Mr. Lynge occurred as alleged, no liability is established as the non-disclosure was not "material". The Holmeses were well aware that many people had shown an interest in the home but had thought the price too high. Despite this, they had declined to significantly lower the listing price earlier than they did.

**45**  Mr. Lee submits that at no time did Mr. Lynge indicate to him that Dr. Baggoo was prepared to make any offer to purchase the Shafton property. Since the price range discussed was considered to be nothing other than opinion as to market value, he was not obliged to take further action. To create such a duty on a real estate agent would be inconsistent with the entire MLS system and run counter to the practice of written offers. Since such a duty does not exist, Mr. Lee was also not negligent with respect to any of his conduct in relation to the initial expression of interest by Dr. Baggoo.

**46**  This is so even after receipt of the Wong offer. He had no indication that any prior interest that had been expressed was continuing. The degree of Dr. Baggoo's interest in the Shafton property in September was not even known to his own realtor at the time. There had already been a significant price reduction in mid-August with no further contact from Dr. Baggoo. Additionally, the evidence is clear that Mr. Lee acted in the best interests of the Holmes by continuing to market the Shafton property after the receipt of the Wong offer.

Conclusion

**47**  With the dramatic difference between the sale price and estimated value, the circumstances of this case require close examination on the issues of breach of fiduciary duty and ***negligence***, particularly where the agent acted for both vendor and purchaser.

**48**  There is no dispute on the law. Most of the authorities cited involving allegations of ***negligence*** against a real estate agent turn on their particular facts.

**49**  It is also well established that the relationship between a real estate agent and the person retaining him to sell property is a fiduciary one. In Ocean City Realty Ltd v. A & M Holdings Ltd. [*(1987), 36 D.L.R. (4th) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MK-00000-00&context=), the British Columbia Court of Appeal held that "material non-disclosure" by a real estate agent to a principal can amount to a breach of fiduciary duty. Wallace J.A., on behalf of the Court, stated at pp. 98-99:

The duty of disclosure is not confined to those instances where an agent has gained an advantage in the transaction or where the information might affect the value of the property, or where a conflict of interest exists. The agent certainly has a duty of full disclosure in such circumstances; they are commonly occurring circumstances which require full disclosure by the agent. However, they are not exhaustive.

The obligation of the agent to make full disclosure extends beyond these three categories and includes "everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal" [citation omitted] or, as expressed in 1 Hals., 3d ed., p. 191, para. 443, everything which "... would be likely to operate upon the principal's judgment". In such cases the agent's failure to inform the principal would be material non-disclosure.

...

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

**50**  While there were instances when their memory of less significant matters was imperfect, the Holmeses are clear thinking and strong minded individuals, particularly Mrs. Holmes who was the primary decision maker. From the outset of this transaction, they took control of the offering price and the lowest price they would consider, initially contrary to the advice of Mr. Lee. That and most subsequent offering prices were overly optimistic and resulted in a complete dearth of offers in reply.

**51**  As a result, they found themselves in desperate financial circumstances by the time the Wong offer arrived. Despite being informed by Mr. Lee that there had been no MLS exposure of the latest dramatic price reduction and that prospective buyers were viewing the property shortly, they decided to accept the only offer they had in hand.

**52**  Mr. Lee was careful and thorough in all his dealings with the Holmeses, taking copious notes of nearly all his dealings with the Shafton property.

**53**  The interest in the Shafton property expressed by Dr. Baggoo through Mr. Lynge was little more than an expression of opinion as to the actual market value of the property. Mr. Lee informed Mr. Lynge of his clients' instructions regarding the lowest offer they would consider. Dr. Bagoo chose not to make an offer. There are some inconsistencies between the evidence of Mr. Lee and that of Mr. Lynge regarding their exchanges. I find that the level of interest of Dr. Bagoo as conveyed to Mr. Lee was such that no duty was created requiring him to do more than he subsequently did.

**54**  With respect to the expert opinion offered, I prefer that of Mr. Phillips to that of Mr. Sidhu. Mr. Sidhu resiled from an earlier and clearly stated opinion. He was unable to substantiate his opinion with respect to the standard in the industry regarding the follow-up requirements of a real estate agent following a price reduction. While a practice of making follow-up calls to other agents who have shown a considerable interest in a property prior to a price reduction may be preferable in certain circumstances, there is no industry standard or accepted practice in that regard.

**55**  Imposing such a general duty on realtors would create more confusion than clarity. In the absence of written offers, determining when the level of interest of prospective purchasers is such that there is a duty on the listing realtor to call them back following price reductions would prove a near impossible task. While there may conceivably arise instances where the circumstances are such that such a duty may arise, this is not one of them.

**56**  Mr. Lee did not breach his duty of care or fail in his fiduciary relationship to the Holmeses. He kept them fully informed of relevant circumstances as they unfolded. He withheld nothing that a reasonable realtor would have disclosed. The Holmeses made their decision fully aware of relevant circumstances and their options. They were under great pressure to get the purchase price in hand promptly. Rejecting the only offer advanced carried with it risks, the purchase price being only one aspect of an offer. For example, other conditions and closing dates accompanying any subsequent offer may have rendered it unacceptable to them.

**57**  While I have sympathy for their plight, it did not flow from the breach of any duty owed them by Mr. Lee.

Summary

**58**  I find that Mr. Lee did not breach his duty of care nor violate his fiduciary relationship to the Holmeses. The plaintiff will have judgment for the amount claimed, together with costs.

JOSEPHSON J.

**End of Document**

[***Chambers v. Lyons, [2000] B.C.J. No. 2526***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2MC-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

Boyle J.

Heard: November 28, 2000.

Judgment: December 8, 2000.

New Westminster Registry No. S029048

**[2000] B.C.J. No. 2526** | 2000 BCSC 1775 | 101 A.C.W.S. (3d) 895

Between Marilyn Chambers, plaintiff, and Phillip Leroy Lyons, Consolidated Freightways Corporation of Delaware, British Columbia Hydro and Power Authority, Her Majesty the Queen in Right of the Province of British Columbia, District of Surrey and Royal Canadian Mounted Police, defendants

(39 paras.)

**Case Summary**

**Practice — Parties — Adding or substituting parties — Necessary parties — Adding or substituting defendants — Considerations — Limitation period.**

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| Appeal by the Attorney General of British Columbia from a decision allowing the victim, Chambers, to amend her statement of claim in a personal injury action long past the limitation period. In December 1993, Chambers was severely injured in a motor vehicle accident. The accident occurred at an intersection where the traffic lights were not working. In December 1995, Chambers instituted a personal injury action against Lyons and several other defendants. After examinations for discovery, Chambers successfully applied to add the Attorney General of British Columbia and two police officers as defendants, notwithstanding the expiry of the limitation period.  HELD: Appeal allowed.  The Attorney General should not have been added as a party, as his participation was not necessary to ensure that all matters were effectually adjudicated upon. Neither justice nor convenience was served by adding the Attorney General. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 15(5)(a)(ii), 15(5)(a)(iii).

Police Act, S.B.C. 1998, ss. 2, 3, 5, 11, 14, 15, 16.

**Counsel**

F.E. Hayman, for the plaintiff. H. Roberts, for the defendant (R.C.M.P.). T. MacLaclan, for the defendant (HMTQ in Right of the Province of B.C.).

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| **BOYLE J.** |

**1**   This was an appeal from a Master's order by which the plaintiff was given the right to amend her statement of claim in a personal injury action long past the limitation period.

**2**  The application before the Master in that part relevant here was brought pursuant to Rule 15(5)(a)(ii) and (iii). Its purpose was to add the Attorney General of B.C. and two police officers to the statement of claim. The Master did so in reasons given August 29, 2000.

**3**  The background (to which there was no dispute) was set out by the Master after an earlier hearing (June 21, 2000), [*[2000] B.C.J. No. 1288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-2287-00000-00&context=), in this way:

The plaintiff was severely injured in a motor vehicle accident ... December 4, 1993, at the intersection of Highway 15 (176th St.) and 24th Avenue, in Surrey. The intersection is normally controlled by traffic lights but on the date and at the time in question there was a power outage. [T]he traffic lights were not working. The collision occurred when the plaintiff's vehicle, proceeding through the intersection westbound on 24th Avenue, was struck by a tractor-trailer unit travelling northbound on 176th Street. The trailer was driven by Phillip Lyons.

...

[A writ was] issued in December, 1995. [It] named as defendants, Phillip Lyons [the tractor-trailer driver], Consolidated Freightways Corporation of Delaware [the owner]; British Columbia Hydro and Power Authority, Her Majesty the Queen in Right of the Province of British Columbia, the District of Surrey and the Royal Canadian Mounted Police ("the RCMP").

...

Plaintiff's counsel was advised that the RCMP was not a legal entity and was therefore not a proper defendant. Accordingly, on October 1, 1997 the plaintiff filed a notice of discontinuance against the RCMP. On September 4, 1998, plaintiff's counsel filed a notice of discontinuance against B.C. Hydro.

In the spring of 1999, through interrogatories served on HMQ/BC and an examination for discovery of a representative of HMQ/BC, plaintiff's counsel learned that the Ministry of Transportation and Highways ("MOTH") was responsible for maintaining traffic lights at the intersection where the accident occurred. Counsel learned that early in the morning on the date in question MOTH had contacted the contractor responsible for maintaining the highway and advised of the power outage.

According to MOTH, in conditions such as power outages and the like, it is historically the RCMP that takes over control of the intersections. On this occasion, however, neither MOTH nor the contractor notified the RCMP.

[As a result of the interrogatories the plaintiff sought to] amend the statement of claim by adding the following paragraph:

1. By virtue of an agreement entered into between HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and the Royal Canadian Mounted Police pursuant to Sections 2, 3, 5, 11, 14, 15, and 16 of the Police Act, S.B.C. 1998, and amendments thereto, the Defendant, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, was also at all material times jointly and severally liable for the ***negligence*** of the Officers of the Royal Canadian Mounted Police (hereinafter "the R.C.M.P.") who were responsible to carry out their duties within the District of Surrey, in the Province of British Columbia, as members of a Provincial Police Force.

The plaintiff also [sought] to amend the allegations of ***negligence*** set out in paragraph 11 of the original statement of claim to read [as is now relevant] as follows:

The Collision was caused or contributed to by the ***negligence*** of the Defendant ... R.C.M.P. officers working in the District of Surrey and each of them, particulars of which ***negligence*** include:

...

As to the ***negligence*** of the R.C.M.P. officers for whose negligent acts while acting within the scope of their duties as R.C.M.P. officers the Defendant, HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA is liable:

1. failing to post or erect warning signs, temporary traffic/stop signs or other device(s) to indicate a right-of-way or to warn of malfunctioning traffic lights at the intersection of 24 Avenue and 176 Street;
2. failing to take such measures as were reasonably necessary to ensure safe travel by the public while crossing the intersection of 24 Avenue and 176 Street;
3. failing to close the said highway to uses thereof when existing conditions were known, or ought to have been known, to be hazardous;
4. failing to devise and implement practices to ensure the safety of motorists at intersections controlled by traffic lights during the power outage;
5. failing to ensure prompt communication of the occurrence of the power outage between the Ministry of Highways and the local R.C.M.P. department;
6. failing to identify the significant hazard posed by the power outage, because of the use of 176th Street by freightliners, the heavy volume of traffic in the area of the power outage, the extended duration of the power outage and the limited visibility during the power outage and failing to take reasonable measures to avoid accidents in circumstances where there was a foreseeably high risk of accidents because of the power outage.

**4**  The Master pointed out Her Majesty was wrongly named, the provincial Attorney General being the proper party under the Police Act where R.C.M.P. in the province are concerned and the R.C.M.P. itself not being a legal entity. Subsequently moving on that direction of the Master, the plaintiff made a second application seeking to add two unnamed members of the R.C.M.P. and the Attorney General. The Master agreed. The Attorney General then brought this appeal.

**5**  On this appeal the first question then is whether or not the Master's order was one vital to the final issues in the action. The answer is found in 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=), in which Lambert J.A. held inter alia that, under s. 4(1)(d) of the Limitation Act, adding a new party entirely eliminated from the proceedings any limitation defence.

**6**  The Master's order therefore was vital to a final issue.

**7**  That conclusion leads to determination of the scope of this court's duty.

**8**  In Abermin Corporation v. Granges Exploration Ltd. [*(1990), 45 B.C.L.R. (2d) 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M4J3-00000-00&context=) (B.C.S.C.), Macdonald J. agreed with the opinion in Stoicevski v. Casement [*(1983), 43 O.R. (2d) 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-K0HK-22GW-00000-00&context=) (Ont. C.A.), which recognized, "that some interlocutory rulings ... raise questions vital to the final issue of the case (that) require a rehearing in which the judges' discretion may properly be substituted for the master." In those circumstances the court may proceed beyond the less complex question: was the Master clearly wrong? (See Canadian Imperial Bank of Commerce v. Barley Mow Inn [*(1994) 1 B.C.L.R. (3d) 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0KC-00000-00&context=) at para. 8).

**9**  In this appeal, a question - limitation - having been raised vital to a final issue, the procedure I followed was that of rehearing.

**10**  Turning to the applicable Rule - 15(5)(a)(ii) and (iii). It provides:

1. At any stage of a proceeding, the court on application by any person may

...

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

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

**11**  Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd. [*(1996), 19 B.C.L.R. (3d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G21K-00000-00&context=) at 297 (C.A.), deals with a change of mind of the kind here - a decision to join which was discontinued and then rethought. Finch J.A. concluded intentional but mistaken conduct was not a decisive factor in an application under the Rule. He excepted honest but mistaken judgment.

**12**  In that same case McEachern C.J. at p. 300 said: "... the most important considerations, not necessarily in the following order, are the length of delay, prejudice to the respondents and the overriding question of what is just and convenient."

**13**  The Attorney General agrees that delay and the explanation for it are not the sole factors to be considered but argues it would not be "just and convenient" to direct the Attorney General be added as a party.

**14**  I have approached this decision as a rehearing on the issue of whether or not there is any merit to be found in the plaintiff's allegations of fact and argument which would support a claim in ***negligence*** against the unnamed officers and therefore vicariously against the Attorney General of B.C.

**15**  First, there is not in the material filed or in argument made any cause of action shown against R.C.M.P. members. There is no common law, statutory or contractual duty placed upon the police generally or officers specifically in this province to keep roads safe in some broad general sense.

**16**  In Kipling v. Holmes (14 February 1994), 100 Mile House No. SC91-1533 (B.C.S.C.), Newbury J. (as she then was) at p. 5 held:

Even if I assume that the fallen [intersection] sign was a contributory cause of the accident, however, I cannot agree with Mr. Halpin that the R.C.M.P. are responsible to keep this road in safe condition. The R.C.M.P.'s primary function is surely law enforcement, not highway maintenance. To saddle them with partial responsibility for this accident seems to me stretching too far in order to supply Miss Therrian with a contributing party when the party with that statutory duty clearly - the Ministry of Highways - is at hand but has not been sued. This is not to say that the police are never under a duty to take reasonable steps to avoid foreseeable risks; but I know of no authority that imposes such a duty on the police that would not be imposed on ordinary citizens and no statutory provisions in the R.C.M.P. Act or otherwise was brought to my attention that would do this.

**17**  Officers, but not the Ministry, are protected against claims in ***negligence*** that might arise in the course of their duty by s. 11 of the Police Act, but here it has not been shown there is some act or omission on the part of R.C.M.P. members which leaves a reasonably strong possibility that, vicariously, a cause of action could be founded against the Attorney General of B.C. (Tanenaka v. Stanley [*[2000] B.C.J. No. 288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JW5H-X24J-00000-00&context=) (S.C.), a decision of Master Bolton).

**18**  In Harrington (Guardian ad litem) v. Pappachristos, [*[1992] B.C.J. No. 2600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4GK-M2FW-00000-00&context=), Callaghan J. concluded:

In my view, the governing principles for Rule 15(5) are set out by McFarlane J.A. in MacMillan Bloedel Ltd. v. Binstead [*(1981), 58 B.C.L.R. 173*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JTNR-M2MX-00000-00&context=) (C.A.) at 175:

It seems to me clear that one of the functions of the chambers judge hearing an application under this rule must be to decide whether there may exist between the appropriate parties a question which can be answered on an issue which can be decided by a court of law or by a judge exercising jurisdiction in a judicial capacity and to see, through whatever means, and not necessarily affidavits, that the question or issue is a real one in the sense that it is not entirely frivolous and would result in courts wasting judicial time. It is not the function, in my opinion, to decide whether on any kind of a balance it is likely that the plaintiff would be able to prove its allegations on a balance of probabilities or to any other degree beyond showing that there may exist such a question or such an issue.

**19**  (Harrington is cited without discussion with counsel but with a clear conscience because Ms. Hayman's firm was plaintiff's counsel in the Harrington case.)

**20**  Although not binding on this court, a decision with which I agree is Clough v. Bussan [1990] 1 All E.R. 431 Q.B. at 435:

So in the end I am driven to conclude that counsel for the police authority is right. Between the hours of 10 pm and 10.45 pm on 31 December 1984 the police in Bradford were under a duty to preserve law and order and to protect life and property, because that is their continuing obligation. But nothing, as I find, happened so as to give rise to a particular duty of care towards the first defendant on which he can now rely in response to the claim for damages from the plaintiff. The fact that a police station received information that the traffic lights at a particular junction were malfunctioning could not, in my judgment, be sufficient to impose on the police a duty of care to every motorist who might thereafter use the junction.

**21**  Clough goes beyond this application because, in Clough, the police were aware of a public hazard before the injury at issue occurred.

**22**  Since there is no general duty to every motorist, the plaintiff must find some specific ***negligence*** by R.C.M.P. members in the circumstances toward the plaintiff particularly at the time and place of the collision.

**23**  The power outage was widespread, the result of a storm. The R.C.M.P. log for the period shows three calls regarding problems with electrical wires in the area but nothing specifically bearing on this intersection or, for that matter, any other. The files relating to the calls (7 years ago) have been purged.

**24**  The R.C.M.P. asserts it cannot determine whether any member knew of the failure of the traffic signals in advance of the collision. No investigation of the civil claim was made by the R.C.M.P. because "from the start it was anticipated that the claim against it would be struck or discontinued" (at it was). A traffic analyst and other members did investigate but on the basis of immediate cause for R.C.M.P. and public purposes. That record is available but it, so far as I know, is not relevant to this application.

**25**  The R.C.M.P. position on notification is supported by MOTH. The Ministry of Transportation and Highways communication centre had advised the maintenance contractor at 4:55 a.m. of the failure but did not tell the R.C.M.P. (third Keiser interrogatory, response to Question 2). (MOTH, not the contractor, is responsible for the lights at the intersection).

**26**  There was no policy or practice dictating an exchange of information between MOTH and the R.C.M.P. at the time (Keiser examination for discovery, April 23, 1999, questions 74 and 75).

**27**  The material shows "the historical situation was for the R.C.M.P. to exercise discretion and only to attend and ask for signs infrequently and not as a matter of course" (Keiser affidavit, para. 3 sworn September 9, 1999):

MOTH would not have had the expectation that the R.C.M.P. would have requested signs on the night in question prior to the motor vehicle accident.

(ibid para. 5)

**28**  A review of Mr. Keiser's examination for discovery dated April 23, 1999, (particularly questions 202 through 207) shows an R.C.M.P. member's request for a sign would arise, for example, from an encountered highway incident at which a member sought to control traffic, not from any general duty of public protection in an event such as a power failure. There is no evidence of protocol, contract, understanding or practice placing responsibility on the R.C.M.P. for emergency signage.

**29**  No traffic members were on duty in the relevant area from 2:00 a.m. to 6:00 a.m. on the morning of the collision. No request was made for signs until after the collision which occurred at about 6:30 a.m. The request came from the Surrey Fire Department at 6:42 a.m. (presumably present as a result of a call to the scene). The highway maintenance contractor provided the signs which were then installed by an R.C.M.P. member (also there presumably after being called to the scene).

**30**  It is not necessary to deal at length with delay and prejudice in bringing the amendment application except to say:

**31**  Delay is of most significance here to show, in all the time that has passed - 20 months alone between the discontinuance and proposal of the amendment appealed herein - nothing of cogency has been turned up to support the plaintiff's application.

**32**  There is real prejudice to the Attorney General of B.C. because records have been purged. There is nothing filed that suggests or shows R.C.M.P. members were aware prior to the collision that the lights were not working.

**33**  There is nothing of weight to show the Attorney General of B.C. should have been joined as a party nor has it been shown the Attorney General of B.C.'s participation in the proceeding is necessary to ensure that all matters may be effectually adjudicated upon.

**34**  Neither justice nor convenience would be served by adding the Attorney General of B.C. as a party.

**35**  There is no evidence of fault on the part of the R.C.M.P., individually or collectively, and so there cannot be vicarious liability on the part of the Attorney General of B.C. In no way has the Attorney General of B.C. been shown to have any connection to any fault or liability that may be found at the end of the day.

**36**  The appeal is allowed.

**37**  The proposed defendant, Attorney General of B.C., will not be added as a party.

**38**  Costs at Scale Three.

**39**  A footnote of interest is provided in a letter from plaintiff's counsel to various other counsel which read:

The plaintiff's only reason for adding allegations with respect to the actions of the police arises from a possibility that the plaintiff will be found contributorily negligent and the need to ensure that all potentially liable parties are included in the action. My client has no interest in pursuing the police as long as we can be assured that such allegations will not be pursued by any other party.

BOYLE J.

**End of Document**

[***Cliff v. Dahl, [2012] B.C.J. No. 370***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-622C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.J. Bruce J.

Heard: January 27, 2012.

Judgment: February 24, 2012.

Dockets: M081915 and M114364

Registry: Vancouver

**[2012] B.C.J. No. 370** | 2012 BCSC 276 | 31 B.C.L.R. (5th) 190 | 2012 CarswellBC 650

Between Aaron Jeffrey Cliff, Plaintiff, and Maureen Evelyn Dahl, Aggressive Auto Towing Ltd., Terry Snelgrove, Trevor Evan Ivor Jones, Peter Alan Weaver and Brett Unger, Defendants, and Trevor Evan Ivor Jones, Peter Alan Weaver and Brett Unger, Third Parties And between Aaron Jeffrey Cliff, Plaintiff, and Derek Alexander Holmes, Defendant

(46 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Trials — Jury trials — Jury notice — Setting aside or striking out — Application by defendant to strike jury notice filed by plaintiff dismissed — Plaintiff commenced action against multiple defendants following motor vehicle accident — Plaintiff suffered serious and permanent injuries — No prejudice to plaintiff by delay in applying to strike jury notice — Length of trial alone not sufficient ground to strike jury notice — Defendant did not provide specific examples of difficulties jury would have interpreting and applying relevant statutes — Applicable legal principles not overly complex — Not sufficient for defendant to list expert reports and assert that jury would have to spend prolonged time reading them.**

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| Application by Dahl to strike the jury notice filed by Cliff. The action involved a motor vehicle accident in which Cliff, a pedestrian, was struck by a motor vehicle driven by Dahl. Cliff sued Dahl and a tow driver and towing company. Dahl issued third party claims against the owners of three disabled vehicles that Cliff and the tow driver were loading onto a tow truck at the time of the accident. Cliff suffered serious and permanent injuries, including a traumatic brain injury. There were expected to be 50 expert reports by the time the trial commenced. Cliff was involved in a second motor vehicle accident in July 2011. The jury notice was served on May 8, 2010. The application to strike the jury notice was outside of the seven-day time limit.  HELD: Application dismissed.  There was no evidence of any prejudice to Cliff by the delay in applying to strike the jury notice. Length of trial alone was not a sufficient ground for striking the jury. It was not sufficient for Dahl to list expert reports and assert that they would require the jury to spend prolonged periods of time studying them. Dahl did not provide any specific examples of the difficulties a jury would have interpreting or applying the relevant statutes. The applicable legal principles were not overly complex. It was not yet clear what evidence would be put before the jury. Dahl had leave to renew her application if, during the trial, there was a material change in circumstances affecting the jury's ability to hear the case. |

**Statutes, Regulations and Rules Cited:**

Occupational Health and Safety Regulation,

Supreme Court Rules, Rule 12-2(9)(b), Rule 12-6(3), Rule 12-6(5)(a), Rule 12-6(5)(a)(i), Rule 12-6(5)(a)(ii), Rule 12-6(5)(a)(iii), Rule 22-4(2), Rule 35(4)(a), Rule 39(27)

Workers Compensation Act, *RSBC 1996, CHAPTER 492*,

**Counsel**

Counsel for the Plaintiff: Michael P. Maryn, Sheena J. Clarkson.

Counsel for Maureen Evelyn Dahl: Ewen C. Carruthers.

Counsel for Aggressive Auto Towing Ltd. and Terry Snelgrove: Karen L. Martin.

Counsel for Trevor Evan Ivor Jones: Jonathan Lim.

Counsel for Peter Alan Weaver: Diana L. Dorey.

Counsel for Brett Unger: Jon R. Walsh.

Counsel for Derek Holmes: Sandra Katalinic.

**Reasons for Judgment**

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| **C.J. BRUCE J.** |

**INTRODUCTION**

**1**  Ms. Dahl applies to strike the jury notice filed by the plaintiff, Mr. Cliff. The defendants, apart from Mr. Snelgrove and Aggressive Auto Towing Ltd., support her application. Mr. Weaver's counsel and Ms. Dahl's counsel both made submissions to the court. For simplicity, I will refer to Ms. Dahl's argument as presented for both parties but treat this proceeding as a joint application by these parties. Mr. Snelgrove and Aggressive Auto Towing Ltd. take no position with respect to the application. Mr. Cliff opposes the application on its merits and due to the delay in bringing on the application and giving notice thereof. Mr. Cliff was involved in a second motor vehicle accident and has commenced Action No. M114364 against Mr. Holmes. The parties agreed that these two actions will be heard at the same time. Mr. Holmes supports the application to strike the jury notice.

**2**  Ms. Dahl's application is pursuant to Supreme Court Rule 12-6(5)(a)(i) and (ii). This rule provides that where a party is served with a jury notice under Rule 12-6(3), a party has seven days to apply to the court for an order striking the jury notice on three grounds: (1) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury; (2) the issues are of an intricate or complex character; or (3) the extra time and cost of a jury is disproportionate to the amount involved in the action. Ms. Dahl does not rely on the third ground.

**BACKGROUND**

**3**  This action involves a motor vehicle accident that occurred on January 21, 2007, when Ms. Dahl's vehicle struck Mr. Cliff, who at the time was a pedestrian. Mr. Cliff was standing in the northbound lane of Bradner Road in Abbotsford, B.C. when he was struck by Ms. Dahl. Mr. Cliff was assisting Mr. Snelgrove, a tow truck driver, to load three disabled vehicles onto a tow truck. Aggressive Auto Towing Ltd. is a defendant because of an allegation that, as Mr. Snelgrove's employer, the company is vicariously liable for his negligent acts in the course of employment.

**4**  The third parties, Mr. Weaver, Mr. Unger and Mr. Jones were present at the scene of the accident and the owners or operators of the disabled vehicles. Ms. Dahl maintains the third parties caused or contributed to the accident by their ***negligence***. The third party notice was filed on June 1, 2010. Mr. Cliff subsequently added the third parties as defendants to ensure he could claim damages against them in the event they were found to have caused or contributed to the accident.

**5**  As a result of the collision, Mr. Cliff suffered serious and permanent injuries, including a traumatic brain injury.

**6**  On May 25, 2010, Mr. Cliff served Ms. Dahl with a jury notice. At this time the trial was scheduled for four weeks. On September 8, 2010, at a Case Planning Conference ("CPC"), Ms. Dahl indicated her intention to apply to strike the jury notice. Dates for the application could not be set at that time.

**7**  A second CPC was held on February 11, 2011, and at that time I directed Ms. Dahl to bring on her application to strike the jury notice within a reasonable period of time. However, this could not be done until after the newly added third parties and defendants filed pleadings and exchanged their lists of documents. The parties agreed that this application would be heard on March 30, 2011; however, the notice of application was not filed and served in time for the hearing. The application was subsequently reset for January 27, 2012, which was the earliest date that all counsel and the court were available. On March 30, 2011, the court held a third CPC, at which time there was a discussion concerning the new defendants and whether the time set for trial would be sufficient. On June 24, 2011, there was a fourth CPC, at which time the trial dates were vacated and reset for five weeks commencing October 1, 2012.

**8**  On July 31, 2011, Mr. Cliff was involved in a second motor vehicle accident and commenced an action against Derek Alexander Holmes. Mr. Cliff maintains he suffered new injuries and an aggravation of his existing injuries from the first accident while he was a passenger in Mr. Holmes' vehicle, which vehicle was involved in a single car accident.

**PRELIMINARY OBJECTION**

**9**  Ms. Dahl acknowledges that her application to strike the jury notice is outside of the seven day time limit. However, she argues that the assigned trial judge has the authority to strike the jury notice on application regardless of whether the seven day time limit has been observed: *Patterson v. Rankel*, [*2001 BCSC 952*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23P1-00000-00&context=); *Lomax v. Weins*, [*2003 BCSC 396*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S2C5-00000-00&context=); and *Adamson v. Charity*, [*2006 BCSC 1642*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X2PW-00000-00&context=). See also, Rule 12-6(5)(a). Ms. Dahl maintains that Mr. Cliff has known of her intention to have the jury notice struck since September 8, 2010, when the issue was discussed at a CPC. Further, Ms. Dahl maintains this action has become more complicated since the jury notice was served by the addition of the three third parties and defendants and by the second action arising out of the July 31, 2011 motor vehicle accident.

**10**  Mr. Cliff argues that Ms. Dahl has brought her application to strike the jury notice more than 19 months after the time period in Rule 12-6(5)(a) expired. Further, at a CPC held on February 11, 2011, the court directed Ms. Dahl to bring on her application within a reasonable period of time. While the application was scheduled for March 30, 2011, due to Ms. Dahl's failure to serve her materials on time, the application did not go ahead. In these circumstances, Mr. Cliff argues the delay should preclude the application. Mr. Cliff notes that Ms. Dahl has not applied for an extension of the time limits pursuant to Rule 22-4(2).

**11**  In addition, Mr. Cliff argues the action has not become more complex since the service of the jury notice on May 25, 2011. The defendants were aware of the third parties since the spring of 2009. At Mr. Cliff's discovery on April 16, 2009, information concerning the identity of the owners of the disabled vehicles was disclosed. The nature and extent of Mr. Cliff's injuries were known to the defendants from the outset of the proceedings. Although another action is now to be heard with this proceeding, Mr. Cliff argues that having two actions heard together does not render the case too complicated for a jury: *Harder v. Nikolov*, [*2001 BCSC 1101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23WM-00000-00&context=).

**12**  Under the old Rule 35(4)(a), a pre-trial conference judge, the trial judge or a master could make an order that a trial be heard without a jury. The court interpreted this provision broadly; it permitted the application to be made outside the seven day time limit imposed in old Rule 39(27), which is for the most part identical to the new Rule 12-6(5). While the old Rule 35(4)(a) does not appear to have found its way into the new rules, the rationale behind permitting applications outside the strict seven day time limit remains consistent with the intent and purpose of the new rules. The ability to apply to strike the jury notice outside the strict time limit was necessary to ensure a fair trial and the court's ability to respond to a change in circumstances surrounding the conduct of a trial. Further, it is apparent that a trial management judge has authority to grant the relief claimed by Ms. Dahl without any reference to the seven day time limit: Rule 12-2(9)(b). Lastly, the court has a discretion to extend time limits in appropriate circumstances without the necessity of a separate application: Rule 22-4(2).

**13**  In the circumstances of this case, there is no evidence of any prejudice to Mr. Cliff attendant upon the delay. Mr. Cliff was aware of the intention to bring on this application as early as September 2010. The nature of these proceedings has changed significantly since the first trial dates were set; three new defendants and third parties have been added and a second action will be heard at the same time. Accordingly, for these reasons I dismiss Mr. Cliff's preliminary objection to the application.

**APPLICATION TO STRIKE THE JURY NOTICE**

**14**  Ms. Dahl argues the jury notice should be struck because:

1. The issues will require prolonged examination of documents that cannot be made conveniently with a jury.
2. The issues will require a scientific investigation that cannot be made conveniently with a jury.
3. The issues are of an intricate and complex nature.

**15**  Ms. Dahl argues that the jury will be required to undertake a prolonged review of numerous and lengthy expert reports, test results, and other documentation. To date there are 38 expert reports and there will likely be 50 at the date of trial. The defence anticipates expert evidence will be tendered by Mr. Cliff addressing the cost of future care, economic loss, damage to his vision, as well as additional expert reports from his physiatrist and a vocational consultant. The neuropsychologists' reports are particularly complicated due to the large number of tests administered, the lengthy interviews of Mr. Cliff and family members, and their document review. In support of this ground, Ms. Dahl cites *Gulamani v. Chandra*, [*2009 BCSC 1042*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-6211-00000-00&context=); *Cochrane v. ICBC*, [*2005 BCCA 399*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B14J-00000-00&context=); *Pratt v. Langley Memorial Hospital Society*, [*[1992] B.C.J. No. 1572*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S0XN-00000-00&context=) (S.C.); *Adamson*; *Sjoblom v. Dueck Chevrolet Oldsmobile Cadillac Ltd.*, [*2006 BCSC 2002*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4FR-00000-00&context=); and *Liu v. Chu*, [*2007 BCSC 974*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21VC-00000-00&context=).

**16**  Ms. Dahl argues this case will involve an assessment of complicated scientific expert reports addressing liability and causation issues. Liability for both accidents is seriously in dispute. The jury will be required to examine engineering evidence regarding the approach speed of Ms. Dahl's vehicle, the lighting at the scene and the possibility of accident avoidance. To date, Ms. Dahl has served an accident reconstruction report and a lighting report. A further report will be served concerning the duties of a tow truck driver. It is anticipated that Mr. Cliff and Mr. Snelgrove will obtain engineering opinions and their own expert reports concerning the duties of a tow truck driver.

**17**  In addition, Ms. Dahl argues that while the extent and nature of Mr. Cliff's injuries are not disputed, the experts disagree about his prospects for some level of recovery. Ms. Dahl says the jury will have to understand complicated medical, psychiatric, and psychological terms, the reasons for the tests administered and the foundation for their opinions to properly assess whether Mr. Cliff remains competitively employable. In support of this ground, Ms. Dahl cites *Lomax* and *Patterson*.

**18**  Ms. Dahl argues it is not "convenient" to have this trial heard by a jury because they will have difficulty retaining an understanding of the expert evidence over a lengthy period in a way that will permit them to make a timely assessment of it at the end of the case. This is particularly problematic when the evidence is interrupted. In this case, Mr. Cliff's evidence may have to be stood down because he tires easily. In support of this ground, Ms. Dahl relies upon *Siple v. Davis*, [*2000 BCSC 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X01V-00000-00&context=); *Clower and Sexton v. Poeckert*, [*2007 BCSC 409*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4DC-00000-00&context=); *Gulamani*; *Davies v. Degiano*, [*2007 BCSC 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61KK-00000-00&context=); *Nikal v. Caira*, [*[1993] B.C.J. No. 277*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1NR-00000-00&context=) (S.C.); and *Gwon v. Tan et al*, [*2002 BCSC 1476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60HD-00000-00&context=).

**19**  Adding to these factors, argues Ms. Dahl, is the multiplicity of parties and defence counsel (six), a multiplicity of standards of care, the need to determine liability and apportion fault, the need to interpret different legislation, and to apply the but for test. In addition, the jury must assess complex legal concepts in future loss and care. Moreover, Ms. Dahl says it is the combined impact of all these factors that dictate the jury notice be struck: *MacPherson v. Czaban*, [*2002 BCCA 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-608F-00000-00&context=); *MacDonald v. Smith* [*(1983), 48 B.C.L.R. 285*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F956-S05H-00000-00&context=) (S.C.); *Wipfli v. Britten*, [*[1982] 1 W.W.R. 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1PC-00000-00&context=) (B.C.S.C.); and *Sivertson (Guardian ad litem of) v. Dutrisac*, [*2011 BCSC 562*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S1PV-00000-00&context=).

**20**  Mr. Cliff argues it is a fundamental right to have a civil trial by jury and this right is deeply rooted in our legal history and traditions. It is a substantive right that should not be taken away without cogent reasons: *King v. Colonial Homes Ltd.*, [*[1956] S.C.R. 528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M11K-00000-00&context=). The onus rests with the applicant to establish those cogent reasons clearly: *Nichols v. Gray* [*(1978), 9 B.C.L.R. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F60C-X0SM-00000-00&context=) (C.A.); *Forde v. Royal Inland Hospital*, [*2009 BCSC 254*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3RK-00000-00&context=); and *Bateson v. Surrey Memorial Hospital Society*, [*[1989] B.C.J. No. 134*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F81W-2151-00000-00&context=) (S.C.). On the other hand, Mr. Cliff says the right to serve on a jury is a reciprocal right of citizenship.

**21**  Mr. Cliff maintains a jury is well equipped to decide this case because today juries are far more sophisticated and better educated than in the past: *R. v. Mezzo*, [*[1986] 1 S.C.R. 802*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23B8-00000-00&context=); and *R. v. W.(D.)*, *[1991] 1 S.C.R. 742*, "Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner", per Cory J. at 761. See, *R. v. Starr*, [*[2000] 2 S.C.R. 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M45J-00000-00&context=) at para. 31 and more recently, *Cahoon v. Brideaux*, [*2010 BCCA 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6329-00000-00&context=) at para. 4.

**22**  Mr. Cliff argues the applicant's burden is not satisfied by mere speculation as to the number of documents a jury will have to examine. The applicant must do more than provide a list of potential problems that the jury may face. Instead, the applicant must provide some concrete examples of the difficulties they anticipate with respect to these matters. The burden is not met by simply listing a number of tests that have been done and asserting that because the jury must look at the tests in the course of their deliberations, the case is unsuitable for a jury: *Dorus v. Teck Corporation*, [*2008 BCSC 1112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M360-00000-00&context=).

**23**  Mr. Cliff argues that there is insufficient specificity in Ms. Dahl's application to grant the relief claimed. First, of the 38 expert reports, there are only seven in Ms. Dahl's materials. All of the experts who authored these reports agree that Mr. Cliff suffered serious, life changing injuries, including a severe brain injury. The only issue in regard to damages is whether Mr. Cliff will be able to work at an unskilled and low level job at some point in the future. The difference of opinion between the experts is not significant in regard to his future employability. In addition, Mr. Cliff says Ms. Dahl exaggerates the mounds of documents the jury will have to review. Clinical records, for example, are rarely led at trial in bulk.

**24**  While Ms. Dahl says the evidence at trial will involve scientific investigation of a complex nature, she does not identify what the complex issues are and why the jury will have difficulty understanding them. While Ms. Dahl says the jury will have difficulty understanding these expert opinions, Mr. Cliff argues it is the task of counsel and the judge to simplify the evidence for the jury and to restrict the amount of documentary evidence that is presented to them: *Harder*. Simply because medical, economic and actuarial evidence is to be called does not give rise to a scientific investigation or render the issues complex: *Reischer v. Love*, [*2005 BCSC 1352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B27M-00000-00&context=). Mr. Cliff says this case does not involve a scientific investigation; rather, it is an investigation into human conduct: *Andersen v. Porter et al*, [*2000 BCSC 1000*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22B3-00000-00&context=).

**25**  Mr. Cliff says it is the character of the evidence, rather than its volume, that may render a trial too complex for a jury: *Furukawa v. Allan*, [*2007 BCSC 283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S435-00000-00&context=). The fact that the jury may have to address causation, contributory ***negligence*** and other legal issues does not render it unsuitable for a jury. The judge must explain the legal principles to a jury and direct them as to how they must be applied: *Aberdeen v. Langley (Township of) et al.*, [*2006 BCSC 1980*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3WF-00000-00&context=); and *Daynes v. British Columbia Electric Railway Co.* [*(1914), 49 S.C.R. 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F956-S14D-00000-00&context=). The jury will need to decide what happened as between the parties and the judge will tell them how to apportion liability, instruct them on how to apply the standard of care, and instruct them on the test for causation. The judge will also instruct the jury, where necessary, on the proper interpretation and application of legislation: *Dorus*. Further, the court must assume that trial management of issues will be effective, but if it becomes clear during the trial that the jury cannot be expected to manage the evidence, they may be discharged mid-trial.

**26**  Mr. Cliff argues that this application should be dismissed and cites three judgments where an application to strike the jury notice was dismissed on similar grounds: *Forde*; *Sartore v. Beckley*, [*2002 BCSC 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-DYMS-61CB-00000-00&context=); and *Aberdeen*.

**DISCUSSION**

*A. General Legal Principles*

**27**  Rule 12-6(5)(a) provides that a party may apply to strike a jury notice on three grounds; however, only the first two grounds are relevant to this case:

1. the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
2. the issues are of an intricate or complex character.

**28**  There is a presumptive right to a trial by jury and Mr. Cliff should not be deprived of that right unless there are cogent reasons to do so. The onus rests with the applicant to clearly satisfy this heavy burden. As Arnold-Bailey J. concluded in *Gulamani* at para. 43:

In my view, the point to be drawn from *Reischer* is clear: juries in this province are held to be informed and intelligent and capable of assessing expert evidence where it is properly presented. In other words, the threshold for determining whether a prolonged examination of documents or a scientific investigation is necessary and whether it can be conveniently done by a jury (Rule 39(27)(a)(i)), or whether the issues are of a complex or intricate nature (Rule 39(27)(a)(ii)), is relatively high even in the context of a long trial with many difficult legal questions.

**29**  Turning to the case for the applicant under Rule 12-6(5)(a)(i), the authorities support a two-step process, as described by Arnold-Bailey J. in *Gulamani* at paras. 28, 29, 31 and 32:

[28] First, the court must determine whether the issues require "prolonged examination of documents or accounts or a scientific or local investigation." That the materials in evidence are lengthy does not, however, necessarily mean that a prolonged examination of them is required. In *Wipfli (Guardian ad litem of) v. Britten*, [*[1981] B.C.J. No. 1706*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1PC-00000-00&context=) (S.C.), at para. 14, Chief Justice McEachern expressed doubt that a 715-page record and hospital procedure manuals would require a detailed or prolonged examination, citing the following statement made by Hutcheon J. in a previous unreported decision:

The common experience is that in most cases the hospital records, having been made an exhibit, play very little part in the proceedings.

[29] To determine whether a prolonged examination would be required by the trier of fact, rather, the court must consider more carefully what the evidence will actually be. ...

...

[31] When the finding is made that a prolonged examination or investigation will be necessary, the court must then turn to the second part of the test, which is whether or not that examination can be made "conveniently with a jury." In *Wipfli* at para. 30, McEachern C.J.B.C. clarified that convenience in this context "does not refer to physical or personal convenience", but rather "to the proper conduct of the trial including an understanding of the issues and evidence, the submissions of counsel, and the Judge's charge." The Chief Justice further described this at para. 26:

Convenience, in the sense in which that word is used in the Rule does not depend solely upon whether or not the jury can be made to understand the evidence. [...] What is required before it is convenient to have a scientific investigation made with a jury, is the ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.

[32] In other words, convenience includes the ability of a jury to both understand evidence and retain that understanding such that a fruitful analysis will be possible at the end of the trial. It is reasonable, I would add, to infer that the longer the trial and the more prolonged and complex the scientific investigation or examination of documents or accounts, the more difficult it will be for a jury to retain a clear understanding of the evidence to the conclusion of the trial.

[Emphasis in original.]

**30**  Rule 12-6(5)(a)(ii) was also considered by Arnold-Bailey J. in *Gulamani* at paras. 34-36:

[34] The other ground for striking a jury notice is found in Rule 39(27)(a)(ii). The question for the court, in considering this alternate route, is whether "the issues are of an intricate or complex character."

[35] These issues will need to be considered in the context of the entire case and the other issues at bar, rather than in isolation. In *Yewdale v. Insurance Corp. of British Columbia*, [*[1994] B.C.J. No. 2835*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0FH-00000-00&context=) (S.C.), Cohen J. found at para. 16 that the combination of the issues in that case made them sufficiently complex that the matter should be tried without a jury:

... when I consider that the trier of fact will have to weigh the evidence and apply the law in an emerging field of jurisprudence to a series of issues complex in character involving different sets of defendants with different sets of duties and standards, allegations of breach of contract, consider a volume of documents, consider alternative legal theories, may have to apportion liability and consider contributory ***negligence***, I am persuaded that this is an appropriate case for determination by a judge without a jury ...

[36] In that case, which arose in relation to a motor vehicle accident, there were four different sets of defendants. The trial by judge and jury was set for three weeks and was to involve multiple causes of action, a large volume of documents, alleged breaches of different duties, various time periods involving different standards of practice, different theories of liability, issues of admissibility, and novel legal issues.

*B. Arguments in Favour of Striking the Jury Notice*

**31**  Ms. Dahl describes several reasons why the court should strike the jury notice in this case based upon Rule 12-6(5)(a)(i) and (ii) in her written argument at page 7. Ms. Dahl elaborates upon each of these reasons in her written argument. I will address each of these reasons individually and collectively as Ms. Dahl argues it is the multiplicity of difficulties that a jury will encounter in this case that renders the matter inappropriate for a jury.

**32**  First, Ms. Dahl maintains a trial of five weeks' duration is too long for a jury to retain a clear understanding of the complicated medical and scientific evidence that will be led during the trial. In my view, a five week trial is not overly long; juries routinely hear civil and criminal trials well beyond this length. Even when a long trial involves complicated factual and legal issues, the length of trial alone is not a sufficient ground for striking the jury. It is merely a subsidiary factor that may tip the balance one way or the other.

**33**  Second, Ms. Dahl argues the trial will involve numerous and complex questions of fact and law on the issue of liability, causation, apportionment of fault, and damages. In particular, Ms. Dahl says the jury will be required to address the ***negligence*** of multiple defendants; the causal connection between the purported ***negligence*** of the defendants and Mr. Cliff's injuries; the allocation of contributory ***negligence***; the application of the "but for" test; the interpretation of various statutes and standards of care; ***negligence*** and apportionment of fault in the second accident and as between the two accidents; the extent of Mr. Cliff's cognitive recovery; and whether he can return to remunerative employment.

**34**  While this list of the jury's tasks, viewed collectively, appears daunting, many of these issues are resolved by the division of responsibilities between the judge and the jury. It is the judge, with the assistance of counsel, who must instruct the jury concerning the legal principles applicable to the facts determined by the jury. If legislation such as the *Workers Compensation Act* and the *Occupational Health and Safety Regulation* are relevant to the issues in dispute, it is the judge who must instruct the jury on its interpretation and application as a matter of law. Similarly, statutory and common law duties and standards of care are also a matter of law to be determined by the judge. Moreover, the comments by Hinkson J. (as he then was) in *Dorus* at para. 31 are applicable to this case. The applicant does not satisfy the burden of proof by simply listing a number of statutes and then asserting that the case is unsuitable for a jury to decide. Ms. Dahl has not provided any specific examples of the difficulties the jury will have interpreting or applying these various statutes.

**35**  Similarly, Ms. Dahl recognizes that the judge will be responsible for defining the legal principles concerning apportionment of fault and the "but for" test; however, she does not identify the problems a jury would have applying these legal concepts to the facts of this case. In my view, while it may be difficult for the jury to determine what occurred from an evidentiary perspective and equally difficult for a judge, the application of the law to the factual conclusions they come to will not be overly complicated. The legal principles applicable to this case are not in a field of emerging law; nor are they overly complex.

**36**  Third, Ms. Dahl argues the case will involve prolonged examination of lengthy reports, test results and other documents dealing with conflicting medical, psychological and vocational expert opinions. In my view, Ms. Dahl overstates the complexity of the medical opinion evidence in this case. Although Mr. Cliff suffered a severe traumatic brain injury, in addition to several other physical injuries, there is no dispute among the various medical experts in regard to the extent of his injuries and the impact of those injuries on his life. The jury will not be required to determine whether Mr. Cliff suffered a severe traumatic brain injury by wading through complex medical reports and test results. In regard to the question of damages, the dispute between the parties is a narrow one; that is, to what extent can Mr. Cliff's quality of life and employment prospects be improved by psychiatric and psychological therapy addressing the organic and psychological causes of his fatigue, depression, and mood disorder. This is an issue that juries are regularly called upon to decide. Rarely will they be required to study test results administered by various experts to determine how Mr. Cliff will fare in the future with the proper medical assistance. The experts' views about the future are primarily based on assumptions, albeit supported by their training and expertise, that may or may not be realized. The differences between them are only a matter of degree.

**37**  Fourth, Ms. Dahl argues the case will require the jury to undertake a prolonged examination of conflicting expert reports of a scientific nature relating to the pre-impact speed, reaction time, accident avoidance and lighting. This argument is based on an assumption that Mr. Cliff will be presenting the jury with expert reports that conflict with the accident reconstruction report authored by Mr. Isling and the lighting report authored by Mr. Inch, both of which were commissioned by Ms. Dahl. It is difficult to assess whether a prolonged examination of these reports will be necessary because there are no conflicting reports in existence at this time. I note that these experts have been given notice that they are required for cross-examination at trial and thus it may be a fair assumption that Mr. Cliff intends to present the jury with competing opinions.

**38**  However, I have read the two reports commissioned by Ms. Dahl and I do not find them to be overly complex or difficult to understand. In argument, counsel was unable to provide me with an example, by reference to the reports, of something that would be too complicated for the jury to understand and retain throughout the trial. Moreover, I agree with the comments at para. 25 of *Harder*, citing *MacKinnon v. Ebner*, [*[1997] B.C.J. No. 364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21CY-00000-00&context=) (S.C.), that it is the responsibility of counsel to ensure that expert opinion evidence is understandable and it is the job of the expert to simplify documentary evidence for either a judge or a jury. As MacKenzie J. (as she then was) says in *MacKinnon* at paras. 24 and 26:

... A reasonably informed and intelligent jury is as capable of assessing expert evidence as is a single judge. It is up to counsel to ensure it is presented so that a jury can understand it. Indeed, the very purpose of expert evidence is to assist lay people to understand technical evidence. ...

...

Juries are sophisticated enough today that, with the assistance of counsel and instructions of the trial judge, they will not find this evidence beyond their abilities to comprehend, retain and apply to the case ...

**39**  Fifth, Ms. Dahl argues this case will involve prolonged examination and understanding of actuarial/economic expert opinion evidence based on Mr. Cliff's pre and post-accident career path and earning stream when determining damages for loss of future earning capacity. Although Ms. Dahl has listed the 38 reports already exchanged, including a work capacity report and an economic report, these reports were not attached to her application. As a consequence, I have not read the reports addressing future economic loss and future care costs. While counsel's statements about the complexity of the reports may be sufficient in cases where there is general agreement as to what the reports say, in this case counsel disagree about the complex nature of the reports and whether the jury will be required to closely examine all of them. Further, Ms. Dahl does not specifically identify the basis for her assertion that these matters are too complicated for the jury to comprehend.

**40**  There is also no indication as to whether the defendants will provide conflicting expert opinion evidence in response to Mr. Cliff's expert reports. While the defendants may commission their own expert reports addressing future care costs and loss of future earnings, there is no certainty that their experts' views will be substantially different from the opinions provided by Mr. Cliff's experts. In general terms, I have never found actuarial evidence of future loss of income to be overly complicated. Given well established parameters, it is a relatively straightforward mathematical exercise to determine the range of future loss of income. It is really the underlying facts that are more difficult to determine. For example, what were Mr. Cliff's employment prospects before the accident and how has that changed since the accident? In my view, a jury is particularly well suited to the task of determining the evidentiary foundation for an award of damages under the headings of future loss of earning capacity and cost of future care.

**41**  Lastly, Ms. Dahl argues that the fatigue experienced by Mr. Cliff may require him to give evidence in stages and over a period of days. This disruption in the evidence, argues Ms. Dahl, will make it difficult for a jury to maintain continuity of the evidence. While this may be a factor to consider, along with all of the other circumstances, the fact that a witness may require breaks while giving evidence is not a proper basis upon which to strike a jury notice.

**42**  It is not sufficient for the applicant to list expert reports and assert that these will require the jury to spend prolonged periods of time studying them. As the authorities cited by Mr. Cliff and Ms. Dahl indicate, the raw data and background materials underlying expert opinion evidence are often not presented to the jury. This evidence is culled and simplified for the trier of fact regardless of whether it is a trial by judge alone or judge and jury. The onus is on the applicant to demonstrate why, in the circumstances of this case, the jury will be required to spend prolonged periods of time examining the raw data in support of the various expert opinions. Further, the onus rests with the applicant to demonstrate, if there will be a need for prolonged examination of documentary evidence, that it is inconvenient for the jury to do so in this particular case. As the court said in *Gulamani*, the mere fact that there will be a need for a prolonged examination of documents does not automatically lead to a conclusion that it will be "inconvenient" for a jury to do so. The question is whether a jury can be made to understand the evidence and to retain this understanding until the end of the trial. On the facts of this case, Ms. Dahl has failed to demonstrate that either part of the Rule 12-6(5)(a)(i) test has been satisfied. She has also failed to demonstrate the "intricate or complex character" of the issues as required by Rule 12-6(5)(a)(ii).

**43**  At the present time it is not known precisely what evidence will be placed before the jury. Nor is it known with any certainty whether there will be material differences between the experts with respect to the issues impacting liability and damages. Should the court determine in the course of the trial that the proceedings are in fact too intricate or complicated for the jury to understand or require a prolonged examination of documents that is not "convenient" for a jury, the matter may be revisited and the court may order the trial to proceed without the jury if the interests of justice requires such an order: *Dorus* at para. 24.

**44**  The parties have cited numerous authorities in support of their respective positions. The result in each case turned on its unique circumstances and particular facts. No two cases are identical. Each trial presents its own complicating and neutralizing factors. It is difficult to say that because a jury notice was struck in a similar case, it should also be struck in this case due to the inevitable presence of unique circumstances. In addition, the results in the authorities often depend on the view taken by the judge or master as to the specific issues raised by the pleadings and the presence of multiple parties and actions. The exercise of discretion is not a scientific process. There will always be a range of possible results based on the facts of any given case when the court is called upon to exercise a discretionary authority.

**45**  Accordingly, on the particular facts of this case, I must conclude that the applicant has failed to satisfy me that the jury notice should be struck based on the grounds articulated in Rule 12-6(5)(a), either alone or collectively. It may well be that this application is premature given the uncertainty surrounding the evidence that will ultimately be led at trial. Ms. Dahl has leave to renew her application if, during the course of the trial, there is a material change in circumstances affecting the jury's ability to hear this case.

**46**  The application is dismissed. Mr. Cliff shall have his costs at Scale B, in any event of the cause.

C.J. BRUCE J.

**End of Document**

[***Cybulski v. Bertrand, [2000] B.C.J. No. 470***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X06N-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Catliff J.

Heard: February 7 - 18, 2000.

Judgment: March 7, 2000.

Vancouver Registry No. B961201

**[2000] B.C.J. No. 470** | 2000 BCSC 415 | 95 A.C.W.S. (3d) 661

Between Angela Cybulski also known as Angela Beaumont, plaintiff, and John Bertrand, Newcourt Credit Group Inc. and Canada Post Corporation, defendants

(45 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, standard of care of driver — Damages — General damages — General damages for personal injury — Pain and suffering, loss of amenities and other nonpecuniary damages — Impairment of earning capacity — Prospective loss of wages or income — Future care and treatment — Special damages.**

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| Action by Cybulski against Bertrand for damages for injuries sustained in a motor vehicle collision. Cybulski was a 46- year-old registered nurse who worked in the haemodialysis department of a hospital. At the time of the accident, she had back problems and was studying to become a perfusionist, which paid somewhat better than general nursing but was less stressful physically. Her car was broadsided by a postal truck, causing her to hit her head on the window and to sustain soft tissue injuries affecting her back, buttocks and leg. Bertrand claimed that he proceeded into the intersection and collided with Cybulski's car because he thought that she was going to stop, and that she was negligent in proceeding. He also claimed that her admission that she thought Bertrand was stopping indicated contributory ***negligence***. Following the accident, Cybulski remained active at first, but she developed chronic pain, bowel and bladder incontinence, and she became depressed. Her activity level decreased significantly and she became prone to rages. She claimed that the accident had caused a mild brain trauma that had kept her from completing her perfusionist course and forced her to continue working in haemodialysis. She also claimed that the accident caused her serious jaw problems, creating headaches and joint-noise. At the time of trial, her soft-tissue problems had resolved, the incontinence was under control, but she still experienced rages and head pain.  HELD: Action allowed.  Cybulski was awarded general damages of $75,000, lost income of $3,396, $50,000 for the lost perfusionist opportunity, special damages of $4,582, and $7,150 for future care. Bertrand was wholly liable for the accident. Cybulski did not prove that she suffered a mild traumatic brain injury. However, the accident caused her psychological problems and associated physical symptoms. The accident was also more than likely the cause of her jaw problems. As she quit the perfusionist course far short of completion, it was not appropriate to award lost opportunity based on a lifetime loss of salary in that profession. Future care damages included $5,000 for psychotherapy. |

**Counsel**

P.S. Boles, for the plaintiff. N.S. Steinman and A.W. Dabb, for the defendants.

[Ed. note: A Corrigendum was released by the Court March 27, 2000. The correction has been made to the text and the Corrigendum is appended to this document.]

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| --- |
| **CATLIFF J.** |

**1**   Angela Beaumont is a 46-year-old registered nurse. She works in the haemodialysis department of St. Paul's Hospital. Four years ago she was injured in a motor vehicle accident. She claims that as a result she suffered a mild traumatic brain injury and other injuries. This, she says, has caused a setback in her career and a variety of physical and psychological problems for which she seeks compensation. Issues in the case include a question of contributory ***negligence***, the diagnosis of brain injury and the nature and extent of the plaintiff's injuries.

THE ACCIDENT

**2**  Shortly before noon on 16 January 1996 the plaintiff was driving her 1987 Hyundai west on Handley Street in Richmond. The defendant Bertrand works for Canada Post. On this day he was delivering mail by truck. He returned to his truck parked on Douglas Street near the south side of its intersection with Handley Street. He drove out into the road and headed north for the intersection. He had his four-way flashing lights on. The plaintiff saw the postal truck on her left coming towards the intersection and thought it was going to stop. It was travelling slowly. Mr. Bertrand said he saw the plaintiff coming from his right and I infer must have thought he had time to cross the intersection ahead of her. Instead his truck hit the middle of the left side of the plaintiff's car. As a result the Hyundai spun to the right 180 degrees and came to rest on the west side of the intersection.

**3**  The plaintiff walked to a friend's house and telephoned her husband who was at home nearby. He came to the accident scene as well as an R.C.M.P. officer, Constable Kent, and John Bertrand's supervisor, Mr. Veperts.

**4**  Constable Kent drew a sketch on which he noted that the plaintiff's car "after being struck went into a skid turning 180 degrees". He drew two lines from the point of impact to the place of rest of the Hyundai. Mr. Veperts said he measured a skidmark of 66 feet. At trial he drew a skidmark that started at the east side of the intersection on Handley Street and continued past the point of impact to the other side of the intersection.

**5**  Mr. Bailey of McInnis Engineering Associates Ltd., a traffic investigation expert, gave evidence that the Hyundai's speed immediately before impact would have been 27 - 37 kph. Assuming a skidmark before impact of between 8 and 10 metres (based on Mr. Veperts trial evidence), he calculated the Hyundai's pre-braking speed at between 42 and 56 kph. The speed limit at the intersection at the time was 50 kph.

**6**  There are a number of inconsistencies between Mr. Bertrand's pre-trial statements and his evidence at trial which call his reliability as a witness into question. For example, at trial he said he put on his brakes before the collision. At his examination for discovery he said he "never had a chance to apply my brakes". He said he saw the plaintiff before the accident, yet apparently told his super-visor shortly after the accident that he had not seen a vehicle coming from his right. At trial Mr. Bertrand said he did not see any skidmarks. Mr. Veperts, on the contrary, testified that Mr. Bertrand helped him measure the marks by holding a measuring tape.

**7**  The plaintiff's friend whose phone she used to summon her husband was Mr. McLaughlin, a retired police officer. He returned with the plaintiff to the intersection after the accident. He could not recall seeing any skidmarks; nor could the plaintiff's husband. Constable Kent did see marks which he sketched, but these were post-impact marks. Mr. Veperts had had no training in accident investigation. His experience was based on inspecting an occasional accident scene when a postal driver had been involved. If he drew a sketch to record his measurements he had long since thrown it away, he said. Assuming there were visible skidmarks on the road their length and location appear quite uncertain. In fact the marks extending beyond the point of impact would probably be "yaw" marks said Mr. Bailey, being marks left by the Hyundai's tires as it turned after being hit and not marks from braking. I find that there were probably marks left on the road by the Hyundai, but consider it unsafe to rely on Mr. Veperts' recollection in the witness box of their location four years after the accident. He was the only one to remember there were skidmarks leading up to the point of impact. None of the other witnesses at the accident scene saw such marks. The plaintiff said she did not see the postal truck again after she had first noticed it until the very last moment when it loomed up at her like a black shadow. This means she would have had little or no time to brake. I note also that even if there were pre-impact skidmarks as described by Mr. Veperts the resulting pre-braking speed calculated by Mr. Bailey had the plaintiff travelling more below the speed limit than above it.

**8**  Mr. Steinman argues that the plaintiff was driving too fast in the circumstances. He says that having seen the postal truck coming from her left the plaintiff should have slowed down and not simply assumed he was stopping and would yield the right-of-way to her. I agree of course that a driver cannot use the right-of-way as an invisible suit of armour without regard to other road users. But in this case there is no reliable evidence that the plaintiff was driving too fast in the circumstances. She said she was driving at a reasonable speed and saw the postal truck first 30 to 50 feet from the intersection. Both vehicles were approaching the intersection at about the same time. If Mr. Bertrand simply did not see the plaintiff, or if he did see her vehicle but estimated that he could cross safely in front of her then he was clearly wrong. While the dominant driver must obviously exercise some caution when another vehicle is approaching an intersection at about the same time, this does not require the dominant driver to assume that the servient driver is going to ignore the law and drive through the intersection without regard to his or her obligation to yield the right-of-way.

**9**  The plaintiff was wrong to think that Mr. Bertrand was going to stop because he didn't do so, but in my view the defendants have not proved -- the onus being on them -- that either the plaintiff's driving speed or her error in thinking Mr. Bertrand was going to stop was contributory ***negligence*** on her part.

**10**  I find the defendant Bertrand wholly responsible for the accident.

PRE-ACCIDENT HISTORY

**11**  The plaintiff grew up in Ontario. She was certified there as a nurse in 1974. In 1980 she came to Vancouver and became employed at St. Paul's Hospital as a critical care nurse. Over the next four years she suffered a number of back injuries due to her work. In June 1988 she ruptured a disk while working, and in November 1989 had disk surgery to repair it.

**12**  After recovery from her surgery she was assessed as having a 6% permanent disability in her back. To lessen the risk of further injury the plaintiff decided to work in the haemodialysis department of the hospital where there was less risk of back injury, at least at that time. Accordingly the plaintiff started work in that department in December 1989. Unfortunately the plaintiff continued to suffer injury to her back. There were five such incidents between 1990 and 1992. In April 1993 she suffered a soft tissue injury to her back in a motor vehicle accident and was off work for four months.

**13**  Concerned about further injury to her back the plaintiff applied for and obtained financial assistance from the Workers' Compensation Board to allow her time off work to become qualified as a perfusionist, i.e. the operator of a heart-lung bypass machine used during open heart surgery. The plaintiff started her perfusionist course in September 1994. It involved studying at home under the supervision of the College of the Cariboo. In addition the plaintiff worked about two shifts per month at the haemo- dialysis department to earn extra income and to maintain her seniority as a nurse. At the time of the accident the plaintiff had two or three years to go to complete her courses. She has not done so. If she had eventually found work as a perfusionist she would have had to have taken a further year's clinical programme before becoming fully qualified.

POST-ACCIDENT HISTORY

**14**  The plaintiff says that as a result of the collision she hit her head "really hard" on the driver's side window. She did not lose consciousness. She said the car went into a spin and she focussed on trying to control the car. She sustained a bruise on her hip and sore knee. She was dazed, sore and in shock.

**15**  The plaintiff walked home from the accident site with her husband. Later that day she visited Dr. Chao. There the plaintiff complained of tension in her right trapezius, right deltoid and neck with accompanying headache. She also had a sore back at the level of her left sacroiliac joint extending to her left hip and thigh. Two days later the plaintiff reported pain in her left knee, continued tension in her right shoulder and neck, headaches and a sore left hip. Treatment was Tylenol 3, Flexorol and physiotherapy.

**16**  The plaintiff did not let the accident affect her immediate schedule. On 7 February she attended a scheduled operation for "nasal reconstruction". The next day she took the first of two perfusionist exams, scoring an A- mark. She took a flight to Florida with her husband for a short holiday. On 26 February she saw Dr. Hildebrand, her regular general practitioner and complained of knee pain, which the doctor noted had eased off, and headache. She said she could not walk half a block without back pain. Complaint was also made of pain and spasm in the trapezius muscles. Dr. Hildebrand noted the plaintiff was using a neck brace and heating pad for her lower back when she was studying.

**17**  In March the plaintiff went on a road trip with her husband to California in their camper. While there she telephoned Dr. Hildebrand to complain of bowel incontinence. On 22 March Dr. Hildebrand noted the plaintiff reported her neck was improving, but her low back was worse, resulting in incapacitating pain. On 6 April the plaintiff took her second perfusionist exam achieving a B+ mark. On 15 May Dr. Crofts, a urologist to whom the plaintiff had been referred, reported no evidence of structural or functional bladder impairment. On 30 May Dr. Hunt, a neurological surgeon, reported that the plaintiff had been fully investigated and had no serious underlying problems "other than paravertibral muscle spasm". She was encouraged to mobilize herself completely and to return to work full time. On the same day the plaintiff saw Dr. Hildebrand who noted the plaintiff was still getting neck spasms when studying for her new course. She was diagnosed as having soft tissue injuries and advised to return to physio.

**18**  The plaintiff saw Dr. Hildebrand twice more on 23 July and 23 August 1996. On the first occasion the plaintiff was described as "less depressed". On the second it was noted that the plaintiff was attending physio, exercising and obtaining some benefit from acupuncture. She wanted six more sessions. She was prescribed Tylenol 3.

**19**  On 12 July the plaintiff had been seen by Dr. Matishak, a neurologist. His clinical impression of the plaintiff was that "she suffers an inordinate amount of back pain and distressing urinary and bowel problems in the face of little overt neurologic deficit.

**20**  The plaintiff saw Dr. Varelas, neurologist, later that month. He dictated a lengthy report on 30 July 1996. He noted that the majority of the plaintiff's problems related to pain from muscle spasm in the neck and across the low back and into the buttocks. He thought her incontinence was functional and related to her pain. He attributed the "pain syndrome" to "lack of mobilization" following the accident. He recommended a mobilization program aimed at stretching and strengthening her muscle groups. He reported that the plaintiff had described "some difficulty with her memory, particularly bad since the pain had become worse in her low back and her in-continence had begun". He concluded that the anxiety arising from pain had contributed significantly to the more significant functional complaints, including incontinence, and the memory disturbance. He did not think a further neurologic follow-up was necessary.

**21**  In November 1996 Dr. Chao referred the plaintiff to Dr. Nairn Stewart, a specialist in rehabilitative medicine, for her low back pain. Dr. Stewart reported that the plaintiff's neck pain had resolved by the summer of 1996 apart from minor symptoms occurring with vigorous exercise. The plaintiff was still experiencing low back spasm two or three times per week. There was no limit to her walking tolerance. She was cycling and doing a gym exercise program as well as stretching and strengthening exercises. In March 1997 the plaintiff reported she had had no headaches. She had had no headaches since February 1997 and her neck and back pain had resolved. She also noted an improvement in her bowel and bladder function.

**22**  The plaintiff reported to Dr. Stewart problems with her memory, concentration and emotional control and a change in personality. She was easily distracted. She was angry at her limitations, impatient to recover and return to full productivity. In November 1996 the plaintiff reported her intellectual abilities had returned to 90% of their pre-accident level -- later revised to 70% -- and to 90% the following January. The plaintiff reported problems with simple mathematics, retention of information and logical thinking. Her emotional control had improved considerably, but she was still "raging" on occasion. She had found herself making mistakes at work to which she had returned on a graduated basis in November 1996.

**23**  Dr. Stewart was of the view that the plaintiff had fully recovered from the soft tissue injury to her neck and low back and no longer had any headaches, neck or low back pain. She felt that the plaintiff's episode of urinary and fecal incontinence was related to what "I consider to be more serious injury, that of mild traumatic brain injury". She recommended further testing.

**24**  Dr. Stewart continued to see the plaintiff -- in all nine times between 1996 and 1999. In her further report she said that the plaintiff had told her in June 1997 of ongoing problems with pain in her neck and shoulders as well as head-aches. In October 1997 the plaintiff was still taking Tylenol 3 and muscle relaxants and anti-inflammatory medications for neck pain flair-ups. She also continued to experience left knee pain as well as sleep disturbance and loss of bowel control.

**25**  Dr. Stewart stated her opinion that it seemed likely the plaintiff had sustained a mild traumatic brain injury.

**26**  The plaintiff also saw Dr. Schmidt, a neuropsychologist, over the course of three visits in 1997 and 1998. Unlike Dr. Stewart he administered a series of tests. His conclusion was that based on her history, the plaintiff had probably suffered a mild traumatic brain injury as well as physical trauma. However, he said it was unclear to what extent the plaintiff's physical/cognitive/emotional problems had co-existed and to what extent they had improved, plateaued or worsened. Dr. Schmidt reported that cognitive testing revealed weaknesses in processing speed as well as attention. Other deficits were secondary and were as likely due to psychological disruption as to brain injury. He opined it was "very unlikely" that the brain injury, which he classified as "very mild", "would create deficits of the severity and pervasiveness that she currently demonstrates. Likewise the course of her condition is atypical for brain injury. However such deficits could easily arise from her psychological state". He recommended psychotherapy.

**27**  The plaintiff was seen by Dr. Sweeney, a neurologist, on 26 February 1997 at which time Dr. Sweeney had read the first report of Dr. Stewart. Dr. Sweeney conducted memory, mathematical and other tests. He reported that his neurological examination of the plaintiff was completely within normal limits. Dr. Sweeney concluded,

I do not consider that she had any significant injury to her head, and although she stated that performances were not particularly efficient at the scene of the accident, there is no indication that she suffered from a concussion or any significant alteration of her level of consciousness or of her other orienting faculties. Her subsequent perform-ance in examinations do not betray somebody who has suffered cognitive damages as a result of a brain injury. At the present time her mental state is testing as normal and apart from the problems with anxiety she appeared to be functioning at a fairly controlled level. In the past however I think she has been emotionally disturbed to the point where this has interfered with her concentrating abilities, giving the semblance that she might have had some memory difficulties. There is however no evidence that she suffered any damage to the memory functions of her brain.

(Ex. 10 Tab 2, pp 5 & 6)

**28**  Dr. Sweeney wrote a second report on 31 January 2000 based on his review of clinical materials including the records of the plaintiff's family doctors. He repeated his opinion that from the history provided by the plaintiff she did not suffer any injury to her head which resulted in brain injury. Ongoing difficulties were related to psychological problems. He particularly disagreed with Dr. Stewart that bowel and bladder incontinence was a result of brain injury. His view was that for this to be so the plaintiff would have had to have suffered a severe brain injury associated with other obvious neurological problems. Dr. Sweeney considered the results of the examinations written by the plaintiff after the accident did not point to a person with cognitive difficulties of any importance. He also noted that the records of Dr. Chao and Dr. Hildebrand closer to the time of the accident did not indicate any neurological consequences. The plaintiff's depression starting in 1996 and worsening in 1997 and anti-depressant medication likely accounted for the plaintiff's reported problems with concentration and memory.

THE PLAINTIFF'S EVIDENCE

**29**  The plaintiff gave evidence of her post-accident condition. Her memory was "screwed up" and she was forgetful. Her pain and depression had been terrible. Her sexual libido had been affected. She was occasionally a "witch" and would fly into rages. She could no longer horse play with her daughter. She was exhausted at the end of the day. She had had difficulty sequencing numbers and in being focussed.

**30**  The plaintiff appeared to admit in cross-examination that apart from reporting her physical symptoms and accompanying pain to her doctor she had not mentioned any cognitive deficits until she saw Dr. Stewart some nine months after the accident. (There is a mention however in Dr. Hildebrand's notes of her being "less depressed" in August 1996 and of a memory problem in Dr. Varelas's report of 30 July 1996.) My impression of the plaintiff was of an alert, bright and articulate witness who fully understood the questions asked of her and gave thorough and intelligent responses to them. She was well able to debate matters with counsel in cross-examination. At times I would describe her answers as argumentative and combative. I detected no sign of any memory difficulty. Nevertheless her husband and sister and a fellow nurse confirmed her problems since the accident. I have no reason to doubt what they said. Indeed they were hardly challenged in cross-examination.

**31**  Dr. Stewart on the other hand was cross-examined at length. Reference was made to the basic symptoms of traumatic brain damage as described in a text entitled "Organic Psychiatry" by W.A. Lishman, Third Edition. These symptoms were not evident in the plaintiff's case. Dr. Stewart maintained in her evidence that many patients suffer traumatic brain damage without having lost consciousness at the time of trauma. The reasons for judgment in Haliday v. Wigmore, [*[1996] B.C.J. No. 1536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-6192-00000-00&context=), were put to her in which she is reported to have said that,

In the vast majority of cases where there is no loss of consciousness, there is no brain injury.

Her explanation of her contradictory opinions was that medical science had developed in the last four years. I must say I did not find this particularly convincing.

**32**  Ms Boles submits that at the end of the day it does not matter whether brain damage or psychological factors caused the plaintiff's non-physical problems. I agree. It also cannot be said on the evidence in this trial that brain damage tends to be permanent and a non-physical cause is not permanent. It was Dr. Schmidt's opinion that,

Although many assume that neuropsychological deficits are permanent and psychological ones are temporary, this is not always the case in either instance. Some neuropsychological deficits resolve or become insignificant in the individual's life whereas in other cases psychological disorders may have a permanent and severe impact on the individual's function.

(Ex. 1 Tab 4, p. 22)

**33**  Because of the doubts I have about the opinion of Dr. Stewart, in the light of Dr. Schmidt's somewhat tentative conclusions and more particularly in view of the unambiguous conclusions of Dr. Sweeney, I find that the plaintiff has not established on a balance of probabilities that she suffered a mild traumatic brain injury as a result of the accident. Nevertheless I am bound to find that she has suffered non-physical problems. Mr. Steinman in his opening statement said he would challenge the plaintiff's credibility and he has sought to do so. I think the plaintiff may have magnified the extent of some of her problems, but the evidence of her witnesses satisfies me that they were real enough. The whiplash symptoms of pain and spasm in the neck and back seem to have resolved and then reappeared somewhat. At least the back spasms have continued to cause her problems now and again. She was certainly depressed at one time, but the bulk of her depressive features had remitted by April 1998. (Ex. 1 Tab 6, p. 3) I find her depression stemmed from her reaction to the consequences of her accident. I note Dr. Sweeney's view that her depression and anti-depressant medications "likely accounted for her reported problems with concentration and memory". I accept that the accident caused her other non-physical problems notwithstanding that by and large they were not reported for many months to her doctors. Her explanation was that she simply hadn't become aware of the extent of these problems, being concerned with the pain caused from her physical symptoms.

**34**  The plaintiff was an active person before the accident. She had assisted her previous husband in running a lodge in the Queen Charlottes. She had learned to fly and had created and run courses for nannies all while maintaining her full-time job as a nurse. Since the accident her activities have decreased. She has not enjoyed the outdoors as she once did, her housework has declined and her relationship with her young growing daughter has been affected, particularly because she has not been as physically robust as she was.

**35**  These problems to some extent continue. Although she has by and large resolved her physical difficulties she still has problems with concentration and rages. She hopes that with time and effort these will resolve themselves. Her bowel incontinence has caused her embarrassment and inconvenience although she now has the problem more or less under control.

TMJ PROBLEM

**36**  The plaintiff did not notice any specific problem with her jaw until two and a half years after the accident when she was in Florida and "felt her top teeth were broken". She was referred to Dr. Blasberg, a specialist on oral medicine. In December 1999 he diagnosed a temporomandibular disorder. This disorder is said to relate to the accident because the plaintiff experienced temple headaches following the accident and joint noise, although when the joint noise first started is unclear. Dr. Blasberg relates the TMJ problem to the accident in the absence of "a more likely explanation". This suggests that the accident was as likely to have caused the problem as any other cause. It could thus be argued that the plaintiff has not proved her TMJ problem was more than likely to have been caused by the accident. In her evidence the plaintiff related a number of her problems, including headaches, which have come together to convince her that the accident was the cause of her TMJ problem and on balance I find that it is more likely than not that it did so.

**37**  I have read the cases referred to me by counsel each, of course, based on different facts. I note for example that in Sangha v. Dhaliwal 11 February 1998, [*[1998] B.C.J. No. 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1PC-00000-00&context=), No. B952733 the judge comments on the sudden use of inappropriate language in the courtroom by the plaintiff as evidencing brain injury. Nothing of that sort occurred here. As I say, I found the plaintiff to be an unusually acute witness. The case that comes closest in my view is that of Tompkins v. Barden et al, [*[1998] B.C.J. No. 2799*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FFMK-M191-00000-00&context=), 30 November 1998 No. B950857. In that case the plaintiff suffered mild cognitive deficit. She required some post-trial psychotherapy because she continued to suffer mild intellectual and emotional symptoms although not significantly disruptive to her life. In my view, as in Tomkins, the appropriate award for non-pecuniary damages in this case is $75,000.00.

LOSS OF OPPORTUNITY

**38**  At the time of the accident the plaintiff was studying at home and working only two shifts a month at the hospital. She had two or three years to go to complete her perfusionist course. Shortly after the accident she sat examinations at a university degree level and did well. In the summer she found it difficult to study. She was told by Dr. Stewart that she had suffered brain damage. Dr. Stewart recommended that the plaintiff postpone her studies for a year (Ex. 1 Tab 3, p. 37) when the "likelihood of success in her courses will be significantly greater."

**39**  The plaintiff returned to work at the haemodialysis department ten months after the accident. She learned that because of her level of earnings she would no longer be eligible for Workers' Compensation Board assistance to enable her to take the perfusionist course. This assistance had been made available to her in the first place to allow her to leave the haemodialysis department which had become more physically onerous. Now she has returned to this work.

**40**  The plaintiff has chosen not to continue the perfusionist course or to contemplate doing so in the future. I accept that she has had concentration problems which made studying difficult, but no one can say that this incapacity will continue indefinitely. The plaintiff has mentioned the possibility of obtaining a nurse's degree. Without financial subsidy the plaintiff will have to take courses in her free time and this may be difficult for her.

**41**  The plaintiff has said that she has given thought to moving to Florida with her husband in about three years when her husband retires or in about six years when her daughter is less dependent. She and her husband own a house there. If the plaintiff had qualified as a perfusionist she might have sought employment as such in Florida where she says salaries are higher. The evidence at trial was that the salary of a perfusionist in British Columbia is a little higher than that of a nurse. As the plaintiff still had two or three years to go before she qualified as a perfusionist, let alone obtained work as such, I do not consider it appropriate to make an award on the basis of a working lifetime loss of salary as a perfusionist. What I consider the plaintiff lost as a result of the accident was the opportunity to pursue her studies in 1996 as a perfusionist. I find that the plaintiff has also incurred some diminished capacity to earn income in the future. I bear in mind, nevertheless, that after psychotherapy, although she may not perhaps be made completely whole as suggested in Tomkins she may come very close to her pre-accident working ability. For her loss of opportunity and earning capacity I award the plaintiff $50,000.00.

LOSS OF INCOME TO DATE OF TRIAL

**42**  The parties agree that the plaintiff lost $3,396.04 in salary for 1996, i.e. notional full employment income less WCB rehabilitation allowance. Thereafter the plaintiff returned to work. As I have said, I reject her claim based on eventually securing work as a perfusionist, but allow her claim to a loss of opportunity in that regard.

SPECIAL DAMAGES

**43**  I allow the plaintiff her disbursement for Dr. Schmidt's services as agreed at $4,582.50.

FUTURE CARE

**44**  I allow the plaintiff $5,000.00 for psychotherapy as recommended. In view of the evidence, the plaintiff and her husband who were married in 1998, do not appear to need "separation" or "marital" counselling as claimed. I also allow the plaintiff $2,150.00 for TMJ treatment.

SUMMARY

**45**  The plaintiff is entitled to the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecurinary Damages | $75,000.00 |  |
|  | Lost Income | 3,396.04 |  |
|  | Loss of Opportunity | 50,000.00 |  |
|  | Special Damages | 4,582.50 |  |
|  | Future Care | 7,150.00 |  |
|  |  | ----------- |  |
|  | TOTAL | $140,128.54 |  |

**46**  The plaintiff is entitled to these sums plus pre-judgment interest as the law allows at Registrar's rates and costs on scale 3 except the costs for one day of trial which are awarded to the defendants.

CATLIFF J.

\* \* \* \* \*

CORRIGENDUM

Released: March 27, 2000

[1] This is a corrigendum to the Reasons for Judgment dated 7 March 2000.

[2] On page 25 under the heading "Future Care", paragraph 44, the second sentence should have read,

In view of the evidence, the plaintiff and her husband who were married in 1998, do not appear to need "separation" or "marital" counselling as claimed.

CATLIFF J.

**End of Document**

[***D.C.L. v. D.R., [2000] B.C.J. No. 1940***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B176-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Quijano J.

Heard: August 28, 2000.

Judgment: September 1, 2000.

Victoria Registry No. 98/1577

**[2000] B.C.J. No. 1940** | 2000 BCSC 1304 | 99 A.C.W.S. (3d) 1080

Between D.C.L., plaintiff, and D.R., defendant, and L.R., third party

(16 paras.)

**Case Summary**

**Practice — Parties — Third party procedure — Dismissal of third party claim.**

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| Application by the third party for an order dismissing the third party claim against her. The plaintiff brought an action against her step-brother for damages for multiple sexual assaults, which took place when the plaintiff was between 10 and 13 years old. The plaintiff's mother was joined as a third party on the basis that she failed to protect the plaintiff. The claim was one for indemnity under the ***Negligence*** Act. The mother married the defendant's father after her first marriage broke down, at which time she had three children including the plaintiff. She denied having had any knowledge that the assaults were being carried out. At his examination for discovery, the step-brother denied being aware of any information to suggest that the mother knew. He also admitted that the mother was very protective of her children. It was suggested, based on some of the evidence given by the plaintiff during the criminal trial proceedings, that some form of notice must have been given to the parents.  HELD: Application allowed.  In light of the mother's denial, the defendant's own lack of information as to the mother's knowledge and the lack of clear evidence from the plaintiff at the criminal proceedings, the third party claim was bound to fail. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18.

***Negligence*** Act, s. 4.

**Counsel**

Krishan Klear, for the defendant. William Murphy-Dyson, for Ms. L.R.

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| **QUIJANO J.** |

INTRODUCTION

**1**  Ms. L.R. brings an application pursuant to Rule 18 of the Rules of Court seeking to have the Third Party claim against her dismissed. The defendant resists that application and seeks an order that Ms. L.R. attend to be examined for discovery.

NARRATIVE

**2**  This is an action brought by the plaintiff against his stepbrother, the defendant, seeking damages against the defendant for multiple sexual assaults which took place when the plaintiff was between the ages of 10 and 13 years. At the relevant times the defendant was, I understand, 17 to 20 years of age. The sexual assaults took place in the early 1970's. The defendant has issued third party proceedings against L.R., the biological mother of the plaintiff and the stepmother to the defendant during the relevant period of time.

**3**  The defendant has been convicted of the sexual assaults upon which this action is based and has admitted in his examination for discovery that he sexually assaulted the plaintiff on numerous occasions during that three year period.

**4**  The issue on this application is whether the defendant is bound to lose his Third Party claim. In this regard I was referred to a number of authorities, the one most frequently referred to being Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd. et al [*(1984), 55 B.C.L.R. 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-FFTT-X05C-00000-00&context=) (B.C.C.A.). The Court of Appeal in Montroyal approved the decision of Esson J., as he then was, in Progressive Const. Ltd. v. Newton, *25 B.C.L.R. 330* at p. 334. In Montroyal the court says this, beginning at the bottom of p. 138:

... There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334-35]:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

**5**  The defendant, in the Third Party Notice, claims against Ms. L.R. for contribution and indemnity pursuant to s. 4 of the ***Negligence*** Act. The substance of this claim is found in paras. 6 and 7 of the Third Party Notice, which read as follows:

1. In the alternative, if any injuries, damages, losses and expenses suffered by the Plaintiff were caused or contributed to by the actions of the Defendant, the Defendant says that the said injuries, damages, losses and expenses were caused or, in the alternative, contributed to, by the act or omissions of the Third Party, which acts or omissions constituted a breach of her duty of care as a parent, a breach of the fiduciary duty she owed to the Plaintiff, and a breach of her duty of trust owed to the Plaintiff.
2. The Third Party, L.R. (sic), was negligent in that she:
3. Failed to control or to supervise the Plaintiff;
4. Failed to take effective action in the circumstances to prevent or to minimize the alleged sexual contact when she knew or ought to have known that such conduct had occurred or was occurring;
5. Failed to adopt measures to protect the best interests of her son;
6. Such further particulars as may be adduced.

**6**  Counsel for the defendant argues that Ms. L.R. knew or ought to have known of the sexual assaults being perpetrated by the defendant on the plaintiff and because she did nothing to prevent the assaults she was negligent.

**7**  This was a blended family. Ms. L.R. had three young boys from a previous relationship, her husband had two children, the defendant and a daughter.

**8**  The defendant was examined for discovery by counsel on behalf of Ms. L.R. In that examination for discovery the defendant acknowledged that to his knowledge no one in the blended family, with the exception of the plaintiff, had any knowledge of the sexual activity between himself and the plaintiff. In addition, the defendant acknowledged that he had never said anything to his stepmother about being attracted to the young boys in the family nor did he ever say anything to her that would suggest to her that she should keep him separated from her children. The defendant also said, in answer to question 313 that his stepmother was very protective of her boys. And finally, the defendant was asked the following questions and gave the following answers:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 325 |  | Q. |  | What could L.R. have done that she didn't do to prevent the sexual activity that went on between you and D.C.L.? |  |

1. I don't know.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 326 |  | Q. |  | What did L.R. do that she shouldn't have done in order to prevent the sexual activity between you and her child? |  |

1. I don't know.

|  |  |  |  |
| --- | --- | --- | --- |
|  | 327 Q. | How old are your children, sir? |  |

1. Twenty-two and twenty.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | 328 Q. |  | And you have been an active father throughout their lives? |  |

1. Yes, I have.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| 329 |  | Q. |  | Based on your experience as a father, sir, now can you think of anything that L.R. could have done or should have done or did that she shouldn't have done that would have prevented the sexual activity between you and D.C.L.? |  |

1. No.

**9**  Counsel for Ms. L.R. takes the position that Ms. L.R. has no interest in a determination as to whether there is any known cause of action disclosed by this pleading. Counsel for Ms. L.R. seeks simply to have the claim against Ms. L.R. dismissed on the basis that the defendant has no evidence which could support the claim.

**10**  The evidence to which I was referred on behalf of the defendant is found primarily in a portion of the transcript of the evidence given by the plaintiff at the preliminary inquiry held in the criminal prosecution of the defendant for these assaults. That evidence amounts to evidence that the assaults were frequent, that they were clandestine, that the plaintiff was behaving bizarrely as a consequence of the assaults, in particular bed wetting, sleep difficulties, fear of being left alone in the home and so forth. As well, there is evidence from the plaintiff that the assaults frequently took place when the parents were home and that they were frequently noisy. There was also a statement given to the R.C.M.P. by the plaintiff, apparently in 1987, in which he said that his brother S. had "asked for a lock on his bedroom because he was being abused but he wasn't allowed to have one yet ...". From that I am invited to conclude that there was some notice given to one or both of the parents that some form of sexual abuse was being perpetrated on the plaintiff's brother. However, the language is ambiguous at best and does not support a conclusion that Ms. L.R. had any reason to suspect that the defendant was sexually abusing any of her children.

**11**  Ms. L.R. has, by affidavit on oath, denied having any knowledge whatsoever of any sexual activity between the defendant and her son.

ANALYSIS

**12**  The defendant says that there is a very heavy onus on Ms. L.R. to establish that the defendant's third party claim will not succeed. Ms. L.R. says that there is an onus on the defendant to put forward evidence on an application such as this which, if accepted, would support the claim and that the defendant has not done so. With respect I think the positions amount to the same thing. In other words, if the defendant puts forward evidence which, assuming it is true, would support the claim, then Ms. L.R.'s application to dismiss must fail. If the defendant does not put forward such evidence, then there would be no evidence to support the claim and Ms. L.R. would have succeeded in establishing that the defendant's claim against her is bound to fail.

**13**  The defendant wishes to examine Ms. L.R. for discovery. As I understand it, the defendant believes that the evidence given by Ms. L.R. on discovery might be of assistance to the defendant's third party claim.

**14**  Taking into consideration the evidence of the plaintiff given at the preliminary inquiry, to which I was referred, and the evidence of the defendant given at his examination for discovery as well as the clear denial of any knowledge on the part of Ms. L.R., I have concluded that the defendant's third party claim is bound to fail and that it should, therefore, be dismissed.

**15**  Having decided the issue in favour of Ms. L.R., the defendant's application to examine Ms. L.R. for discovery is also dismissed.

COSTS

**16**  Ms. L.R. will have her costs at Scale 3.

QUIJANO J.

**End of Document**

[***Deline v. Kidd, [2001] B.C.J. No. 645***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2T5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Gill J.

Heard: March 23, 2001.

Judgment: April 2, 2001.

Vancouver Registry No. C972971

**[2001] B.C.J. No. 645** | 2001 BCSC 491 | 103 A.C.W.S. (3d) 1140 | 49 W.C.B. (2d) 410

Between Toni E. Deline, plaintiff, and David A. Kidd, Steve Stirling, Robert W.G. Gillen, Ernie Quantz, Q.C., Attorney General of British Columbia and its employees and servants, defendants

(24 paras.)

**Case Summary**

**Practice — Judgments and orders — Summary judgments — To dismiss action — Torts — Abuse of legal procedure — By Crown — Malice, what constitutes — Reasonable and probable cause — Evidence and proof.**

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| --- |
| Application by the defendants Kidd and Stirling for summary judgment dismissing the action against them. Deline was charged with uttering a death threat based on a complainant's statement. Kidd, a Crown counsel, made all court appearances and the defendant Sterling, another Crown counsel, determined what charges to make against Deline. Sterling's wife represented Deline's wife against Deline in matrimonial proceedings and Deline criticized her in court. Sterling decided to stay the threatening charge and seek a peace bond instead. During a court hearing, Deline was required to wait while other matters were being addressed by the Court. The Information for the peace bond was sworn more than six months after Deline uttered the threat. The judge dismissed the peace bond application. Deline sued Kidd and Sterling for gross ***negligence***, malicious prosecution and breach of his rights under the Canadian Charter of Rights and Freedoms. He alleged that Sterling was out to get him because he criticised Sterling's wife. He further alleged that Kidd and Sterling had no reasonable and probable cause to lay the charge of uttering. He similarly alleged lack of reasonable and probable cause for proceeding with the peace bond application in light of its stale date.  HELD: Application allowed.  The action was dismissed. Deline failed to establish malice. The complaint was sufficient grounds for proceeding with the uttering charge, and there was some authority for arguing that the Information respecting the peace bond was valid despite the expiry of the six-month limitation period. Deline failed to rebut Sterling's testimony that the incident with his wife had no effect on his decisions. The inconsistency in Kidd's and Sterling's testimony was minor. There were no bars to proceeding with a summary judgment. Deline had provided no evidence of breach of his Charter rights. The requirement that Deline remain in Court was not a detention that gave rise to Charter rights. Statutes, Regulations and Rules Cited: British Columbia Supreme Court Rules, Rule 18A. Canadian Charter of Rights and Freedoms, 1982. Criminal Code, s. 264(1)(a). |

**Counsel**

The plaintiff, Toni E. Deline, appeared in person. D.C. Prowse, for the defendants, David A. Kidd and others.

|  |
| --- |
| **GILL J.** |

**1**   The defendants bring application pursuant to Rule 18A for an order dismissing the plaintiff's action.

**2**  Mr. Kidd, Mr. Stirling and Mr. Gillen are Crown counsel and each was involved in some way in the prosecution of criminal charges against the plaintiff. In these proceedings, Mr. Deline seeks general, special, aggravated and punitive damages alleging gross ***negligence***, malicious prosecution and breach of his Charter rights.

**3**  The involvement of Mr. Stirling, administrative Crown counsel, began on July 26, 1994, when he received a Report to Crown Counsel recommending that a charge be laid against the plaintiff for uttering a threat. Mr. Leger, the complainant, had reported that during a telephone conversation with Mr. Deline on July 11, 1994, the plaintiff said that he was ruining his life and that he was going to kill Mr. Leger. After reviewing the report, Mr. Stirling determined that there was a substantial likelihood of securing a conviction against the plaintiff. He approved a charge of uttering a threat contrary to s. 264.1(1)(a) of the Criminal Code and referred the matter to Mr. Kidd, who made all court appearances.

**4**  As a result of submissions made by the plaintiff and his counsel, Mr. Stirling discussed the matter with Mr. Gillen, regional Crown counsel. In 1994, a charge of uttering a threat was strictly an indictable offence and an accused therefore had the option of electing trial by jury. Mr. Stirling has deposed that both he and Mr. Gillen were of the view that this matter did not warrant a jury trial and accordingly, proposed to substitute a peace bond. Mr. Stirling had also spoken with Mr. Leger, although he cannot recall when and whether it was by telephone or in person. Mr. Leger seemed very belligerent, and Mr. Stirling concluded that there may have been fault on both sides.

**5**  The peace bond was not processed until late March, 1995, as Mr. Stirling was awaiting materials from the plaintiff's counsel, Mr. Roth. By letter dated March 30, 1995, Mr. Roth advised Mr. Stirling of certain actions of Mr. Leger and expressed his view that the charge ought not to proceed. Mr. Stirling nevertheless determined that a peace bond should be sought.

**6**  A preliminary hearing on the threatening charge had been set for April 4, 1995. On that date, Mr. Kidd advised the court that the Crown would be staying the threatening charge and proceeding instead with an application for a peace bond. Mr. Deline wished to contest the Crown's application and a hearing date of May 2, 1995, was set.

**7**  As the plaintiff places particular reliance on the rest of what occurred on the 4th of April, I will refer in greater detail to the proceedings and to portions of the transcript. Mr. Kidd indicated to the court that if the matter was not to proceed, he would be asking that a no contact condition be imposed. In response, Mr. Roth submitted that there had been no contact between the complainant and Mr. Deline since the phone call and he questioned the need for such a condition when there had not been contact or further incidents. He also questioned why the Crown would now be seeking the imposition of such a term when it had not done so earlier. Mr. Kidd then advised the court that there has been a change in circumstances.

**8**  The matter was recalled after the lunch break. Mr. Roth withdrew as counsel and thereafter, Mr. Deline acted on his own behalf. The following exchange took place between the court and Mr. Deline:

THE ACCUSED: Yeah, but there's no necessity for such an undertaking before. I've done nothing since this matter allegedly arose in July and I don't see the necessity for it at this stage. The Crown alleges that things happened since July, so the only way for him to resolve it is for him to call his witnesses. Nothing else has happened.

THE COURT: Okay, but clearly you understand -- clearly you understand that you may be forcing me to make a choice, the choice being holding you in custody until this matter is concluded or putting you on a condition not to contact him. Do you understand that that is the other option, the only other option, that I have?

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| --- | --- | --- | --- |
|  | THE ACCUSED: | The -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | THE COURT: | Do you understand that? |  |

THE ACCUSED: I understand that if I disagree -- or if I -- I understand that if you make such an order that I not contact him and that if I at that stage say that I'm not going to obey such an order --

|  |  |  |  |
| --- | --- | --- | --- |
|  | THE COURT: | No. |  |

THE ACCUSED: -- but I'm not saying at this stage that I'm going to disobey any court order, so if the court places a condition on me, I'm going to follow the condition. However, I don't believe that it's necessary to place any condition on me since this matter has been in existence since July without anything.

|  |  |  |  |
| --- | --- | --- | --- |
|  | THE COURT: | Well, okay, you'll have to have -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | THE ACCUSED: | And the Crown -- okay, well -- |  |

THE COURT: You'll have to have a seat and wait. But you think about this.

The matter was then stood down to the end of the list.

**9**  When the matter was recalled Mr. Kidd advised the court that the complainant had indicated that there had been indirect contact which had caused him to be fearful. Mr. Kidd did not wish to be specific as it might prejudice the hearing but stated that Mr. Leger's fear of reprisals from Mr. Deline was the reason for his request that there be a no contact condition. As to the submissions of the plaintiff, I refer again to the transcript:

THE COURT: All right. That's fine and all of those are good and valid arguments for you to raise at the hearing, but what you must right now do is convince me why I shouldn't release you on a condition that you not have contact with the person named, Mr. Leger, in this information, or the previous information?

THE ACCUSED: Well, as I have no information in front of me as they haven't served me, I am at a pretty much of a disadvantage to really comment very much on that. They haven't served me with any information so I haven't really seen it.

THE COURT: But didn't your previous lawyer discuss with you what is happening now?

THE ACCUSED: We discussed, but we were trying to get a copy of the information. They haven't provided us with a copy of the information. I don't see how I can be here in front of the court without having received one. I have never been served.

MR. KIDD: Your Honour, it is obvious this peace bond was sworn in discussions with his counsel, Mr. Roth. It is replacing a charge that Mr. Deline was well aware of, and for him to come to the court now saying he has no knowledge doesn't --

THE COURT: Does the Crown want to reinstate then the more serious information?

MR. KIDD: Well, Mr. Deline is not leaving me much alternative.

THE COURT: Okay. All right. The old information then is reinstated. You are now back -- you are back charged with assault causing bodily harm. All right.

THE ACCUSED: Excuse me, Your Honour. It was uttering a death threat.

A further exchange took place as between the accused and the court and ultimately, it was ordered that Mr. Deline should not have any contact directly or indirectly with Mr. Leger.

**10**  Mr. Deline retained new counsel, Mr. Firestone, to act on his behalf. On April 21, Mr. Firestone wrote to Mr. Kidd indicating that he was not available on the 2nd of May but would be prepared to act for Mr. Deline if an adjournment could be obtained. Mr. Kidd was not prepared to agree to an adjournment.

**11**  On May 2, Mr. Deline asked that the matter be adjourned. He also pointed out that the information was defective in that there was no indication of the month that it was sworn. The matter was ultimately adjourned to October 3, 1995. On May 2, Mr. Kidd was also asked by the court about the status of the threatening charge. He stated that he expected that the Crown would be proceeding with the s. 810 peace bond application in October.

**12**  On October 3, Mr. Deline represented himself. He argued that the information had to be sworn within six months of the event, which had occurred on July 11, and the information was sworn May 4, 1995. Mr. Kidd submitted that so long as the complainant feared harm on the date the information was sworn, that was sufficient. No further arguments were made and no authorities were referred to during argument. The ruling of the trial judge on this issue included the following:

... The evidence that I have heard from Mr. Leger is of an ongoing offence, and clearly the Crown could lay an information alleging that the fear has gone from the 11th of July 1994 until today in laying an information, and then it would obviously be within the six months, or secondly, I have reviewed the material, and it appears to me that Mr. Deline has been on an undertaking or a recognizance and they clearly could charge him with one of the incidents that has arisen since he was placed on that undertaking.

So, having said all of that, I reluctantly agree with Mr. Deline and I find that the information was sworn out of time and that for the Crown to properly proceed, they will need to lay a new information, matching the evidence, and a new trial date will have to be set for that.

Mr. Kidd was then asked about the original charge of uttering a threat. He stated that there should be a stay and added that he believed that there may have been a stay entered on April 4.

**13**  As the application for peace bond was dismissed because the information was sworn out of time, the trial judge did not make any determinations about the credibility or reliability of Mr. Leger's testimony. The statement of claim describes his evidence as ludicrous. It was, however, consistent in that he maintained he was threatened and in fear of the plaintiff.

**14**  In Nelles v. Ontario, [*[1989] 2 S.C.R. 170*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-651D-00000-00&context=), the Supreme Court of Canada rejected an argument that Crown attorneys enjoy an absolute immunity from suit for malicious prosecution. Lamer, J., speaking for the majority, set out the four elements which must be proven for a plaintiff to succeed in such an action:

1. The proceedings must have been initiated by the defendant;
2. The proceedings must have terminated in favour of the plaintiff;
3. The absence of reasonable and probable cause; and
4. Malice, or a primary purpose other than that of carrying the law into effect.

In discussing the element of malice, Lamer, J. stated, at 194:

In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice.

His Lordship's conclusions included the following, at 199:

A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional ***negligence***. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.

**15**  If the plaintiff's action is in ***negligence***, it cannot succeed. As to malicious prosecution, the argument of the plaintiff focussed on the issue of reasonable and probable cause. Mr. Deline submits that the evidence of Mr. Leger was not believable. He says that Mr. Leger wanted to harm him and had attempted to do so in other ways. His affidavit provides details. On this issue, Mr. Deline further argues that because the defendants did not believe that the matter warranted a jury trial, they could not have believed that the threatening charge was meritorious. When the charge was "reinstated" on April 4, the Crown did so solely to ensure that a no contact order would be made and had no intention of proceeding with that charge. That Mr. Kidd did not intend to proceed with that charge is also said to reflect his belief that it lacked merit. It is also argued that Crown counsel could not have believed that the matter was not time barred and thus, knew that the peace bond proceedings must fail.

**16**  The defendants have each sworn to their belief that there was a substantial likelihood of conviction on the threatening charge. Mr. Kidd described Mr. Leger as adamant in his statements that he feared the plaintiff and as already noted, that was his testimony at trial. It continues to be the view of Mr. Kidd and Mr. Stirling that the peace bond application was not time barred.

**17**  I do not accept that the decision to proceed pursuant to s. 810 of the Criminal Code reflects negatively on the genuineness of the belief of any defendant as to the existence of reasonable and probable cause. Nor do I agree that it ought to have been obvious that the information was sworn out of time. As counsel for the defendants submitted, the decision of our Court of Appeal in R. v. D.A.S., [*[2000] B.C.J. No. 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X064-00000-00&context=) gives some support to the defendants' views.

**18**  As already stated, the plaintiff emphasizes the "reinstatement" of the more serious charge on May 4, 1995. Although Mr. Kidd responded to the court's inquiry about reinstating the threatening charge using language which could be construed as a statement that the charge was to be recommenced, the Criminal Code sets out the procedure to be followed and notice of recommencement must be given to the clerk of the court by the Attorney or counsel instructed by him for that purpose. I question whether what occurred was a recommencement. In any event, what the argument of the plaintiff fails to recognize is that whether one looks at the decision to charge an offence contrary to s. 264.1(1) of the Criminal Code or to seek a peace bond, the decision was based on the evidence of Mr. Leger that he had been threatened and was fearful of the plaintiff and it is not uncommon for an accused to deny what a complainant alleges.

**19**  Whatever the merits of any arguments as to reasonable and probable cause, it is my view that the in the end result, the plaintiff must fail on the issue of malice. Each of the defendants has addressed this issue in his affidavit. Each believes his actions were proper and professional.

**20**  Mr. Deline deposed that he has always believed that the fact that his former wife had been represented by Mr. Stirling's wife in matrimonial proceedings played a role in how Mr. Leger's complaint was dealt with. Mr. Deline is of the view that Ms. Stirling "stood in court as my wife changed her story from judge to judge" and believes that his criticisms of Ms. Stirling caused the defendant to "try to maliciously get me". In answer, Mr. Stirling deposed that he knew of no connection between the alleged incident involving Mr. Leger and the plaintiff's former wife and did not consider anything other than the evidence related to the specific charge. The question of whether to prosecute Mr. Deline's former wife for perjury was referred to Regional Crown Counsel, who determined that the charge approval standard was not met.

**21**  I simply do not accept that Mr. Stirling abused his office to get back at Mr. Deline. If it is suggested that the other defendants were party to such an abuse, I reject that suggestion as well. In my view, the plaintiff cannot establish a motive that involves an abuse or perversion of the criminal justice system.

**22**  Mr. Deline submitted that this matter ought not to be resolved on an 18A application. The first reason related to what are alleged to be inconsistent statements made by certain of the defendants. I do not agree that there are true inconsistencies, but in any event, they are not material. As to the argument that the defendants have failed to produce all relevant documents, while Mr. Deline says that he has not received copies of notes made by Mr. Gillen, he was advised that Mr. Gillen has no notes and has already produced the entirety of his file materials. It is my view that this matter is appropriate for disposition by way of Rule 18A.

**23**  I refer, finally, to the claim of the plaintiff that his Charter rights were violated. The statement of claim refers to violations of ss. 7, 9, 10(b), 11(d) and 11(h) of the Charter. The factual basis of the alleged violations is not apparent from a review of the statement of claim. During oral argument, Mr. Deline addressed the issue of detention and the right to retain and instruct counsel. He submitted that he was detained in court on April 4, 1995, and further, that when the more serious threatening charge was reinstated, he was not informed of his right to counsel nor was he permitted to retain and instruct counsel without delay. Although Mr. Deline may view his situation on April 4 as a detention, that is not what the Charter addresses. If there are circumstances in which a plaintiff may recover damages for constitutional torts, this is not such a case.

**24**  The plaintiff's action is therefore dismissed.

GILL J.

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[***Dhillon v. Virk, [2014] B.C.J. No. 464***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61T1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W. Ehrcke J.

Heard: March 5, 2014.

Oral judgment: March 5, 2014.

Docket: S104133

Registry: Vancouver

**[2014] B.C.J. No. 464** | 2014 BCSC 447

Between Baljindar Singh Dhillon, Plaintiff, and Parmjit Singh Virk, Amandeep S. Sanghera, Barinder S. Sanghera, SVS Lawyers, John Doe and/or Jane Doe, Defendants

(19 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Trials — Conduct of — Adjournments — Application by plaintiff for adjournment dismissed — Plaintiff brought *negligence* action against defendant lawyers in 2010 and applied for adjournment on first day of trial in 2014 — Issues were relatively straightforward and within competence of plaintiff to deal with effectively, even without assistance of counsel — Case was almost four years old and defendants were entitled to have their day in court without further delay.**

**Counsel**

Appearing on his own behalf: B.S. Dhillon.

Counsel for the Defendants P.S. Virk and B.S. Sanghera: A. Leoni.

**Oral Reasons for Judgment on Adjournment Application**

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| **W. EHRCKE J. (orally)** |

**1**   This is my ruling on an adjournment application brought at the opening of trial by the plaintiff, Baljinder Singh Dhillon.

**2**  This action brought by Mr. Dhillon claims damages flowing from the alleged ***negligence*** of the defendants Parmjit Singh Virk and Barinder Sanghera.

**3**  The defendants are lawyers, and in broad terms the allegation is that, as lawyers, they breached the standard of care required of them in representing the interests of Mr. Dhillon, who claims that he retained Mr. Virk to act for him.

**4**  This lawsuit was commenced in June 2010. The allegation of ***negligence*** relates to events in the years 2003 and 2004.

**5**  There has already been a summary trial in this matter before Mr. Justice Davies. At that time, the case was dismissed against a third defendant, Amandeep Sanghera, but the affidavit evidence that was before Mr. Justice Davies did not permit him to make the findings of fact necessary with respect to the liability of Mr. Virk and Barinder Sanghera, there being credibility issues arising out of the conflicting affidavits.

**6**  So the matter now comes before me for trial. This date, March 5, 2014, was set for the commencement of this trial, and three days of court time have been set aside for that purpose.

**7**  I understand that Mr. Dhillon also has civil lawsuits against two other lawyers, Mr. Parmar and Mr. Burke. Those two matters have been ordered to be tried together, and the trial date for that I am told is April 22, 2014, and either 9 or 11 days have been set aside for the hearing of those trials.

**8**  Mr. Dhillon at the outset of proceedings here this morning applied for an adjournment of this trial for two reasons. First he says that he needs to retain counsel to act for him on this matter, but that he has had difficulty finding counsel willing to act and has been told by the various lawyers that he has spoken to that even if they were willing to act, they would need at least six to eight months' preparation time, which means that if I were to grant the adjournment request made by Mr. Dhillon, it would have to be for at least six to eight months in order for it to serve the purpose that he is seeking. Any shorter adjournment would not put him in any better position than he is now.

**9**  Secondly, Mr. Dhillon submits that he is in poor health with various different problems, including anxiety and high blood pressure. He says that he is on nine different medications, and he says that his medical conditions make it difficult for him to proceed with this matter at this time.

**10**  I asked him if he had any documentation from medical practitioners to support his claim that he is not medically fit to proceed today, and I have been supplied with two different letters, one from Dr. Peach dated April 18, 2012, and the other from Dr. Pole dated April 13, 2012. Both of them refer to his medical conditions.

**11**  In the case of Dr. Peach, he suggested that any legal proceedings be postponed for a period of at least 12 weeks, but of course that is 12 weeks from April 18, 2012, which has long since passed. In the case of Dr. Pole, he wrote that he recommended that the court case be adjourned by about three months, but again that is three months from April 13, 2012, which has long since passed.

**12**  So apart from Mr. Dhillon's own representations before me today, I have no independent evidence from medical practitioners that he is medically unfit to proceed today.

**13**  The adjournment request is opposed by counsel for the two defendants, who points out that this matter has now been outstanding for almost four years since it was commenced in June 2010 and that since the defendants are lawyers and since the allegation relates to professional ***negligence***, this leaves them under a cloud of the allegations and they are anxious to emerge from that cloud as quickly as possible by having this case resolved by trial.

**14**  We have now spent more than an hour in court, during which time I have been hearing submissions both of Mr. Leoni for the defendants and of Mr. Dhillon in support of his adjournment application, and this has given me the opportunity of observing Mr. Dhillon and assessing the degree to which he can express himself and the degree to which he appears to grasp the issues that are involved in this case.

**15**  In my view, Mr. Dhillon is able to proceed today. I am not satisfied that his medical conditions make it impossible for him to proceed with this trial on today's date, even if unrepresented. Moreover, from my understanding of the case, the factual and legal issues are relatively straightforward and they are within the competence of Mr. Dhillon to deal with effectively, even without the assistance of counsel.

**16**  Having said that, it is typically a benefit to a person to have counsel in any litigation, but that has to be weighed against the fact that this case is now almost four years old and the defendants are entitled to have their day in court without further delay, particularly since, if there were a delay, we would be looking at not a delay of a week or a month but a delay of at least six to eight months.

**17**  One final issue that I should address is that Mr. Dhillon has suggested that it would be preferable to have this case tried along with the outstanding lawsuits that he has against Mr. Parmar and Mr. Burke. However, despite the fact that this case is now almost four years old, no formal application has ever been made to consolidate this trial with the other two, and so I hear about that simply on the morning set for trial, although I understand there had been some discussion of this issue earlier before other Justices of this Court at case planning conferences or trial management conferences. But despite those discussions, it has never crystallized into a formal application to have this trial consolidated with the others.

**18**  From what I have heard about the issues involved in this case and the facts surrounding the other cases, I do not see the necessity or benefit of having this case tried with the other two.

**19**  So for all those reasons, the application to adjourn this trial is dismissed.

W. EHRCKE J.

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[***Ewert v. Marshall, [2003] B.C.J. No. 2202***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B038-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Goepel J.

Heard: September 8, 2003.

Judgment: September 19, 2003.

Vancouver Registry No. S002414

**[2003] B.C.J. No. 2202** | 2003 BCSC 1429 | 19 B.C.L.R. (4th) 131 | 125 A.C.W.S. (3d) 415

Between Jeffrey Ewert, plaintiff, and Brenda Marshall, Patricia David, Dr. John Hogan, Holly Dirk, and Attorney General of Canada, defendants

(29 paras.)

**Case Summary**

**Medicine — Liability of practitioners — *Negligence* or fault — Failure to diagnose an illness — Practice — Dismissal of action — Application or motion for dismissal.**

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| Application by the defendants, Marshall and others, for summary dismissal of Ewert's action for damages for medical ***negligence***. Ewert was a prison inmate. He attended the prison health unit on April 25, complaining of abdominal pain. After experiencing ongoing pain he was taken to hospital on April 29, where an appendectomy was conducted the next day. It was acknowledged that the medical staff at the prison health unit had failed to diagnose appendicitis. There was conflicting opinion evidence as to whether the defendants fell below a reasonable standard of care. None of the experts had been cross-examined.  HELD: Application dismissed.  There was insufficient evidence to find the facts necessary to determine the litigation. Further, it was not just to decide in a summary manner the appropriate standard of medical care in a prison setting. That was an issue of general importance best determined on a full evidentiary record. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.

**Counsel**

D.M. Turko, for the plaintiff. J. Corbett, for the defendant, Dr. John Hogan. K.A. Manning, for the defendants, Brenda Marshall, Patricia David, Holly Dirk, and Her Majesty the Queen in Right of Canada.

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| **GOEPEL J.** |

INTRODUCTION

**1**  Jeffery Ewert claims damages for ***negligence*** in the provision of medical services. He alleges that the defendants failed to take proper steps to diagnose and treat his appendicitis.

**2**  The defendants apply pursuant to Rule 18A for an order that the action be dismissed with costs. Mr. Ewert submits that the matter is not suitable for summary determination and should proceed to trial.

BACKGROUND

**3**  In 1998 Mr. Ewert was an inmate at the Kent Institution in Agassiz, British Columbia, serving a life-sentence for second degree murder. Dr. John Hogan is a physician who practises general medicine. In 1998 he was under contract with the Federal Government to provide medical care for inmates in the federal penitentiary system, including those at the Kent Institution. In that capacity he treated Mr. Ewert.

**4**  Holly Dirk was a registered nurse employed by the Correctional Services of Canada. She attended to Mr. Ewert at the times that are critical to this litigation. Her supervisor was Patricia David. Brenda Marshall was the warden of the Kent Institution.

**5**  The main issue is whether or not the health professionals treating Mr. Ewert were negligent in failing to diagnose his appendicitis during visits he made to the Kent Institution Health Unit between April 25, 1998 and April 28, 1998. It is common ground that Mr. Ewert was suffering from appendicitis and that the medical staff failed to make the proper diagnosis.

**6**  Mr. Ewert attended the Health Unit on several occasions between April 25 and April 28 complaining of abdominal pain. On the morning of April 27, Dr. Hogan conducted a physical exam. He noted that Mr. Ewert's abdomen was soft and hypersensitive to deep palpitations. Dr. Hogan referred him to an urologist and ordered lab tests and imaging studies.

**7**  On the evening of April 27, Mr. Ewert returned to the Health Unit where he saw Ms. Dirk. He was complaining of unbearable abdominal pain. He demanded pain killers. She told him he would have to cope as best he could.

**8**  At approximately 7:20 p.m. on the evening of April 28, he again returned to the Health Unit. He said he was in extreme pain. When asked by Ms. Dirk to provide a urine sample, he was verbally abusive. He demanded pain killers but refused to allow a physical examination. He was escorted out of the Health Unit.

**9**  He returned approximately three hours later. He complained of continuing pain and had tears in his eyes. Mr. Ewert says he told Ms. Dirk he might have appendicitis. He says she pressed down on his abdomen and then told him that he did not have appendicitis. Mr. Ewert says no further examination was performed.

**10**  Ms. Dirk claims she was unable to palpitate his abdomen because Mr. Ewert was guarding and pulling away from her. She observed his skin to be warm and dry. She took his temperature and blood pressure and observed that bowel sounds were present in all four quadrants. She says that Mr. Ewert denied constipation or diarrhoea and told her he had eaten light meals during the day. Her affidavit is silent as to whether Mr. Ewert raised the possibility of appendicitis.

**11**  Subsequent to this examination, Ms. Dirk telephoned Dr. Hogan and advised him of her findings. Based on Ms. Dirk's report, combined with the patient's history and the results obtained in his previous examination, Dr. Hogan deposes that he did not suspect any acute problem with Mr. Ewert's abdomen and decided that it was appropriate to await the results of the tests he had ordered on April 27. The affidavits of Dr. Hogan and Ms. Dirk are both silent on whether there was any discussion between them concerning the possibility that Mr. Ewert was suffering from appendicitis.

**12**  Mr. Ewert's pain continued. At 3:00 a.m. on the morning of April 29, 1998, he again returned to the Health Unit. He says he felt like his stomach was going to explode. An ambulance was called and he was transferred to Chilliwack General Hospital.

**13**  Mr. Ewert was suffering from a retrocaecal appendix abscess. This diagnosis was made at the Chilliwack General Hospital on April 29, 1998. Mr. Ewert underwent an appendectomy on April 30, 1998.

EXPERT EVIDENCE

**14**  Mr. Ewert relies on a report from Dr. Panton. Dr. Panton's expertise is laparoscopic surgery. The defendants submit that Mr. Ewert cannot rely upon expert evidence from a physician who has more specialized training and who has significantly different background, education and experience than that of Dr. Hogan.

**15**  In support of that position the defendants rely on the decision of Madam Justice Quijano in Hughes v. Cooper, (3 Oct. 1996), Victoria 91/3001 (B.C.S.C.). Hughes was an oral decision given in the course of trial. In that case, the plaintiff was trying to introduce evidence of a gastroenterologist in regard to the standard of care of a general practitioner. Madam Justice Quijano refused to admit that evidence. She relied on an unreported decision of Mr. Justice Gow in St. Jules v. Chen (October 17th, 1989), Nanaimo Registry No. 8412.

**16**  St. Jules was also an oral decision given in the course of trial. Mr. Justice Gow refused to allow a paediatrician to give an opinion on the standard of care of a general practitioner. No case authority was cited.

**17**  Madam Justice Allan 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.), in a reserved decision, considered the admissibility of evidence from an expert who was better qualified than the defendant. After referring to decisions of the Courts of Appeal of Newfoundland, Saskatchewan and Ontario, she held that while locality and specialization may be relevant to the applicable standard of care in a particular case, they are not relevant considerations when determining the admissibility of expert evidence on the standard of care.

**18**  The considered decision of Madam Justice Allan is binding upon me. I am not prepared to follow Hughes. See: Hansard Spruce Mills (Re), [*[1954] 4 D.L.R. 590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2JF-00000-00&context=) (B.C.S.C.).

**19**  The report of Dr. Panton is admissible. The difference between his expertise and work experience and that of Dr. Hogan may be a relevant consideration when determining the weight to be given to Dr. Panton's opinion.

**20**  Dr. Panton acknowledges that when the appendix is in the retrocaecal position, appendicitis is frequently difficult to diagnose. In his report, he states that if the patient had been referred to the Chilliwack General Hospital earlier in the course of his illness, the diagnosis would probably have been made earlier and Mr. Ewert would have avoided the excruciating pain that he experienced between the onset of his symptoms and his transfer to hospital on April 29, 1998. Dr. Panton opines that the nursing and medical staff involved in Mr. Ewert's care at the Kent Institution fell below a reasonable standard in failing to recognize that Mr. Ewert had appendicitis.

**21**  Mr. Ewert has also filed a report from Ms. Lynne Esson. Ms. Esson is a faculty member of the School of Nursing at the University of British Columbia and she teaches both theoretical and clinical nursing. Her area of expertise is medical-surgical nursing, with a focus on the care of patients undergoing general surgical procedures.

**22**  In her report, Ms. Esson notes that the patient had, since 1997, numerous visits to the infirmary for chronic abdominal and urinary complaints and these complaints may have affected the objectivity of the Kent Institution staff who dealt with Mr. Ewert in April 1998. She also notes that Mr. Ewert was not always cooperative, which may have affected the ability of the nurse and physician to take a more detailed history or do a complete physical assessment. Ms. Esson concludes that the patient was not well served by the medical and nursing staff of the Kent Institution. She states that the patient had a long-standing complaint of abdominal pain that was not satisfactorily investigated.

**23**  The defendants have also filed expert reports. Dr. Murschell, who practises family medicine, concludes that this was a challenging case from a diagnostic point of view and that there were several factors which made the diagnosis more difficult, including Mr. Ewert's long history of abdominal complaints and other known conditions of Mr. Ewert that could account for symptoms of abdominal pain. Dr. Murschell notes that appendicitis is infrequently a straightforward and easy diagnosis. This is especially so if the appendix lies in a retrocaecal position. Dr. Murschell concludes that Dr. Hogan did not fall below the standards expected of a reasonable general or family practitioner in his management of Mr. Ewert.

**24**  The defendants also rely on a report from Ms. Diane Thiessen. Ms. Thiessen is a registered nurse with extensive experience in the Provincial Corrections Branch. She concludes that the nursing staff at Kent Institution consistently acted in accordance with generally accepted nursing practice that would have been employed by a competent nurse in the same circumstances.

DISCUSSION

**25**  On an application under Rule 18A, the court may grant judgment unless it is unable on the whole of the evidence to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application. In this case there are contradictory expert opinions as to whether Mr. Ewert received appropriate treatment. None of the experts have been cross-examined.

**26**  Further, the affidavit of Dr. Hogan is silent as to whether or not he ever considered that Mr. Ewert might be suffering from appendicitis. Mr. Ewert says that he advised Ms. Dirk when he saw her on the evening of April 28th that he believed he had appendicitis. It is not known whether Ms. Dirk passed that information on to Dr. Hogan in their subsequent telephone conversation. Whether Dr. Hogan should have considered the diagnosis of appendicitis and whether his failure to do so was below the standard of care is very much a live issue.

**27**  A further factor in this case is that Mr. Ewert was at all material times a prisoner with severe restraints on his liberty. He was at the mercy of the medical staff at the Health Unit. None of the expert reports give consideration to the standard of care when that care is being given in a prison setting. I was referred to no authority on this point.

**28**  Having considered the evidence as a whole, I am not satisfied that I can find the facts necessary to decide the issues to determine this litigation. Further, I do not think it just to decide the issue of the appropriate standard of medical care in a prison setting in a summary manner. This is an issue of general importance best determined on a full evidentiary record.

**29**  The defendants' applications are dismissed. Costs will be in the cause.

GOEPEL J.

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[***Faust v. See, [2018] B.C.J. No. 1287***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SRY-8JT1-JW5H-X4R5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Marzari J.

Heard: February 19-21, 2018.

Judgment: July 3, 2018.

Dockets: M133837, M150783

Registry: Victoria

**[2018] B.C.J. No. 1287** | 2018 BCSC 1085

Between Nathaniel Faust, Plaintiff, and Janet See, Defendant And between Janet Kathleen See, Plaintiff, and Nathaniel Stefan Faust, Defendant

(71 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Determination of liability for motorcycle accident — Plaintiff was 100 per cent liable — Parties were riding motorcycles on highway, with plaintiff in lead — Defendant struck plaintiff perpendicularly when he suddenly and without warning turned perpendicular to line of traffic — She was likely 30 seconds behind him, came around corner and saw him — She could not have anticipated his turn into lane of travel.**

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| Determination of liability for a motorcycle accident. The parties were riding motorcycles on a highway, with the plaintiff in the lead. His motorcycle was struck by the defendant's after she came around a corner.  HELD: The plaintiff was 100 per cent liable for the accident.  The defendant struck the plaintiff perpendicularly when he suddenly and without warning turned perpendicular to the line of traffic. She was likely at least 30 seconds behind him, came around the corner and saw him sitting with his hands off the steering panel and his feet on the gravel shoulder. She could not have anticipated his turn into the lane of travel. By pulling in front of her to make a U-turn without signalling or ensuring that the lane was clear, he created an emergency situation. She would have had less than seven seconds between when she could have seen him and the point of impact. He was stationary for part of that time. By applying her brakes to the extent that she did, she might have avoided a more severe accident. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, *R.S.B.C. 1996, c. 316*,

**Counsel**

Counsel for the Plaintiff in Action No. M133837: B. Hickford.

Counsel for the Defendant in Action No.M133837: C. Salomon, R. Fraser, Articling Student.

Counsel for the Plaintiff in Action No. M150783: M.H. Martin.

Counsel for the Defendant in Action No. M150783: E. Wagner.

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| **MARZARI J.** |

**Introduction**

**1**  These two actions arise out of an accident between two motorcycles that occurred on April 21, 2013 when Ms. See's motorcycle struck Mr. Faust's motorcycle. The parties were enjoying a ride along Highway 14 between Victoria and Jordan River with Mr. Luptak, who was then Ms. See's common-law partner and Mr. Faust's good friend. The accident occurred at approximately 12:55 p.m. in the eastbound lane of Highway 14 near the intersection of Invermere Road, west of Sooke, British Columbia.

**2**  Liability for the accident is the sole issue before me. Mr. Faust and Ms. See have differing accounts of how the accident occurred: Ms. See states that Mr. Faust pulled out directly in front of her and perpendicular to the line of traffic while executing a U-turn, making the collision unavoidable, while Mr. Faust states that he was pulled over near or on the shoulder of the road, and Ms. See ran into him in his stationary position from the rear or at a rearward angle. Both parties seek to attribute 100% liability to the other party, or in the alternative say that the other party is contributorily negligent.

**Liability**

**3**  It goes without saying that both parties owed a duty of care to the other in this case, and were expected to comply with the provisions of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 316*.

**Events leading up to the accident**

**4**  At around 11:00 a.m. on April 21, 2013, Ms. See, Mr. Faust and Mr. Luptak set out on a motorcycle ride toward Sooke from Victoria, British Columbia. The ride was undertaken for the pleasure of riding, with no particular destination in mind. Mr. Faust was riding a 2007 Kawasaki Ninja, Ms. See a 2009 Kawasaki ZX-GR, and Mr. Luptak a 2010 Yamaha. The evidence is consistent that the riders rode in a staggered formation with Mr. Luptak riding in what is referred to by motorcyclists as position one, which is close to the centreline of the highway. Mr. Faust road in what is referred to as position two which is closer to the shoulder. Ms. See rode in a position which is similar to position one, sometimes also called position 3: close to the yellow centre line. These positions are taken by the riders for the purposes of safety and manoeuvrability. The evidence of all three was consistent that this configuration was maintained throughout the day, with Mr. Luptak in the lead, Mr. Faust behind him and Ms. See following behind, and sometimes well behind the other two.

**5**  While the three riders set off on their ride as a group, they became separated at various times. Mr. Luptak, in the lead, was not visually monitoring the other two. Mr. Faust, kept Mr. Luptak in his sights, but was not monitoring the location of Ms. See or how near or how far she was behind him. Mr. Faust's evidence in this regard was he "wasn't paying attention to Janet". Ms. See's evidence was that she was enjoying her ride, but that she does not enjoy riding at the speed which her two fellow riders do and was content to let them get ahead of her.

**6**  All three agreed that Mr. Luptak was the more senior and experienced rider. They generally consider him to be a safe rider, due to his experience, although he would take risks, such as doing wheelies. He was described as a "wheelie king."

**7**  Mr. Faust has been a long time dirt bike rider and also considers himself to be an experienced rider. I find that he has considerable experience in riding dirt bikes and motor bikes, but no formal training in this regard.

**8**  Ms. See obtained her motorcycle license in 2004, and subsequently took a learn-to-ride program offered through the Comox Valley Driving School. This program included lessons on what to wear, how to operate a motorcycle in a controlled manner, emergency stopping, positioning oneself to be seen, and hazard perception. She also took two further advanced rider training courses which involved both classroom and track training, including instruction on the proper lines to take when cornering. She approached motorcycle riding more in the nature of a trained and practised sport, while her companions relied on their years of experience. Ms. See also actively mentored other riders, particularly women riders. However, she was considered by Mr. Faust to be a novice rider, in that she rode generally more conservatively and at a slower pace than he ordinarily would. The evidence establishes that during the course of their morning ride, Mr. Luptak and Mr. Faust would often drive out of sight of Ms. See, and that Ms. See was comfortable driving her motorcycle on her own, and catching up with the two gentlemen at various stops along the way. I find that she was a conscientious rider, who rode for pleasure but not necessarily for thrills.

**9**  Ms. See testified that she preferred riding in the position closest to the centreline, as it made her the most visible to other vehicles on the road. She also testified that she had aftermarket changes made to her motorcycle to make it louder. She stated that she considered a louder bike to be a safer bike.

**10**  On Highway 14 between Sooke and Jordan River there is a straight portion of highway known to the parties as Blueberry Flats that gives access to dirt biking opportunities off the highway. It is also particularly attractive to those who can do wheelies, such as Mr. Luptak, because of the straightness and length of the road in this section. As the riders rode past Blueberry Flats on their way toward Jordan River, they did not see or notice any debris or oil spills on the road. The road remained dry, and it is agreed that it was dry at the time of the accident on their return.

**11**  Sometime after the riders passed Blueberry Flats it began to rain, and first Mr. Luptak and Mr. Faust, and not long thereafter Ms. See, pulled over at the parking lot for French Beach Provincial Park. The riders decided to turn around and go back to Victoria. While they were pulled over, Ms. See saw Mr. Faust playing with something she believed to be his cell phone or MP3 player. Mr. Faust has headphones built into his riding helmet specifically to listen to music which he says is safer than wearing ear buds for this purpose. While there was some question as to whether Mr. Faust was listening to music during the course of the ride or on the return ride, on all the evidence, including the fact that sound could be heard emanating from his helmet after the accident, I find that he was.

**12**  The parties maintained their positions on the ride back to Victoria, with Mr. Luptak in the lead in first position and Mr. Faust not far behind him in second position. Ms. See was behind them both, near the centre of the road. As they were riding, Ms. See saw Mr. Luptak and Mr. Faust pass a small car on the curvy section of the road with a double solid line. Ms. See considered that this was not a safe place to pass, and remained behind the car for some time, allowing the others to get some distance ahead of her. While Mr. Luptak and Mr. Faust did not specifically recall any particular cars that they saw or passed on that road, I find on all the evidence that this did occur. In addition, Ms. See was cross-examined extensively as to what happened to that car, and whether she eventually passed it. Ms. See's answers were vague and somewhat inconsistent on this point reflecting, I find, that she simply does not recall what happened to that car and whether she eventually passed it, or whether it eventually turned off or drove out of sight. I do not consider that anything significant turns on this, nor do I put the weight on Ms. See's answers in cross-examination that Mr. Faust's counsel urged in terms of affecting Ms. See's credibility. I find it entirely reasonable that none of the parties kept track of the cars that they passed or did not pass many years ago. The car was not a factor at the time of the accident, other than being the occasion upon which the parties were separated.

**13**  Mr. Luptak testified that when he passed through Blueberry Flats on the way back to Victoria, he saw a couple he knew on the side of the road unloading a dirt bike from their truck. He passed Blueberry Flats and proceeded around the long right turning bend out of Blueberry Flats and towards Invermere Road. This bend is towards the right when one is travelling back to Victoria on Highway 14. It is described as a "sweeping blind corner" in that you cannot see around the corner to Invermere Road until you are approximately halfway through the corner. I accept the evidence of the experts who conducted measurements of this area that visibility is limited to about 120 metres leading up to the site of the accident. It is not possible to see Blueberry Flats from the site of the accident near Invermere Road.

**14**  After Mr. Luptak passed Blueberry Flats and had rounded the right hand bend in the road, he turned around and headed back in the direction of Blueberry Flats to see his friends. He testified, and I believe him, that once he was around the corner and back on the straight section of road along Blueberry Flats he did a wheelie where his friends could see him. I furthermore accept Mr. Luptak's evidence that he is very good at doing wheelies, and is recognized for his ability to do that. However, he would never do them on a curve in the road because the speed required to do so is over 100 kilometres an hour, and it is only safe and possible to achieve this speed to do a wheelie on the straight stretch of the road.

**15**  Mr. Faust saw Mr. Luptak turnaround. There is some discrepancy in their evidence as to whether Mr. Luptak simply pulled a U-turn in the middle of the road, or first pulled over on the side and then re-entered the road to turn around. Very little turns on that.

**16**  After seeing Mr. Luptak turn around, the evidence is consistent that Mr. Faust pulled over towards the side of Highway 14 and came to a stop. What happened next, however, is the subject of the trial, and is largely determinative of the parties' liability with respect to the accident that occurred.

**The Accident**

**17**  The parties differ on what occurred in the seconds leading up to the accident.

**18**  Mr. Faust says that he saw Mr. Luptak turn around. He pulled over to the side of the road. He was on the side of the road for "maybe 30 seconds" before he was struck. He states that he signalled to the left before coming to a stop in a patch of gravel, though he may also have been on the concrete. He looked down at his cluster to make sure that he was in neutral. At trial he stated that he then rolled backwards and that he was at a 45 degree angle at the side of the road either entirely on the gravel or partly on the gravel and partly on the concrete of the road. He stated he looked back behind him in the direction Ms. See was coming but that he could not see Ms. See, but he did see Mr. Luptak doing a wheelie.

**19**  His evidence was that he was not in gear and was not moving across the road, when he was struck from behind by Ms. See. He saw something black in the corner of his eye before he was hit.

**20**  Mr. Faust has almost no recollection of what occurred after the accident. He does not recall the ambulance ride or moving to the side of the road.

**21**  His theory of the case is that Ms. See was travelling fairly closely behind him, and that she also turned to watch Mr. Luptak pop a wheelie as she came around the corner from Blueberry Flats, and that she was distracted by watching Mr. Luptak and ran into Mr. Faust from behind him on the side of the road.

**22**  Mr. Faust's defence counsel suggests that on the basis of the evidence (discounting Ms. See's evidence as unreliable) there are four possibilities of where and what Mr. Faust was doing:

1. Mr. Faust was on the shoulder of the road and hit while he was stationary;
2. Mr. Faust was in the lane of travel and hit while he was stationary;
3. Mr. Faust was on the shoulder of the road and hit while he was pulling into the lane of travel, essentially waddling his bike forward with his feet while the bike was in neutral; and
4. Mr. Faust was stationary in the lane of travel and hit when he started to move further in the lane of travel.

**23**  When asked which of the four scenarios actually occurred, counsel submitted it was unclear. Indeed, if one were to rely on Mr. Faust's evidence alone the best that could be concluded is that Mr. Faust's position was unclear because his testimony in this regard was not consistent with his previous evidence in discovery, with the expert evidence, with the photographic evidence regarding the lines of visibility, nor with the evidence of others.

**24**  Mr. Faust's initial evidence in discovery was that he was stopped parallel to the road on the shoulder of the road, but through subsequent examination for discovery and then at trial his angle with respect to the road had increased to 45 degrees and closer to the lane of travel. I note that this angle is more explicable with respect to the expert evidence tendered by both parties in that none of the expert evidence supports a collision of Mr. Faust's motorcycle entirely on the shoulder or that Mr. Faust sustained an impact directly from the rear.

**25**  In addition, Mr. Faust's evidence that he saw Mr. Luptak pop a wheelie is also not consistent with Mr. Luptak's evidence. I find that Mr. Luptak was generally a credible witness who had no interest in favouring either party. He had been close with both parties at the time of the accident, but at the time of trial was no longer friends with Mr. Luptak, nor in a relationship with Ms. See. It is clear that he had been put in a difficult position between them, and I am satisfied that he did his best simply to answer the questions put to him as best he could.

**26**  Mr. Luptak's evidence puts beyond doubt that he did not perform a wheelie within sight of where Mr. Luptak had stopped, and where the accident ultimately took place. Mr. Luptak was clear that he would not have been able to gather the speed to have popped a wheelie in that corner. Rather, he states that he rounded that corner out of sight of the accident scene, accelerated to a speed of 100 kilometres an hour or more, and then popped a wheelie at some distance along the straightaway at Blueberry Flats where his friends could see him. Given the distances and his speed, this would have been completed no more than about 10-20 seconds after he turned around. I find that Mr. Faust could not have seen Mr. Luptak pop a wheelie from the location of the accident. I further find that Ms. See could not have been observing Mr. Luptak pop a wheelie as she came around the corner and approached Mr. Faust's location. I find it more likely that the sound that Mr. Faust heard, and which he attributed to Mr. Luptak popping a wheelie, was the sound of Ms. See approaching.

**27**  I find that Mr. Faust's recollection of these events is not reliable. Mr. Faust's evidence and recall of the seconds leading up to the accident were unclear in his mind, and this was conveyed in his evidence both at trial and in discovery. This is perhaps not surprising given that he lost consciousness and has very little recollection of the events directly thereafter.

**28**  Ms. See's evidence was that she saw her friends as she passed Blueberry Flats. She did not see Mr. Luptak on the road and she did not stop to greet her friends. She did not know and could not have known how far ahead of her Mr. Faust and Mr. Luptak were, or that Mr. Luptak had turned around. While she speculated that Mr. Luptak may well have been with their friends at Blueberry Flats, the fact is that she did not know where he was at that time, and had determined to continue home regardless.

**29**  There is an inconsistency between Ms. See's evidence and Mr. Luptak's as to whether they saw each other in the area of Blueberry Flats at this time. Ms. See states she did not see him, while Mr. Luptak remembers seeing her while he was still on his bike.

**30**  Ms. See states she entered the sweeping corner after Blueberry Flats in first position, and specifically recalls looking forward to the opportunity to execute her recent training with respect to these types of turns. She geared down and slowed down and then accelerated into the turn while moving toward the middle of the lane. As she was coming out of the turn, she saw Mr. Faust on the side of the road on the gravel shoulder. This is consistent with Mr. Faust's evidence in examinations for discovery in October 2017 and January 2015.

**31**  Ms. See testified that she saw that Mr. Faust's feet were on the ground and his hands were off his handlebars as she came around the corner. This is consistent with Mr. Faust's evidence that his left foot and possibly both feet were on the ground. Mr. Faust stated that he continued to have the right hand signal activated up to the point of the accident, while Ms. See does not recall his signals being on. In either event, there was no indication to Ms. See that Mr. Faust was preparing to resume his travel, or turn left across the traveled portion of the road. Ms. See testified that she assumed he was adjusting his music. She continued straight in her lane of travel.

**32**  Ms. See testified that when she was only seconds away from passing Mr. Faust, he manoeuvred his motorcycle off the shoulder of the road and perpendicularly into the lane of traffic directly in front of her. This was her evidence in her statement to police at the scene of the accident, as well as in discovery, and at trial. She stated Mr. Faust appeared to have decided to do a U-turn to go back to Blueberry Flats. She testified that when Mr. Faust entered her lane of travel he was perpendicular to her, and she did not have enough time to do anything but apply her brakes as hard as she could. Her back tire came up off the road and she tried to keep it down by pushing down. She collided with the side of Mr. Faust's motorcycle in the middle of the eastbound lane. She says she struck the middle of Mr. Faust's motorcycle, approximately where his leg was situated. This is also consistent with Mr. Faust's recollection of where on his body he was struck.

**33**  When Ms. See struck Mr. Faust, she flew over top of him striking his shoulder and head. This is also consistent with Mr. Faust's testimony. When Ms. See struck Mr. Faust he was knocked off his motorcycle. Ms. See landed on the roadway in the middle of the lane she had been travelling in. She stated that she landed perpendicular on the road with her head closer to the shoulder of the road and her feet closer to the centreline. She could see her motorcycle perpendicular to the road with its front wheel facing the shoulder of the road and its back tire close to the centreline between herself and Mr. Faust. Mr. Faust fell straight over and landed face down in the middle of the laneway. Ms. See says he was perpendicular to the road but facing the opposite direction, with his head facing the centreline and his feet facing the shoulder. His motorcycle also landed in the middle of the lane beyond Mr. Faust. His motorcycle was perpendicular to the road opposite to the direction of Ms. See's, with the front tire facing the centreline of the highway and the rear tire facing the shoulder.

**34**  This account is generally consistent with other lay evidence. Mr. Faust admitted to lying in the middle of the road of the eastbound lane in his examination for discovery in 2015. When asked if he was on the shoulder he clarified twice that he was not on the shoulder but in the middle of the lane of traffic. Both parties agreed that Mr. Faust did not remain at the location he initially came to rest after the collision. He attempted multiple times to stand and walk around but he was unable to remain standing and he was told to remain on the ground at the shoulder until the ambulance arrived.

**35**  Mr. Luptak also confirmed that as he rode toward the accident scene after leaving his friends at Blueberry Flats he saw Mr. Luptak's motorcycle facing the centre of the road in the lane of traffic. He saw a passerby pick up Mr. Faust's bike from the road and move it onto the shoulder.

**36**  Photographic evidence also shows debris and oil near the centre line of the road consistent with where Mr. Luptak and Ms. See recall seeing the front of Mr. Faust's motorcycle.

**37**  The evidence is therefore relatively consistent with respect to the position of the parties and their motorcycles after the accident. Mr. Faust has no clear recollection of this, though he does recall moving himself from the centre of the road. Both Ms. See and Mr. Luptak observed Mr. Faust's motorcycle perpendicular to the lane of travel in the centre of the lane.

**38**  Overall I accept that, on the balance of probabilities, Ms. See's recollection of the location of the motorcycles and the parties is accurate: After the accident, Ms. See was located in the centre of the travelled portion of the lane in the furthermost position from the point of impact moving in the direction of Victoria. Behind her was her motorcycle, behind her motorcycle was Mr. Faust, who also landed in the centre of the lane initially, and finally Mr. Faust's bike, which was also in the centre of the lane. All four were perpendicular to the lane of travel.

**39**  As to the moments leading up to impact, in examination for discovery Mr. Faust could not remember if he was contemplating doing a U-turn at the time immediately before the accident. He denies that he was actually executing such a U-turn, however.

**Summary of expert evidence**

**40**  Expert evidence was tendered by both parties. All three experts were accepted by the parties as providing opinion within their expertise, and no objections were made as to admissibility of any of the reports. Nor were cross-examinations conducted with respect to any of the experts.

**41**  Mr. Jonathan P. Gough, a professional engineer with Baker Materials Engineering Ltd. prepared a report in September 2017.

**42**  Mr. Gough reviewed photographs of the motorcycles after the collision. Neither motorcycle was available at the time for inspection by Mr. Gough, or any of the other experts. Mr. Gough reported at page 3 that the motorcycle ridden by Mr. Faust sustained abrasive contact to the right side of its fuel tank, the right end of the handlebars, the right side of the fairing and the right side frame slider. There is no evidence of damage to the front or rear of Mr. Faust's motorcycle. Mr. Gough reported further damage to the left side fairing directly below the fuel tank. Photographs of Mr. Faust's motorcycle taken at the collision scene confirm that his motorcycle did not sustain any damage to its rear end. The rear brake light and license plate remain intact. Ms. See's motorcycle sustained significant damage to its frontal structures, particularly the instrument cluster, headlight and front fairing. The right side and top of the fuel tank were dented.

**43**  Mr. Gough, in reviewing the damage to the motorcycles, concludes that the damage on the right side of Mr. Faust's motorcycle was typical of sliding contact with the asphalt road surface, and was essentially abrasive in nature. The damage on the left side of Mr. Faust's motorcycle could have occurred as a result of contact from Ms. See's motorcycle, and that there was no other explanation for this damage apparent. He concludes that the damage to the two motorcycles was more consistent with a perpendicular collision in which Ms. See's motorcycle would have hit Mr. Faust's on the side.

**44**  With respect to the collision dynamics, Mr. Gough concludes:

If Ms. See's motorcycle had rear-ended the Faust motorcycle, then it is unlikely that Mr. Faust would have come to rest ahead of his motorcycle or that Ms. See's motorcycle would have come to rest to the east of the Faust motorcycle. The impact would have propelled Mr. Faust motorcycle out from beneath him and would also decelerated the See motorcycle such that it would have come to rest behind, rather than ahead, of the Faust motorcycle.

**45**  Overall, Mr. Gough's report supports the conclusion that the collision was a perpendicular one with Ms. See's motorcycle striking Mr. Faust's motorcycle in a T-bone collision while traveling straight in the centre of the lane, propelling Ms. See and her motorcycle over the head of Mr. Faust.

**46**  Mr. Lawrence, a professional engineer with MEA Forensic, prepared a report dated December, 2017.

**47**  Mr. Lawrence agrees with Mr. Gough that the photographs taken at the collision scene do not show any obvious impact damage to the rear side of Mr. Faust's motorcycle. He states that based on the supplied photographs of bruising to Mr. Faust's left leg, it is possible that Mr. Faust's left leg received a significant component of the impact force from Ms. See's motorcycle. He goes on to state:

There is no distinct match between the damages to the motorcycle of Mr. See [sic] and Mr. Faust. Absent another injury mechanism, Mr. Faust's left leg bruising is consistent with direct contact from Ms. See's motorcycle. The angle between the motorcycles at impact cannot be determined.

**48**  With respect to impact mechanics, Mr. Lawrence states:

The supplied photographs show Ms. See's motorcycle at rest in the middle of the southbound lane. Based on impact mechanics if the motorcycles were perpendicular to one another at impact and Mr. Faust was moving slowly, this rest position is consistent with an impact near the middle of the southbound lane. In this scenario, Mr. Faust would be expected to also come to rest in the middle of the southbound lane. The supplied photographs show him lying mostly on the shoulder of the road, inconsistent with this scenario. However, I understand that Mr. Faust may have moved from his initial rest position to where he is shown in photographs.

**49**  Mr. Lawrence does not disagree with Mr. Gough's conclusion that Mr. Faust and Ms. See's motorcycles were both in the lane of travel when the collision occurred. However, he states that an angle impact rather than a perpendicular impact would be more consistent with Mr. Faust's position if he landed on the shoulder of the road.

**50**  Given my factual finding above that Mr. Faust did come to rest in the middle of the eastbound lane, a finding which is based both on Mr. Faust's evidence in the examination for discovery, and Ms. See's evidence, Mr. Lawrence's report also tends to support a collision in the middle of the eastbound lane with a perpendicular impact to Mr. Faust's motorcycle.

**51**  Mr. Lawrence states that a lack of damage to the motorcycle makes determining the angle of impact using mechanical engineering with certainty impossible, and that biomechanical analysis would be required in this regard.

**52**  Dr. Desmoulin, who is a biomechanical engineer, was retained by Ms. See's counsel to provide this analysis. Dr. Desmoulin has a PhD in mechanical engineering, and a masters of science in kinesiology. He concluded as follows:

After contacting Mr. Faust during impact, according to the laws of physics, Ms. See would have flown over Mr. Faust motorcycle, and landed further down the roadway in a similar direction as her initial velocity at contact. Simultaneously, her motorcycle would have followed a similar path. Hence, if Mr. Faust's motorcycle were positioned on the shoulder or at the edge of the roadway at the time of the collision, Ms. See and/or her motorcycle would have likely come to rest on the shoulder or off the road entirely. Alternatively, if Mr. Faust's motorcycle was in the middle of the lane and performing a U-turn, it is likely that Ms. See and her motorcycle would have come to rest within the confines of the lane...

**53**  Dr. Desmoulin provides an analysis of all the evidence, including the parties' injuries, and an opinion as to the most likely points of contact between Ms. See and her motorcycle and Mr. Faust and his motorcycle. He states: "In my opinion a more perpendicular impact occurred between Ms. See's and Mr. Faust's motorcycles."

**54**  Dr. Desmoulin also references a crescent shaped mark on Mr. Faust's leg that matches the front fairing of Ms. See's type of motorcycle. This mark in its shape and height is aligned vertically and horizontally with a perpendicular impact of Ms. See's motorcycle with Mr. Faust's leg. In addition, Mr. Faust's thigh contusion is consistent with the blunt impact from a rounded surface similar to Ms. See's fairing leaning laterally towards his thigh. The contusion is located at a height that aligned both vertically and horizontally with a perpendicular impact. Dr. Desmoulin also finds that Mr. Faust's clavicle fracture is consistent with the compressive load to the shoulder most consistent with two perpendicular impacts, the first being that impact between the motorcycles and the second being impact between two riders. The combination of these impacts would have violently pushed Mr. Faust off his motorcycle and toward the ground in a lateral direction. Finally, Dr. Desmoulin's momentum assessments concluded as follows:

The momentum assessment of the two (2) motorcycles shows that during a high-angle or rearward impact Ms. See's motorcycle would more likely have come to rest on the shoulder of the road or in the ditch which is not consistent with where both parties agree her motorcycle came to rest, in the middle of the road. This indicates that a high-angle or rearward impact did not likely occur...

The momentum assessment of the two (2) motorcycles show that: a) the resting location of Ms. See's motorcycle is undisputed; and b) Ms. See and her motorcycle would have flown over Mr. Faust's motorcycle, and landed further down the roadway in a similar direction as the initial velocity of contact. Since her motorcycle was found in the centre of the roadway this indicates perpendicular impact was more likely than not.

**55**  Therefore all three of the experts, including the expert report tendered by Mr. Faust, indicate that the impact was a T-bone impact in the lane of travel. The conclusion to be drawn from the expert evidence on the facts as I have found them regarding the parties' resting positions is that, at the time of impact, Mr. Faust was travelling perpendicular to the lane of travel in the middle of the lane. This is entirely consistent with Ms. See's version of events, and generally inconsistent with Mr. Faust's.

**Conclusion on liability**

**56**  Counsel on behalf of Mr. Faust suggested that there is too much uncertainty with respect to the evidence, and expert evidence, to conclude a perpendicular impact was more likely than a rear or angled impact. I disagree. On the balance of probabilities, and taking into account the credibility of Ms. See and Mr. Luptak, and the reliability Mr. Faust's recollection, I find that the evidence consistently and strongly indicates a perpendicular impact in the centre of the laneway. The witness and expert evidence is inconsistent with Mr. Faust's position that he was either sitting stationary at the side of the road parallel to the direction of travel, or angled at a 45 degree angle at the side or close to the side of the road.

**57**  Furthermore, I found Ms. See to be credible in her detailed recollection of the events immediately preceding the accident, the accident itself, and the events immediately afterward. Furthermore, her evidence in material aspects was generally consistent with that of the independent witness, Mr. Luptak. The notable exception to this is Ms. See's evidence that she did not see Mr. Luptak in the area of Blueberry Flats, in contrast with Mr. Luptak's evidence that he did see Ms. See. On all the evidence, I do not find this discrepancy determinative of the question of how the accident occurred.

**58**  Mr. Faust's defence largely relies on an attack on Ms. See's credibility. Ms. See was cross-examined on numerous aspects of her evidence, and it is true that there were some inconsistencies with respect to her evidence relating to events other than the moments leading up to the accident. This included her evidence in cross-examination on issues such as her recollection of what happened to the car that Mr. Luptak and Mr. Faust passed, what the impact of the accident was on her relationship to Mr. Luptak, and some other subsequent events. I consider all of these to have been minor inconsistencies with respect to matters that have only tangential relevance to the accident itself.

**59**  In comparison, I find Mr. Faust's evidence to have been inconsistent on numerous points that were particularly relevant to the moments leading up to the accident. I ascribe these inconsistencies to recall issues related to his loss of consciousness as a result of the accident. I find he is not a reliable witness with respect to the seconds leading up to the accident, or the events immediately thereafter.

**60**  Other than relying on attacks of Ms. See's credibility, Mr. Faust suggests that the strongest evidence as to what occurred should be taken from the evidence of Mr. Luptak's family members at the hospital after the collision. They say that at the hospital Ms. See admitted responsibility for the accident, and that this should be determinative. Specifically, Mr. Faust relies on the evidence of his common law wife Lona Seidel, and her daughter, Zafia Wood, who was eight or nine years old when the accident happened, and is now 13.

**61**  Ms. Seidel's evidence was that she met Ms. See and Mr. Faust at the hospital. When she turned to Ms. See and asked what happened, she says Ms. See said "I don't really know, Ricky had turned around and I had turned to look and didn't see Nathan." Ms. Seidel says that Ms. See apologized multiple times and said she was sorry because she didn't mean to hit him. In cross-examination she reiterated that Ms. See said sorry to her and that she didn't mean to hit Mr. Faust. She also said that those are the words that she remembers but that Ms. See did say words to that effect more than one time. She rephrased what Ms. See had said was that she was looking away, and "before she knew it she had hit him."

**62**  Ms. Wood says that Janet also told her that she was sorry. She says that she admitted to not paying attention, and that she hit Nathan from behind. However, she also said that some of this information was relayed to her by Mr. Luptak, and that in fact the information came from Mr. Luptak first.

**63**  Mr. Luptak was also asked about Ms. See's apologies. He did not recall any statements that Ms. See was looking away. He said she felt very badly. He also said that there were apologies all around for quite a while.

**64**  Mr. Faust says the evidence of these apologies is the best evidence of all the evidence before the court as to what actually happened, and is determinative of the issue. I disagree.

**65**  The evidence of Ms. Seidel and Ms. Wood, which I accept as sincere, is still hearsay evidence from Ms. See that is admissible at trial as an admission against interest. As an admission, however, it lacks the type of detail that would be needed to suggest that events occurred differently than is supported by the physical evidence, or as Ms. See stated in her detailed account to the police immediately after the accident (tendered by Mr. Faust), in her examinations for discovery, and at trial. It is also subject to the vagaries of recollection more than four years after the event.

**66**  While I accept that it is entirely likely that Ms. See felt deeply apologetic for colliding with Mr. Faust, and that she did not see him moving across her path in time to stop, on a balance of probabilities the evidence does not establish that Ms. See rear-ended Mr. Faust while her attention was turned. As I found above, Mr. Faust's theory that Ms. See was watching Mr. Luptak pop a wheelie immediately before impact is not at all probable given Mr. Luptak's evidence that it would not have been possible for him to have done a wheelie on the long blind corner leading up to the accident scene or directly coming out of that corner. Overall, while Ms. See may have been apologetic, and likely expressed this to Mr. Faust's loved ones, I do not find that her statements are reliable evidence that the accident occurred as Mr. Faust suggests.

**67**  On all the evidence I find that Ms. See struck Mr. Faust perpendicularly when he suddenly and without warning turned perpendicular to the line of traffic to follow Mr. Luptak. I find Ms. See was travelling at the speed limit and did not see Mr. Luptak return towards his friends at Blueberry Flats. I find Ms. See was likely at least 30 seconds behind Mr. Luptak and Mr. Faust, and was not distracted by watching Mr. Luptak pop a wheelie when she passed Blueberry Flats and then came around the corner and saw Mr. Faust sitting with his hands off the steering panel and his feet on the gravel shoulder. I find that Ms. See could not have anticipated Mr. Faust's turn into the lane of travel. I find that while Ms. See was undoubtedly apologetic for running into Mr. Faust, the collision was inevitable and brought about by Mr. Faust's actions.

**Contributory *Negligence***

**68**  Mr. Faust argues that if he is found to be liable, Ms. See was contributorily negligent. In this regard, he argued that Ms. See should have been able to evade Mr. Faust, or that, knowing that he was not always a predictable driver, she should have anticipated his U-turn in front of her.

**69**  While one cannot help but have sympathy for Mr. Faust and his family, I cannot find on these facts and on all of the evidence that Ms. See could have done anything differently in the circumstances. By pulling in front of her to perform a U-turn without signalling or ensuring that the lane was clear, Mr. Faust created an emergency situation. It is well-established that the standard of care applied to individuals in emergency situations is not one of perfection: *Walls v. Mussens Ltd. et al* [*(1969), 11 D.L.R. (3d) 245*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW41-F2F4-G0KV-00000-00&context=) at 247 - 248 (N.B.S.C.); *Brook v Tod Estate*, [*2012 BCSC 1947*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X35C-00000-00&context=) at para. 26. On all the evidence, Ms. See would have had less than seven seconds between when she could possibly have seen Mr. Faust on the side of the road and when she reached the point of impact with Mr. Faust at the centre of the lane. I also find that Mr. Faust was stationary with his feet on the ground for some portion of that time and Mr. Faust would have crossed from the shoulder into the middle of the travelled lane from the shoulder within a matter of only a few seconds. I find that this time would have been insufficient for Ms. See to have done anything more than what she did do, and that indeed, by applying her brakes to the extent that she did, she may well have avoided a more severe accident.

**Conclusion**

**70**  In conclusion I attribute 100% of the liability of this accident to Mr. Faust.

**71**  Subject to any submissions with respect to costs that the parties may wish to raise, Ms. See is entitled to costs with respect to both actions. Should the parties wish to speak to costs, they shall have 30 days to contact the registry to make arrangements to appear before me in this regard.

MARZARI J.

**End of Document**

[***Glover v. Leakey, [2016] B.C.J. No. 1857***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KNG-YT61-JG02-S34W-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

J.M. Gropper J.

Heard: June 28-30, July 4-8, 11-15 and 28, 2016.

Judgment: August 31, 2016.

Docket: M51479

Registry: Vernon

**[2016] B.C.J. No. 1857** | 2016 BCSC 1624

Between Diana Glover, Plaintiff, and Kenneth Roger Leakey, Defendant

(97 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Trials — Mistrials — Application by the plaintiff Glover for a mistrial and to set aside portions of the jury's verdict on damages allowed in part — Glover, a backseat passenger, was injured when the vehicle driven by her husband, the defendant Leakey, struck the back of a snow plow — The jury found that Leakey was not liable — Yeomans, a front seat passenger, commenced a separate action, which was settled — The administration of justice was compromised by Leakey's conflicting positions in the two actions — A mistrial was declared — Glover's application to set aside the jury verdict was now moot.**

**Damages — Proceedings — Practice and procedure — Application by the plaintiff Glover for a mistrial and to set aside portions of the jury's verdict on damages allowed in part — Glover, a backseat passenger, was injured when the vehicle driven by her husband, the defendant Leakey, struck the back of a snow plow — The jury found that Leakey was not liable — Yeomans, a front seat passenger, commenced a separate action, which was settled — The administration of justice was compromised by Leakey's conflicting positions in the two actions — A mistrial was declared — Glover's application to set aside the jury verdict was now moot.**

**Tort law — Practice and Procedure — Trials — Application by the plaintiff Glover for a mistrial and to set aside portions of the jury's verdict on damages allowed in part — Glover, a backseat passenger, was injured when the vehicle driven by her husband, the defendant Leakey, struck the back of a snow plow — The jury found that Leakey was not liable — Yeomans, a front seat passenger, commenced a separate action, which was settled — The administration of justice was compromised by Leakey's conflicting positions in the two actions — A mistrial was declared — Glover's application to set aside the jury verdict was now moot.**

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| Application by the plaintiff Glover for a mistrial, a declaration that the defendant Leakey engaged in an abuse of process, and to set aside portions of the jury's verdict in respect of damages. Glover was a backseat passenger in a vehicle driven by her husband, the defendant Leakey, when the vehicle struck the back of a snow plow. Glover suffered significant injuries in the accident. Both liability and damages were in dispute. The jury found that Leakey was not liable for the accident. Yeomans was a front seat passenger of the vehicle at the time of the accident and also suffered personal injuries. She commenced a separate action, which was settled. Glover alleged that Leakey engaged in an abuse of process on the basis of inconsistent pleadings. Leakey took the position that his differing positions on liability for the accident were not inconsistent pleadings, irreconcilable positions, or an abuse of process.  HELD: Application allowed in part.  A misunderstanding between counsel and the Court compromised Glover's position and she did not have a fair trial. Leakey knew or ought to have known of the inconsistent positions and the administration of justice was compromised by his conflicting positions. Leakey engaged in an abuse of process. A mistrial was declared. Glover's application to set aside the jury verdict was now moot. |

**Statutes, Regulations and Rules Cited:**

Rules of Court in Nova Scotia, Rule 14.11

Supreme Court Civil Rules, Rule 9-5(1)(d)

**Counsel**

Counsel for the Plaintiff: M. Yawney, R. Irving.

Counsel for the Defendant: D. Yerema, D. James (on July 8 and 28, 2016).

**Reasons for Judgment**

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| **J.M. GROPPER J.** |

**Introduction**

**1**  This accident concerned a motor vehicle accident on January 3, 2012 where the plaintiff Diana Glover was a backseat passenger in the 1998 Subaru Legacy which she co-owned with the her husband, the defendant Kenneth Roger Leakey. Kenneth Leakey was the driver of the Subaru. The Subaru struck the back of a snowplow on Highway 97 near Bear Lake, B.C. The plaintiff suffered significant injuries in the accident.

**2**  I heard this action with a jury from June 28 to July 15, 2016. Both liability and damages were in dispute. The parties requested that I instruct the jury on both liability and damages and direct them to make a decision on both issues, whether or not they found the defendant liable for the accident.

**3**  The jury found that Mr. Leakey was not liable for the accident. They provided answers to the questions related to damages.

**4**  The defendant applied for judgment immediately after the jury's verdict. I did not enter judgment.

**5**  Three issues arise from the jury trial:

1. the plaintiff applies for a mistrial on the issue of liability;
2. the plaintiff alleges that the defendant engaged in an abuse of process;
3. the plaintiff seeks to set aside portions of the jury's verdict in respect of damages.

**6**  For the reasons that follow, I declare a mistrial, grant judgment to the plaintiff on the issue of liability because the defendant engaged in an abuse of process and decline to set aside portions of the jury's verdict on damages.

**Mistrial**

**Background**

**7**  As noted, Ms. Glover was a backseat passenger in the vehicle that her husband was driving on January 3, 2012. Penny Yeomans was also a passenger in the front seat of the defendant's vehicle at the time of the accident and she also suffered personal injuries. She commenced a separate action (the "Yeomans Action").

**8**  In this trial, the defendant denied liability and challenged the damages sought by Ms. Glover.

**9**  On July 4, 2016, while the jury trial was underway, the plaintiff brought an application to have the defendant's position on liability dismissed on the basis of an abuse of process. The application was brought under Rule 9-5(1)(d) of the *Supreme Court Civil 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

...

1. it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**10**  The application was based upon an inconsistent pleading filed by Mr. Leakey in the Yeomans Action and that filed by him in this action. The plaintiff also sought special costs.

**11**  The facts upon which the plaintiff relied in bringing her application were these:

The Within Action

1. On December 11, 2013, Glover filed a notice of civil claim in the within action. Glover alleged that Leakey was solely at fault for the Accident. In Part 3, paragraph 1, Glover particularized the ***negligence*** of Leakey which caused the Accident.
2. On June 26, 2014, Leakey filed a response to civil claim. Paragraph 1 of division 2 of part 1 reads as follows:

The Defendant denies the particulars of ***negligence*** as alleged in Part 3, paragraphs 1(a) to (j) of the Notice of Civil Claim.

The "Liability Denial"

1. On May 14, 2015, Leakey filed an amended response to civil claim. The Liability Denial was not amended. Additional facts were added raising the defence of no ***negligence***, inevitable accident, the "agony of the moment" and the "agony of the collision".
2. At no time has Leakey claimed that any other party may be responsible for the Accident.
3. A jury trial began on June 27, 2016 and is scheduled to conclude on July 15, 2016. To date, Leakey has maintained a denial of liability.

The Yeomans Action

1. On June 29, 2012, Yeomans filed a notice of civil claim commencing Action no. 947417 in the Supreme Court of British Columbia (Kamloops Registry) (the "Yeomans Action"). Yeomans named Glover, Leakey, Yellowhead Road & Bridge (Fort George) Ltd. and Raymond Warren as defendants. Paragraph 10 of the notice of civil claim reads as follows:

The plaintiff was injured in a motor vehicle accident that occurred on or about January 3, 2012 on Highway 87 near Bear Lake, British Columbia and at that time, the plaintiff was a seat belted passenger in the Subaru when it rear ended the Western Star that was stopped on the highway.

1. On September 5, 2012, a response to civil claim was filed on behalf of Glover and Leakey. Paragraph 1 of division 2 of part 1 reads as follows:

The accident particularized in paragraph 10 of the Notice of Civil Claim occurred as a result of the ***negligence*** of the Defendant, Kenneth Roger Leakey, while driving a motor vehicle owned by the Defendants, Glover and Leakey.

[Underlining added by counsel for the plaintiff]

1. It is believed that the Yeomans Action has now been settled.

Discovery of the Inconsistent Pleadings

1. On June 28, 2016, counsel for the plaintiff discovered the admission of liability in the Yeomans Action. Counsel for the plaintiff contacted counsel for Leakey and requested that liability be admitted. To date, Leakey has maintained the denial of liability.

**12**  The defendant opposed the plaintiff's application on various bases including that the application was brought too late; the plaintiff had not met the heavy onus on her to prove that there were inconsistent pleadings; that any alleged inconsistent pleadings did not lead to a finding of abuse of process; and, for reasons of public policy each claim by a plaintiff needs to be handled individually.

**Hearing of July 8, 2016**

**13**  The application was heard on July 8, 2016. The defendant was represented by J. Derek James, rather than trial counsel, David Yerema.

**14**  At the hearing, Michael Yawney, counsel for the plaintiff, suggested that because the jury trial was underway, the timing of the application was problematic. Mr. Yawney suggested that the decision on the abuse of process application wait until the jury had reached a verdict on liability, reasoning that if the Court found that there was an abuse of process the jury may perceive, having sat on the case for two weeks of evidence, declaring the defence of liability to be an abuse of process might harm their view of the integrity of the administration of justice. Mr. Yawney suggested that in the circumstances, I should defer judgment on the issue until the conclusion of the jury trial but before the final order for judgment is entered. Mr. Yawney acknowledged that that gave the Court time to consider the matter thoughtfully and let the jury finish their work. In that regard, Mr. Yawney said the jury did not have to see how the system had failed in some respects, and there would be no urgency in terms of the timeline for a decision.

**15**  Mr. Yawney submitted that it was within the Court's discretion to fashion a remedy in the circumstances because it involved the integrity of the administration of justice. He referred to his suggestion to delay the decision on the application as a concession on the part of the plaintiff "recognizing the bigger picture".

**16**  At the end of the hearing I had a discussion with counsel about delaying the judgment and whether or not it may become moot if the jury decided that Mr. Leakey was liable. I asked Mr. James if he had anything that he wished to say, to which he responded:

Well, there was one item, but I'm not sure that it's . . .

Actually there's nothing. It just occurred to me though that the -- the issue of what to -- what is to be done if the remedy is to wait until the jury decides, and I must admit I'm not entirely clear what my friend is proposing in that regard, so the jury would give its verdict, of course a verdict is not an order of the court, at that time defence counsel, who will be Mr. Yerema, will move the court for -- for an order for judgment on the jury's verdict, and I suppose, is it that stage that there would be a further consideration of this issue?

**17**  I then stated: "Yes, the jury -- the judgment wouldn't be entered", to which Mr. James responded "Okay".

**18**  Mr. James continued:

And having heard my friend's further submissions, I see the merit in his argument to let the jury do its job, let the jury reach its verdict, and then deal -- deal with the issue as far as the remedy is concerned. I see what he's saying.

**19**  It was my understanding that Mr. James agreed to the process that Mr. Yawney suggested: proceed with the jury trial and await their verdict. The judgment would not be entered pending my decision on the abuse of process application.

**20**  When the hearing concluded on July 8, I had the option of delivering a decision the following Monday, July 11 or accepting Mr. Yawney's proposal to postpone the decision on the abuse of process matter until after the jury had heard the evidence and reached its verdict on both liability and damages.

**Continuation of Trial on July 11, 2016**

**21**  I chose the latter course, and on July 11, 2016 made the following statement to Mr. Irving, who was Mr. Yawney's co-counsel, and to Mr. Yerema who acted for the defendant in the jury trial but not in respect of the abuse of process matter. Mr. Yerema asked about the ruling of the court on the application, to which I responded:

|  |  |  |  |
| --- | --- | --- | --- |
|  | THE COURT: | Yes, the application -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | MR. YEREMA: | On the application. |  |

THE COURT: -- to find -- the application to find ICBC in having abuse of process. And I have -- have a seat, thank you. I've considered the -- the matter and I agree with both counsel, that it -- a more -- the most practical course is to proceed and in the event that the jury -- well, when the jury comes in, if they make a finding of -- if there is no liability, that I postpone entering judgment until I make a decision. If they find that the defendant is liable, then we'll address it then and -- as it was suggested by counsel for the plaintiff and counsel for the defendant agreed to it. So I think that's the most practical course.

**22**  Mr. Yerema did not object to the course that I proposed. The trial proceeded.

**23**  The parties agreed that I would charge the jury on both liability and damages which I did on July 14, 2015.

**Proceedings on July 15, 2016**

**24**  While the jury was deliberating, Mr. Yerema raised a concern about my postponing my judgment on the abuse of process application until after the verdict was rendered. He advised that Mr. James, counsel on the application, did not agree that judgment would not be entered on the jury's verdict until I ruled on the abuse of process application. Mr. James was not in the courtroom at that time. I explained my understanding to Mr. Yerema, that is, that if the jury found no liability that the judgment would not be entered pending my decision on abuse of process. I did not know what Mr. James' understanding was.

**25**  On July 15, 2016, the jury reached its verdict after deliberating for approximately 9 1/2 hours.

**26**  In respect of their verdict, the jury advised they were unanimous. In response to Question 1: "Was there any ***negligence*** on the part of the defendant that caused or contributed to the harm or damage suffered by the plaintiff?", the jury answered "No".

**27**  The jury was asked to consider the remaining questions concerning the quantum of damages and did so.

**28**  A signed copy of the jury foreperson's verdict sheet was entered as an exhibit. Mr. Yerema on behalf of the defendant asked to have the verdict entered as an order of the Court. I declined to make that order at the time because of my understanding of how the abuse of process application would be addressed. The plaintiff also asserted that there was no reasonable evidence to support the jury's verdict on liability and past wage loss.

**Hearing of July 28, 2016**

**29**  On July 28, 2016, I heard Mr. Yawney and Mr. James on the procedure to be adopted in respect of reasons on the abuse of process application. Mr. James advised that he did not agree to postpone the delivery of reasons on the application on the condition that the jury verdict not be entered. Instead, he asserted that the plaintiff waived her claim for the relief involving striking of the paragraphs of the pleadings denying liability and was content to pursue her claim for relief in costs.

**30**  Mr. James referred to various excerpts from the transcript of the proceedings of July 8, 2016 where he says that Mr. Yawney, on behalf of the plaintiff, referred to the plaintiff conceding to have the jury proceed to address liability and thus waived her remedy of striking the pleadings.

**31**  Mr. James took the position that judgment ought to be entered as that was the agreement that was made by the parties.

**32**  Mr. James says that Mr. Yerema did not agree to the approach that I outlined on July 11, 2016. Mr. Yerema did not argue the abuse of process issue and was not present during the hearing.

**Decision**

**33**  At the conclusion of the July 28, 2016 hearing, it was clear to all that there had been a misunderstanding between counsel in respect of how the matter would proceed before the jury and whether the jury's verdict would be entered as a judgment of this court. I was clearly of the view that Mr. Yawney was not conceding the liability issue, but suggesting that the decision on abuse of process be postponed pending the jury's verdict. I also understood that if the jury found that there was no liability, judgment would not be entered pending my decision on abuse of process.

**34**  Mr. James says he made no such agreement. His understanding of the agreement is not reflected in the transcripts of the proceedings, nor is it likely that it was what Mr. Yawney proposed. Would plaintiff's counsel bring the application and then abandon the relief of having the defendant's position on liability dismissed on the basis of an abuse of process and only proceed with costs? I think not.

**35**  The matter proceeded as it did based on a misunderstanding. The plaintiff proceeded, I find, to her detriment, because of her reliance on an agreement between counsel, where none existed.

**36**  The plaintiff proceeded with her case before the jury; she chose not to cross-examine Mr. Leakey about his inconsistent pleadings; she left the matter of liability with the jury. In all, I find that the misunderstanding between counsel caused both parties to proceed on a basis that was not clearly understood. Further, had I understood that Mr. James did not agree to Mr. Yawney's proposal to reserve the decision on the abuse of process matter, I would have provided a decision before the jury proceeded on July 11, 2016. It is regrettable that Mr. James did not express his position to the Court about the agreement between counsel before the trial concluded and the jury verdict was announced.

**37**  A trial judge does not have jurisdiction and is *functus officio* to hear an application after a jury has rendered its verdict, except an application that goes to an issue of trial fairness.

**38**  This was confirmed by the Court in *Leslie v. Parmar*, [*2006 BCCA 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1C6-00000-00&context=), where the appellant, the defendant in the personal injury action, sought a mistrial three months after the jury's verdict was rendered to set aside a jury verdict based on a witness who gave evidence and later advised counsel for the plaintiff that her evidence may not have been accurate. The witness was not recalled. The trial judge dealt with the matter in her charge to the jury. The verdict was not entered as a court order.

**39**  On the application the trial judge concluded that the jury must have acted on evidence that was false and misleading, although she did not identify any such evidence. She determined the trial should continue without a jury for the assessment of damages.

**40**  The Court of Appeal found that the trial judge had no jurisdiction to consider the plaintiff's application and ought to have dismissed it as unfounded in law. The Court considered that the judgment should have been entered pursuant to the jury's verdict and counsel could then consider whether they ought to appeal (at paras. 23 and 25).

**41**  *Leslie* was considered in *Oberreiter v. Akmali*, [*2009 BCCA 557*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24PH-00000-00&context=), where the defendants sought to appeal a decision of the trial judge declaring a mistrial after the delivery of the verdict by a civil jury before the judgment in the action was entered.

**42**  In that case, counsel for the plaintiff learned after the jury's verdict that an exhibit, a DVD compilation of surveillance evidence on the plaintiff, contained 10 additional minutes of footage that had not been shown to the jury during the trial but was with the jury during its deliberations.

**43**  The trial judge did not enter the judgment and approximately one month later heard the plaintiff's application for a mistrial. He declared a mistrial, relying on *de Araujo v. Read*, [*2004 BCCA 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3J7-00000-00&context=), where Mr. Justice Thackray observed at para. 68: "a new trial may be ordered where the trial irregularities may have influenced the verdict or award of the jury..." (at para 13).

**44**  The Court of Appeal reviewed the jurisprudence relating to whether the trial judge had jurisdiction to rectify an irregularity in a jury trial before judgment was entered.

**45**  At para. 10 of the decision the Court referred to the decision of *R v. Burke,* [*2002 SCC 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4D2-00000-00&context=), where the Court confirmed that the court maintains jurisdiction to declare a mistrial after the jury was discharged as part of its remedial jurisdiction, and delineated circumstances where that might occur including, a reasonable apprehension of bias: at paras. 70 to 74.

**46**  After citing the authorities that confirmed that a trial judge has no jurisdiction to hear an application after the jury has rendered its verdict, including *Leslie v. Parmar*, the Court stated at paras. 23 and 24:

[23] ...In this case, the respondent's application for a mistrial was not based on an improper verdict but was made pursuant to the court's inherent jurisdiction to rectify an irregularity that went to the issue of trial fairness. This is an issue of law that is addressed pursuant to the court's remedial jurisdiction.

[24] It is settled law that until a judgment or order has been entered, a trial judge continues to be seized of the matter before him or her. In *Clayton v. British American Securities,* [*[1935] 1 D.L.R. 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JW09-M09C-00000-00&context=) at para. 83, [*[1934] 3 W.W.R. 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JW09-M09C-00000-00&context=) (B.C.C.A.), the court noted that this was recognized as an "unquestioned practice" and "one of very long standing". Similarly in *Burke*, the court concluded that, as a principle of law, a trial judge retains the remedial jurisdiction to declare a mistrial on an issue that goes to trial fairness (in that case it was whether there existed a reasonable apprehension of bias) after a jury verdict has been rendered and the jury discharged.

[Underlining added.]

**47**  I have already determined that due to the misunderstanding between counsel and the court the plaintiff proceeded with the trial and, in so doing, compromised her position. In other words, she did not have a fair trial.

**48**  It is obvious (based upon my decision on the abuse of process matter, below) that had I rendered a decision on the abuse of process before the trial proceeded and before the jury reached a verdict, the result in this case would have been different.

**49**  The plaintiff asserts that I ought to declare a mistrial in respect of the liability portion of the verdict only. No authority was provided and I have not found any authority where a mistrial can be declared for only a portion of the jury's verdict.

**50**  While the argument has a certain attraction because of the obvious judicial efficiency, I find it would be unfair and contrary to the principle in *Oberreiter*. If a mistrial is granted to remedy an issue of trial fairness that may have impacted the verdict, it is likely that the apparent unfairness tainted the entire proceeding. If not, it would be very challenging to sever a part that was not impacted by the irregularity. It is difficult to know to what extent the plaintiff's compromise impacted the entirety of the trial. While not directly the subject of the mistrial application, the defendant's position on liability and comments made to the jury minimizing the accident likely impacted the assessment of damages. There could also be a concern about litigating in slices. It would be an effective severing of issues in the trial that has already been conducted.

**51**  A mistrial is appropriate where necessary to ensure that justice is done between the parties: see *de Araujo v. Read*. The plaintiff's application for a mistrial is allowed.

**Abuse of Process**

**52**  I have already referred to the facts upon which the plaintiff asserts an abuse of process by the defendant. It is based on the inconsistent pleadings by the same defendant, Mr. Leakey in this action and the Yeomans Action. Ms. Glover and Ms. Yeomans were both passengers in the defendant's vehicle. Neither of them was contributorily negligent. They were in the exact same situation in relation to whether the defendant was negligent.

**Legal Framework**

**53**  The court has inherent power to prevent its procedure from being used in a manner that brings the administration of justice into disrepute: *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 para. 37. The doctrine of abuse of process is a broad and flexible mechanism; its purpose is to enable the court to prevent misuse of its own process: *First Majestic Silver Corp. v. Davila Santos*, [*2012 BCCA 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1D5-00000-00&context=) at para. 22.

**54**  In *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=), Mr. Justice Goepel referred to the following passage from *Babavic v. Babowech* [*(1993), 42 A.C.W.S. (3d) 447*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F4NT-X2W2-00000-00&context=) (S.C.):

[17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose. ...

[18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. ...

**55**  Canadian courts have invoked the doctrine of abuse of process in circumstances where, while issue estoppel may not be made out, permitting the litigation to proceed would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City)* at para. 37.

**56**  In *First Majestic*, Mr. Justice Tysoe considered whether the concept of abuse of process could extend to inconsistent factual positions rather than just an inconsistent election of rights. Tysoe J.A. concluded that the plaintiffs had not made inconsistent allegations in a previous action as the defendants argued. His reasons make reference to a number of cases supporting the proposition that inconsistent positions in prior proceedings can constitute an abuse of process. *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, [*2009 ABQB 480*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-FFMK-M0N5-00000-00&context=) was cited with approval.

**57**  In *Mystar*, the applicants argued that the respondent had made an inconsistent claim and that their action should be dismissed as abuse of process. The relevant Alberta rule is nearly identical to the B.C. rule:

129(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that ... (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.

**58**  The alleged inconsistent claim in *Mystar* was that in a previous action against a different defendant, the respondent claimed they lost half interest in a particular property. Then in a later action the respondent claimed to have lost 100% interest in the same property. While considering the applicable principles, Mr. Justice Brooker held at para. 49:

In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[Emphasis in original.]

**59**  In the result, Brooker J. found that it was not plain and obvious that the action in that case was an abuse of process as he "[did] not read the current Amended Statement of Claim as asserting that [the respondent] never lost a 50% interest in the property" (at para. 71). The case is instructive as it recognizes that advancing irreconcilable positions in various actions is impermissible. This is adopted in *First Majestic.*

**60**  The decision of *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, [*2012 BCCA 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-249C-00000-00&context=) is also informative. In that case the appellant, Pepper's Produce entered into a contract to buy a business that failed to complete. Two parties filed a small claims action against Pepper's Produce. The president of Pepper's Produce deposed that these individuals were not parties to a contract and they had never met. Pepper later brought its own action, stemming from the same transaction after the small claims action was dismissed and sought to add the individuals that they had denied knowing as parties to the new action.

**61**  Madam Justice Levine upheld the decision of the chambers judge refusing to add those defendants. She held, in part relying on *First Majestic*:

[28] ... These positions are diametrically inconsistent within the same action, and the claims against Gao and Tan are diametrically inconsistent with the appellant's response to the Small Claims action. These proceedings cannot, as a matter of protecting the integrity of the court's process, stand together.

**62**  Whether taking contrary positions on the same issues in separate proceedings, i.e. inconsistent pleadings, constitutes an abuse of process depends on the context and circumstances of each case: *Mystar* at para. 53; *Stewart v. Clark,* [*2013 BCCA 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B25C-00000-00&context=) at para. 51.

**63**  In *Halagan v. Reifel,* 1997 CarswellBC 4040, Madam Justice Satanove considered an application to amend pleadings. She refused to do so and dismissed the application because the proposed amendments were inconsistent. She found they constituted approbation and reprobation. At para. 8 she stated:

... [N]either pleadings nor any other of the court processes are a game to be played according to what appears to be a strategic advantage of the time. The court expects a party to take a position which is consistent with its evidence and to maintain that position in its dealings with the court. In other words, saying something to one judge and saying the opposite to another will not be countenanced.

**64**  The test in the context of Rule 9-5(1)(d) is a high one: it must be plain and obvious that a pleading is an abuse of process.

**Position of the Parties**

***Plaintiff***

**65**  The plaintiff submits that Mr. Leakey's position in the Glover and Yeomans actions are diametrically opposed. Liability was not pleaded in the alternative in either action. The defendant was aware of his role in the accident from the outset and cannot claim that his knowledge of the accident was somehow incomplete or imperfect. The plaintiff says that in allowing Mr. Leakey to maintain a denial of liability in the Glover action is an affront to the court's process and brings the administration of justice into disrepute; it is a clear abuse of process and ought to be struck, and seeks judgment in favour of the plaintiff on the issue of liability.

***Defendant***

**66**  The defendant's position is that his differing positions on liability for the accident are not inconsistent pleadings, irreconcilable positions or an abuse of process. He claims it is permissible to have inconsistent defences to an action. Further, if inconsistent pleadings are found, the defendant argues that it is not an improper use of the court's process; the court must consider the context and circumstances of each case and the two actions must be treated individually. He says that it has been recognized that inconsistent pleadings are permissible in the context of an insurer-insuree relationship. The defendant submits that he did not knowingly advance irreconcilable positions which he submits is an essential element of an abuse of process. Prior admissions of liability should be dealt with as an admissibility issue. Finally, the defendant's position is that to find Mr. Leakey's denial of liability as an abuse of process would have an effect of discouraging admissions.

**Decision**

**67**  In considering my analysis of this application, I must note that the Insurance Corporation of British Columbia (ICBC), the Province's public mandatory motor vehicle insurer had conduct of both the Glover and the Yeomans actions. The evidence provided is sparse, but it is clear that the adjuster in the Yeomans Action determined that liability would be admitted on behalf of Mr. Leakey whereas the adjuster in the Glover action determined that liability would be denied. I expressly find that ICBC knew of the inconsistent pleadings and that the insured, Kenneth Leakey knew or ought to have known of the inconsistent positions.

***Whether the inconsistent positions are an abuse of process***

**68**  Courts retain jurisdiction to dismiss actions that are an abuse of process where the principles such as judicial economy, consistency, finality and the integrity of the administration of justice will be violated. This doctrine is flexible and the categories of abuse of process are open. In my view, the defendant's inconsistent positions on liability offend all these principles which are fundamental to our system of law.

**69**  Before this action was filed the defendant admitted liability for the subject accident in the Yeomans Action. He obtained the benefit of settlement with that defendant. It cannot be open to him to re-litigate something that he already conceded in the Yeomans Action. That offends the principle of judicial economy, unnecessarily expending the resources of the justice system and in this particular instance it is more egregious as the case called upon the wisdom of the community in the form of jurors. It is also contrary to the principle of finality to permit something that has been admitted to be re-litigated.

**70**  Consistency is also compromised. A position that Mr. Leakey is on one hand negligent but on the other not negligent cannot be anything but irreconcilable and inconsistent. The only distinction in the pleadings is that in the Yeomans Action the defendant asserted that Ms. Yeomans failed to properly adjust and securely fasten her seatbelt. That does not alter the bare fact of the defendant's ***negligence***.

**71**  It is not relevant that Ms. Glover was a co-owner of the vehicle. The defendant has not explained how that distinction makes a difference. The same conduct of the defendant was involved in both the Yeomans and the Glover actions. To take different positions is inconsistent and provides unpredictability in the law.

**72**  I am also of the view that the administration of justice is compromised by the defendant's conflicting positions that it was his fault and then it was not his fault. Neither position was advanced in the alternative. As Levine J.A. stated in *Pepper's Produce*: "these proceedings cannot, as a matter of protecting the integrity of the court's process, stand together."

***Whether the claim was brought too late***

**73**  The defendant claims that bringing this application in the middle of the trial of an action is too late. This is also a surprising position for the defendant to take. Clearly the defendant and his insurer were aware of the inconsistent pleadings; but that was not shared with the plaintiff or her counsel. Counsel for the plaintiff says that he discovered the pleading in the Yeomans Action after this jury trial was underway.

**74**  Further, the defendant has not referred to any authorities to support its submission in this regard. I find the language in Rule 9-5 as a full answer to this point as it permits an application to be brought "at any stage of the proceeding."

***Whether inconsistent defences are permissible***

**75**  The defendant also submits that the denial/acceptance of liability in the two actions should be characterized as inconsistent defences rather than inconsistent "positive averments". The defence argues that it is permissible to have inconsistent defences and they should be treated differently. In that regard the defendant relies on *National Bank Financial Ltd. v. Potter*, [*2005 NSCA 139*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPX1-FCCX-6242-00000-00&context=). In that case the appellant, Mahoney, appealed from an order of the Nova Scotia Supreme Court dismissing the application to strike portions of the defence of the respondent National Bank as inconsistent between the actions. National Bank had pleaded in one action that there was no stock manipulation scheme and in the other that there was a stock manipulation scheme. The Nova Scotia Court of Appeal upheld the dismissal and held that the relevant Rules of Court in Nova Scotia (excerpted below) applied because the pleadings were in separate actions. The rule relied on was Rule 14.11 which provides:

Unless a party amends his pleading, he shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading of his.

**76**  The Court of Appeal held that the pleadings were not inconsistent but rather alternative pleadings. It also considered that the reasoning of the chambers judge that whether or not there was a stock manipulation was not yet fully within the knowledge of the parties; it was a complex trial where that very issue remained to be determined. At that point in the proceedings, the Court found it would be unfair make a party choose between two sets of alleged circumstances that they did not yet have full knowledge of.

**77**  I do not find the *National Bank* case to stand for the proposition that defences in various actions stemming from the same facts may be inconsistent and should be treated differently from positive averments. The Nova Scotia decision applies when there is an application to "strike portions of the defence".

**78**  In any event, the primary holding of *National Bank* was that Rule 14.11 had no application where the alleged inconsistent pleadings were in separate actions. The Court went on to hold that the pleading could not be said to be inconsistent but rather alternative pleading because the party did not yet have full knowledge of the facts. In British Columbia, the courts have clearly recognized that inconsistent pleadings in different actions can be an abuse of process (*First Majestic*). The court's interpretation of the Nova Scotia rule is unhelpful.

***Whether the pleadings may be inconsistent where ICBC involved.***

**79**  The defendant claims that under the ICBC insurance scheme, courts have recognized that there will be inconsistent pleadings referring to the decision of *Mara v. Blake* [*(1996), 23 B.C.L.R. (3d) 225*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3JM-00000-00&context=) (C.A.). In that case, there were four separate motor vehicle accidents involving the same plaintiff and four separate defendants. All four defendants were insured by ICBC and represented by the same counsel. Three of the defendants admitted liability but pleaded contributory ***negligence***. The fourth defendant denied liability. The Court was asked to consider whether it was a conflict of interest for ICBC to have one counsel acting for all four defendants.

**80**  I find this case to be distinguishable. In *Mara* there were multiple accidents with different facts in each. In this case, there is one vehicle and one accident. It would have been open to the different defendants in *Mara* to have divergent positions as they were based on different accidents. It is not analogous to this case where the defendant has taken two divergent positions on liability arising from the same accident. The Court of Appeal was not considering the issue of inconsistent pleadings but rather whether it was a conflict of interest for ICBC to have one counsel acting for all defendants.

***Whether knowingly advancing an inconsistent position***

**81**  I have already noted, I find that ICBC knowingly advanced an inconsistent position and I accept that as the defendant's representative the diametrically opposed pleadings were knowingly advanced. They were not articulated as alternate claims.

**82**  A pleading that is an abuse of process is not the same as the tort of abuse of process which requires "a wilful misuse or perversion of the court's process for extraneous or ulterior purpose": *Border Enterprises Ltd. v. Beazer East Inc.,* [*2002 BCCA 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-255F-00000-00&context=) at para. 51. A pleading is distinct from an intentional tort.

***Whether issue should be determined on the basis of admissibility***

**83**  The defendant claims that the courts in British Columbia have determined that situations such as the present must be addressed on the basis of whether the pleading is admissible in the subsequent action. While prior proceedings can be admissible in subsequent actions and there is a body of case law addressing that point, I find that the defendant has overlooked the point that the matter before me is not admissibility but rather whether inconsistent pleadings are an abuse of process.

**84**  In this regard, the defendant refers to the decisions of *Caviglia v. Tenorio* [*(1992), 71 B.C.L.R. (2d) 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JB2B-S111-00000-00&context=) (S.C.) and *Theriault v. Patrick* [*(1995), 54 A.C.W.S. (3d) 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2GJ-00000-00&context=) (S.C.).

**85**  Neither of these decisions address abuse of process.

**86**  In *Caviglia* the plaintiff's car slid and stalled with its fender extending into traffic. The defendant's vehicle struck the rear end of the plaintiff's vehicle as she attempted to drive around it but hit a patch of ice. A third party hit the two vehicles after the plaintiff, the defendant and the defendant's passenger had left the vehicle. The ensuing circumstances were described by Madam Justice Allan at para. 10:

An unusual issue arises in this case. The writ was issued on July 18, 1989 and the statement of defence, in which Ceoalia Tenorio denied liability, was filed on December 19, 1989. In a separate action, commenced in the New Westminster Registry on September 21, 1990 [the Second Action], Marlene Tenorio, who was a passenger in Ceoalia Tenorio's vehicle, sued her sister Ceoalia for damages suffered as a result of this accident. Marlene Tenorio also sued Mr. Caviglia in the Second Action but discontinued her claims against him in February 1991.

**87**  The relevant issue in that case was whether the admission of liability made in one action was admissible and, if so, whether it is conclusive of liability or evidence to be given weight in the circumstances. The Court concluded that the prior admission was not conclusive and should go to weight at para. 26:

The plaintiff submits that Ms. Tenorio's admission of liability in the Second Action should be admitted as conclusive evidence of her liability in this case for the following reasons: the factual foundation, i.e., the circumstances of the accident are the same; the legal issue, i.e., the liability for the collision between the Tenorio and Caviglia vehicles, is the same; the defences in both action are conducted by a common insurer.

**88**  *Caviglia* possesses some factual similarities to the present case: the defendant admitted she was liable to her passenger but denied she was liable to the car she struck. Clearly, the passenger in the defendant's vehicle was not negligent and the actions of the defendant did not affect the passenger's right to claim fully for her injuries. Those circumstances are not the circumstances here. Similar circumstances would be if the defendant has had two passengers and admitted liability in respect of one passenger but not the other.

**89**  Madam Justice Allan declined to view the admission is conclusive of liability and held that it goes to weight that should be determined in the particular circumstances of each case.

**90**  That is the same analysis that I must undertake in these circumstances. Recalling the holding in *Mystar* and *Stewart* that whether inconsistent pleadings constitute an abuse of process depends on the context and circumstances of this case. That is to say an abuse of process will not always be made out when litigation positions are inconsistent.

**91**  I do not find *Theriault* informative as it is an application to withdraw an admission of liability in a circumstance where new information came to light regarding liability.

**92**  I note that the defendant says that if the pleadings are inconsistent, the defence asks for the admission in the Yeomans Action to be withdrawn and undertakes to do so. This is an empty suggestion. The Yeomans Action has been settled and no longer exists. Withdrawal of the admission in Yeomans Action has absolutely no practical effect and nor is it an answer to the allegation of abuse of process.

***Whether contrary to public policy***

**93**  The defendant claims that to find these pleadings as inconsistent and an abuse of process will discourage admissions, contrary to public policy. I find that there is much larger public policy at stake. It is an abuse of process to allow a defendant to admit liability in respect of one passenger and deny liability in respect of the other where there are no facts to distinguish the two. Requiring a party, even ICBC, to file consistent pleadings is not onerous and, with respect, is a principled way to proceed. The pleading of inconsistent positions in this case cannot be condoned.

**94**  I have declared a mistrial in this case. It may appear that my decision on the abuse of process application is moot. It is not for three reasons:

1. A declaration of mistrial means that the matter will proceed to a new trial.
2. I grant judgment on the liability issue in favour of the plaintiff.
3. The plaintiff seeks special costs related to the abuse of process and has asked for leave to provide further submissions in that regard.

**95**  Both parties may seek to appear to address the issue of special costs based on my finding of an abuse of process.

**Set aside the Jury Verdict**

**96**  Having declared a mistrial, I find that that the plaintiff's application to set aside the jury verdict on any basis is truly moot. I decline to rule on the plaintiff's application to set aside portions of the jury verdict.

**Costs**

**97**  The parties have leave to address costs.

J.M. GROPPER J.

**End of Document**

[***Gorrie v. McIntyre (Guardian ad litem of), [2001] B.C.J. No. 2506***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M43K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Catliff J.

Heard: November 22 and 23, 2001.

Judgment: November 29, 2001.

Vancouver Registry No. B954986

**[2001] B.C.J. No. 2506** | 2001 BCSC 1631 | 109 A.C.W.S. (3d) 836

Between Elizabeth Gorrie, plaintiff, and Hollijaye McIntyre, an infant by her Guardian ad litem, Judith Sutherland, defendant

(11 paras.)

**Case Summary**

**Torts — *Negligence* — Motor vehicle, standard of care of driver — Imminent danger, "agony of the moment" or "agony of collision" — Motor vehicle, rules of the road — Intersections, entering.**

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| Action by Gorrie against McIntyre for damages for injuries suffered in a motor vehicle accident. Gorrie stopped at a stop sign, waited for traffic to clear, then looked left and right and started out into the intersection, again looking left and right. She saw McIntyre's vehicle to her right, but thought she could clear the intersection. McIntyre's vehicle struck Gorrie's rear right passenger door, causing Gorrie's vehicle to spin around. McIntyre said that, as she approached the intersection, Gorrie's vehicle came right in front of her across the intersection, and she could not avoid colliding with it. At issue was whether Gorrie entered the intersection at a time when McIntyre's vehicle was an immediate hazard to her.  HELD: Action dismissed.  McIntyre's vehicle was an immediate hazard to Gorrie when she entered the intersection. Gorrie's own expert concluded that the only way McIntyre could have avoided the collision was to react in an emergency mode, and brake as hard as she could when she saw Gorrie leaving the stop sign. Since McIntyre, as the dominant driver of an approaching vehicle, was required suddenly to brake hard to avoid the threat of a collision with Gorrie, who was a servient driver emerging from a side street, McIntyre's vehicle constituted an immediate hazard to Gorrie. Gorrie was solely responsible for the accident. There were no grounds for finding McIntyre contributorily negligent. |

**Counsel**

David L. Greenbank, for the plaintiff. John D. Spencer, for the defendant.

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| **CATLIFF J.** |

**1**   The plaintiff seeks compensation from the defendant for injuries she suffered as the result of a motor vehicle accident in February 1994. The trial before me concerned only the issue of liability.

**2**  On 18 February 1994 at about 8:20 a.m. the plaintiff was driving south on 180th Street in Surrey, British Columbia. The plaintiff is a 47 year old accounting student and former notary public. She had dropped her son off at his school and was seeking to cross 60th Avenue. At this intersection 60th Avenue is a through street running east and west; 180th Street is controlled by stop signs and runs north and south. The plaintiff says she was stopped at the stop sign. There was a great deal of traffic on 60th Avenue and she sat waiting for the traffic to clear for some "three or four minutes". She then looked left and right and started out toward and into the intersection, again looking left and right. She saw a Honda vehicle to her right at the crest of the road on 60th Avenue, which she calculates was some 250-270 feet away. Assuming she could cross safely, the plaintiff proceeded to do so moving slowly, she said, as she had seen pedestrians on the other side of the intersection and had not made eye-contact with them. She said she had first seen the Honda when she moved out into the intersection and into the north lane of 60th Avenue. At that point she thought there might be a problem and that it would be unsafe to stop and let the Honda go through as she would have to stop in the Honda's lane of travel. She said she thought she could clear the intersection. She drove across, not looking again to her right and thought that she had crossed the intersection when she was struck in the area of her rear right passenger door and centre post.

**3**  The plaintiff's vehicle was spun around and both vehicles ended up to the south of the intersection. An ambulance and police were called. The police officer who came to the scene made a rough sketch of the resting places of the vehicles. This sketch and the plaintiff's written statement (not in evidence) and her sketch of where the vehicles came to rest made some six months later were all provided to an accident reconstruction expert. His conclusion, based also on the damage to the vehicles, was that just before impact the plaintiff's vehicle had been travelling between 27 and 32 kph and the defendant's vehicle had been travelling at between 36 and 39 kph.

**4**  The defendant gave evidence. She said that at some distance west of the intersection on 60th Avenue, the speed limit is reduced by playground signs to 30 kph. This was the speed she was travelling as she approached the intersection. She saw vehicles and pedestrians at the intersection as she had normally come to expect. The defendant at the time was a 16 year old high school student who had been driving for some nine months. She said she was on her way to pick up her boyfriend and take him with her to their school. Some distance from the intersection she noticed cars stopped at the stop sign on 180th Street facing south as also cars stopped on 180th at the stop sign facing north. She noticed a dark coloured van coming down the hill on the other side of the intersection on 60th Street toward her. As she approached the intersection the van passed her on her left. As soon as this happened what she thought was a blue vehicle came right in front of her across the intersection. She believes she took her foot off her accelerator, but she could not avoid colliding with the plaintiff's vehicle.

**5**  The plaintiff says that before she entered the intersection she recalls a vehicle crossing in front of her on 60th Avenue. Whether it was a van or not she did not remember, nor how far this vehicle proceeded west along 60th before she entered the intersection.

**6**  The issue is whether the plaintiff entered the intersection at a time when the defendant's vehicle was an immediate hazard to her. I find that the defendant's vehicle was an immediate hazard to the plaintiff when she entered the intersection.

**7**  It is clear from the evidence that whether the defendant had been travelling at 30 kph before coming up to the intersection, or at 50 kph or less just before the intersection and past the end of the playground zone, there could have been no collision if the plaintiff had first seen her 250-270 feet away to her right when she entered the intersection. Mr. Greenbank concedes the plaintiff's recollection must be at fault in this respect. When the plaintiff first entered the intersection the defendant's vehicle was therefore closer to it. In fact, Mr. Bailey, the plaintiff's expert, concluded that the only way the defendant could have avoided the collision was to react in an emergency mode i.e., brake as hard as she could, when the defendant saw the plaintiff leaving the stop sign. This evidence appears to confirm that when leaving the stop sign the defendant's vehicle was an immediate hazard to the plaintiff. An immediate hazard has been defined as follows:

"... an approaching car is an immediate hazard if the circumstances are such as to require the driver of that car to take some sudden or violent action to avoid threat of a collision if the servient driver fails to yield the right-of-way." Per Davey J.A.: Keen v. Stene [*(1964) 44 D.L.R. (2d) 350*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3RS-00000-00&context=) at p. 359.

In my view, if the dominant driver of an approaching vehicle is required suddenly to brake hard to avoid the threat of a collision with a servient driver emerging from a side street, the dominant driver's vehicle constitutes an immediate hazard to the servient driver. That the defendant's car was an immediate hazard appears also indicated by the plaintiff's evidence that having entered the intersection and then noting the Honda, she considered that there was a problem and that she could not then stop safely, but should cross the intersection.

**8**  The defendant was cross-examined extensively. In my view she gave her evidence in a candid and straightforward way. I accept her evidence that, approaching the intersection, a van passed her and that she did not see the defendant's vehicle until it emerged suddenly from behind the van. In my view, the plaintiff is solely responsible for the accident.

**9**  In the alternative, Mr. Greenbank submitted that there was contributory ***negligence*** by the defendant. He points to three matters. The first is that the defendant was travelling at excessive speed. The defendant gave evidence that she was travelling at 30 kph in the playground zone and then may have accelerated to something under 50 kph (the speed limit), having passed the playground zone just before the intersection. This would have given her a very short distance to increase her speed. It is to be remembered that the evidence of Mr. Bailey was that her pre-collision speed was 36 to 39 kph. There was no evidence of braking by the plaintiff and she thought that she had had no time to do so. I find that there is no evidence of any substance that the defendant was travelling at an excessive speed as she approached the intersection.

**10**  It is also submitted that the defendant should have kept a better lookout for the plaintiff, who should have been seen leaving the stop sign and entering into the intersection. I find there is no evidence on which I can base a finding that the defendant was negligent in this regard. As I say, I accept that some part of the plaintiff's journey at the intersection was hidden from the defendant by the van that was passing by. I do not find that she was showing a lack of due care and attention as she was driving down the road. This was not seriously put to her. Her evidence satisfies me that she was alert and aware as she drove toward the intersection.

**11**  Lastly, it is submitted that ***negligence*** is to be inferred because the expert concluded that the defendant collided with the plaintiff at an angle to the right and thus seems to have swerved in that direction shortly before impact. This reconstruction evidence is based largely on where Mr. Bailey believes the vehicles came to rest. I conclude however, that the precise location of the point of impact is uncertain. Mr. Bailey's evidence is based on the plaintiff's recollection and the rough police sketch. It cannot be relied on with exactitude. The defendant has no memory of turning her steering wheel to the right and believes that she hit the plaintiff head-on in her lane of traffic. Even if this was not so and somehow her car veered to the right at the last moment, there is no evidence as to how or why this occurred. I cannot conclude that the defendant was negligent from this fact alone, assuming it to have been proved. In my view there are no grounds for finding the defendant contributorily negligent. For these reasons the claim of the plaintiff must be dismissed with costs.

CATLIFF J.

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[***Guinther Estate v. Behrens, [2002] B.C.J. No. 2333***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-JSRM-60F4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.R.A. Edwards J.

Heard: October 11, 2002.

Judgment: October 16, 2002.

Vancouver Registry No. S021892

**[2002] B.C.J. No. 2333** | 2002 BCSC 1454 | 117 A.C.W.S. (3d) 341

Between Brian Jack as Executor and Personal Representative of the Estate of Beckie Rae Guinther, also known as Beckie Rae Jack, deceased, the Estate of Beckie Rae Guinther, also known as Beckie Rae Jack, and Brian Jack, plaintiffs, and Dr. Ralph Behrens, Dr. Elizabeth McCoid, and the College of Physicians and Surgeons of British Columbia, defendants

(21 paras.)

**Case Summary**

**Medicine — Discipline for professional misconduct — Statutory regulation — Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action.**

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| Application by the defendant College of Physicians and Surgeons to strike out a ***negligence*** claim by the Guinther estate. The estate claimed that the College failed to exercise its statutory duties or mandate to regulate two physicians respecting their prescription of medication to Guinther. Section 70(1) of the Medical Practitioners Act provided that no action lay where the College or its employees acted in good faith performance of their duties.  HELD: Application allowed.  The claim was struck out. In light of s. 70(1), the claim failed to disclose a reasonable cause of action. While the College could be vicariously liable for the conduct of its officers or employees, this did not apply to damages caused by their good faith exercise of duties. |

**Statutes, Regulations and Rules Cited:**

Medical Practitioners Act, R.S.B.C. 1996, c. 285, s. 70(1), 70(5).

**Counsel**

R. Hungerford and G. Crickmore, for the plaintiffs. D. Martin, for the defendant, College of Physicians and Surgeons. K.J. Jakeman, for the defendants, Behrens and McCoid.

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| **E.R.A. EDWARDS J.** |

**1**   The defendant, College of Physicians and Surgeons of British Columbia ("the College"), applies under Rule 19(24) to have the plaintiff's claim against it struck out on the ground that it discloses no reasonable cause of action.

**2**  The plaintiff, in his personal capacity and as Executor of the Estate of Beckie Rae Guinther ("Beckie"), alleges the personal defendants, both physicians, negligently prescribed opioids, analgesics and related medication (the "medications") causing Beckie's death.

**3**  The plaintiff alleges that the College has the following statutory duties:

1. serve and protect the public;
2. superintend the practice of the medical profession; and
3. establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst members.

**4**  These are referred to in the Statement of Claim as the "Duties" of the College.

**5**  The plaintiff further alleges as follows. The College, "In furtherance of these Duties instituted a Triplicate Prescription Program" (the "Program") to monitor prescription of the medications by physicians.

**6**  In 1993 the College published Guidelines for Management of Chronic Non-Malignant Pain (the "Guidelines") applicable to the medications.

**7**  The College's Executive Director wrote Dr. Behrens on August 3, 1995, to inquire about 22 prescriptions by Dr. Behrens and Dr. McCoid ("the doctors") of the medications. Dr. Behrens "failed to provide a suitable explanation" to the College "with respect to the prescription of these medications to Beckie". The College made no inquiry of Dr. McCoid, although she too had prescribed the same medications to Beckie on several occasions. Despite the failure of Dr. Behrens to "provide a suitable response", "the College failed to seek a further response" from the doctors. The doctors thereafter prescribed the medications a further 225 times for Beckie before her death, "without further inquiry or review" by the College.

**8**  The key allegations of ***negligence*** or breach of duty by the College are set out in the Statement of Claim as follows:

1. The College having instituted the Program and becoming aware of the over-prescription of medications covered by the Program to Beckie by Behrens and McCoid, assumed a duty of care to Beckie and owed a duty of care to Beckie to monitor, investigate and supervise the continued prescription of such medications to Beckie, including:
2. ensuring that such medications were prescribed to Beckie in accordance with the Guidelines;
3. ensuring that such medications prescribed to Beckie were necessary and beneficial to the health and care of Beckie;
4. ensuring that the prescription of such medications to Beckie were necessary or required for the treatment of underlying medical concerns;
5. ensuring that the purported health or medical concerns requiring the prescription of such medications to Beckie were actually present;
6. such further and other particulars as the Plaintiffs may advise.
7. The College, in breach of its duty of care to Beckie, failed to monitor, investigate and supervise the continued prescription of such medications to Beckie. Had the College done so, Behrens and McCoid would have been unable to continue to prescribed (sic) those medications to Beckie which caused her death or in the alternative were the proximate cause of her death, on April 4, 2000.
8. In the alternative, the College pursuant to the Duties and otherwise owed a duty of care to Beckie, and to patients such as Beckie, to ensure that the long-term prescription of analgesics, opioids and related medications including anti-depressants by Behrens and McCoid, and by such general practitioners, was at all times strictly in accordance with and subject to appropriate standards and guidelines, including the Guidelines.
9. The College breached such duty by failing to ensure that the prescription of such medications on a long-term basis to Beckie, and to patients such as Beckie, was at all times strictly in accordance with and subject to appropriate standards and guidelines, including the Guidelines.
10. In the alternative, the College breached its duty of care to Beckie, and to patients such as Beckie, by failing to ensure that appropriate standards and guidelines, including the Guidelines, were implemented to govern, direct, monitor and control the prescription of such medications on a long-term basis.

**9**  I interpret these allegations to amount to an allegation that in furtherance of its statutory powers or "Duties", the College assumed a common law duty of care to "monitor, investigate and supervise the continued prescription of the medication to Beckie by the doctors" to prevent them from continuing to prescribe the medications or, alternatively, pursuant to "the Duties and otherwise owed a duty" to ensure that the medications were prescribed in accordance with the "appropriate standards and guidelines including the Guidelines".

**10**  I interpret the allegation that the doctors "would have been unable to continue to prescribe" the medications as an allegation that the College was obliged to take disciplinary action to prevent them from doing so.

**11**  If that is so, then all of the duties allegedly owed by the College are statutory "Duties" as pleaded. Put another way, all the allegations, as I interpret the pleadings, amount to allegations the College failed to exercise its "Duties" or statutory mandate. In short, these are all allegations of regulatory failure by the College.

**12**  The College relies on s. 70(1) of the Medical Practitioners Act, [*R.S.B.C. 1996, c. 285*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-DXHD-G1RP-00000-00&context=) which provides:

1. No action for damages lies or may be brought because of anything done or omitted in good faith in the performance or purported performance of any duty, or in the exercise or purported exercise of any power, under this Act by the college, the registrar, a deputy registrar, the special deputy registrar, an employee of the college, a member of the council, the executive committee or a committee appointed under this Act.

**13**  The Statement of Claim does not allege absence of good faith and counsel for the plaintiff indicated there was no intention to amend to allege bad faith on the part of the College.

**14**  Counsel for the plaintiff referred to s.70(5) which provides:

1. This section does not absolve the college from vicarious liability for an act or omission for which it would be vicariously liable if this section were not in force.

**15**  As I understood plaintiff's counsel's submission, it was that since the College must act through its officers and employees and since s. 70(5) implies they may be liable for tortuous conduct, the College remains vicariously liable for any and all tortuous conduct by its officers and employees.

**16**  I have no difficulty interpreting s. 70(5) as meaning the College is vicariously liable for torts of its officers and employees which are not committed in the exercise of the "Duties" or statutory powers of the College. Counsel and I discussed the example of the registrar negligently injuring someone in a motor vehicle accident while on College business, as one which would engage s. 70(5). That sort of tort is one any employee of any organization might commit during the course of employment. There is no reason the College should be immunized from vicarious liability for it. It has nothing to do with the exercise of the College's statutory powers.

**17**  It is quite another thing, however, to interpret s.70(5) as making the College vicariously liable for damages caused by the good faith exercise by an officer or employee of the College's statutory powers in furtherance of its "Duties" as pleaded. Such an interpretation, which is the one I understand the plaintiff's counsel to advance, would eliminate the very immunity s 70(1) confers on the College and ignores the concluding words of s. 70(5) "if this section were not in force".

**18**  I find the pleadings allege what I have termed regulatory failure on the part of the College. I find s. 70(1) of the Act, is a statutory bar to such a claim.

**19**  Counsel for the plaintiff also argued that the action should not be dismissed against the College if there was the possibility of an amendment to the Statement of Claim, once all the facts were known, which would effectively put the case in the same category as the hypothetical one of the registrar driving negligently.

**20**  I am unable to imagine how the facts could develop to support an application to amend so as to allege that officials or employees failing to supervise the doctors, enforce guidelines or prevent the doctors from continuing to prescribe the medications would be doing (or omitting to do) things other than in the exercise of the College's statutory powers and in conformity of the "Duties" as presently pleaded.

**21**  I find it is plain and clear that the Statement of Claim discloses no reasonable cause of action against the College in light of s. 70(1) of the Act. The College's application is granted with costs on Scale 3.

E.R.A. EDWARDS J.

**End of Document**

[***Hirji v. Strata Corp. Plan VR 44, [2015] B.C.J. No. 2424***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HD5-ST21-F2F4-G3K6-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N. Sharma J.

Heard: April 7-10, 13-17, 20-24, 27-30, May 4-5, 7-8, 2015.

Judgment: November 6, 2015.

Docket: S070817

Registry: Vancouver

**[2015] B.C.J. No. 2424** | 2015 BCSC 2043

Between Mohd Ali Hirji, also known as Mohamedali Hirji Mohamed Lalani, and Parin Mohd Ali Hirji, also known as Parin Mohamedali Hirji Lalani, Plaintiffs, and The Owners Strata Corporation Plan VR 44, Defendant

(185 paras.)

**Case Summary**

**Real property law — Condominiums — Condominium corporation — Rights and obligations — Building management — Repair obligations — Units ù- Common elements — Action by strata unit owner for damages for breach of contract, failure to repair and deficient work dismissed — Plaintiff alleged his complaints about ingress of water and damaged deck were not addressed promptly or at all and that structural deficiencies in his unit were not repaired — Defendant responded promptly, fairly, and diligently to all of plaintiff's complaints — All repairs done to plaintiff's unit were adequate and of sufficient quality - No contract between plaintiff and defendant with regard to any repairs existed.**

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| Action by a strata unit owner for damages for breach of contract, failure to repair and deficient work. For over a decade, the plaintiff waged a campaign of complaints against the strata council about deck repairs he claimed were required or promised but never done, or done poorly. He alleged his complaints about ingress of water were not addressed promptly or at all and that the alleged structural deficiencies in his unit were not repaired. He alleged work done on his unit was done poorly or remained unfinished. The defendant had spent over $100,000 in engineering and contractors' fees to address repairs in the plaintiff's unit, about four times more than what was spent on any of the other 64 units in the strata complex, most of which had more serious repair issues.  HELD: Action dismissed.  The defendant responded promptly, fairly, and diligently to all of the plaintiff's complaints. The defendant did not promise to repair or replace the plaintiff's east deck in 2001. The defendant responded promptly and diligently to all four instances of water ingress. When repairs were being done to the plaintiff's unit, he interfered and interrupted the work in an unreasonable manner by asking the workers to stop, refusing access to workers and generally getting in the way by taking pictures, video, and purporting to instruct the workers, causing the work to be delayed. All deck and structural repairs that the defendant agreed to pay for as of the end of 2007 were completed by January 2008. The main structural complaints of the plaintiff had no relationship to water ingress issues. Those structural issues were internal to the plaintiff's unit and therefore not the responsibility of the defendant because they were unrelated to common property. All of the repairs done to the plaintiff's unit were adequate and of sufficient quality. The plaintiff failed to prove that the defendant did not meet the applicable standard of care. There was no reliable or credible evidence that the defendant was responsible, careless, or unreasonable in its choice of professionals. The plaintiff failed to adduce any credible or reliable evidence that there was any agreement or a contract between the plaintiff and the defendant with regard to any repairs. |

**Statutes, Regulations and Rules Cited:**

Strata Property Act, [*S.B.C. 1998, c. 43, s. 72*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-JSXV-G0KK-00000-00&context=), s. 165(a)

**Counsel**

Plaintiffs, Mohd Hirji and Parin Hirji: In person.

Counsel for the Defendant: A. Eged, R. Shaw.

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| **N. SHARMA J.** |

**I. OVERVIEW**

**1**  For over a decade, the plaintiff, Mr. Hirji, has waged a campaign of complaints against the strata council for the complex in which he lives, Lillooet Place, about deck repairs he says were required or promised but never done, or done poorly. Not being satisfied with the response he received, he launched this litigation over eight years ago.

**2**  In the course of this litigation, Mr. Hirji has sued the strata management company which oversees the strata complex, strata council members in their personal capacity, and engineering and contracting firms, and the principals of those firms, in their personal capacity. All defendants except the Owners Strata Corporation Plan VR 44 have settled with the plaintiffs.

**3**  Mr. Hirji also complained to the Association of Professional Engineers and Geoscientists ("APEG") about two of the engineers hired by the defendant. He complained to the governing body of real estate agents about one of the strata managers for the complex. He even tried to enlist the assistance of the Better Business Bureau by sending a complaint about a consultant who had not yet started working on Mr. Hirji's unit. He threatened a human rights complaint against various defendants for what he perceived to be the "discriminatory treatment" he was receiving.

**4**  During the trial he attempted to repeat accusations of dishonesty, bad faith, and exploitation of a position on strata council for personal gain and benefit against individuals who served on council despite the fact that those allegations, originally included in his law suit, were discontinued about three years ago.

**5**  The evidence establishes that the defendant has spent over $100,000 in engineering and contractors' fees to address repairs in the plaintiffs' unit. This is about four times more than what was spent on any of the other 64 units in the strata complex, most of which had more serious repair issues. Despite this, Mr. Hirji maintains he is the victim in this saga.

**6**  Far from being a victim, I find that the evidence shows that Mr. Hirji has threatened, harassed, and taken any action he thought necessary to get what he wanted, with little regard for the impact he has had on reasonable people, most especially the 64 other owners in the complex. Rather than being unfair, I find that the defendant responded promptly, fairly, and diligently to all of Mr. Hirji's complaints.

**7**  Mr. Hirji's wife, Parin Mohd Ali Hirji, is also a plaintiff but she did not testify. This is surprising since most of the evidence at trial pertained to the condition of the unit in which she lived and continues to live. Presumably she was in a good position to corroborate Mr. Hirji's evidence, and she attended the trial almost every day. No evidence was presented to substantiate the submission that Mrs. Hirji suffered any of the losses identified in the Amended Claim.

**8**  Mr. Hirji represented himself and his wife at trial and did so adeptly. He had an encyclopedic knowledge of events and documents relating to his complaints, and many times demonstrated that without aid, he could recall the date and often the content, or at least his version of the content, of many documents he felt were crucial to his case. He questioned witnesses with vigour. He has had the benefit of legal advice, although he did not have legal representation consistently. He had sufficient familiarity with court procedures. Like any in-person litigant, he needed guidance and direction about the admission of evidence, proper questioning of witnesses and the *Rules of Court*, but I am satisfied that Mr. Hirji was able to launch an effective prosecution of his claim notwithstanding his lack of legal representation at trial.

**9**  Despite that, and as I explain in this decision, I find that the plaintiffs have failed to prove any of their claims.

**10**  Throughout the decision, I refer to the Owners Strata Corporation Plan VR 44 as the defendant. The defendant can only "act" through its strata council, so for convenience, I also refer to the strata council as "the defendant".

**A. The Plaintiffs' Claims**

**11**  The plaintiffs claim damages for ***negligence*** and breach of contract. The original statement of claim was filed on February 7, 2007. It was amended for the ninth time during the trial (the "Amended Claim"). At its heart, the Amended Claim alleges a failure to repair and maintain common property adjacent to the plaintiffs' unit -- the building envelope beside the front and rear decks of the plaintiffs' unit.

**12**  In his closing submissions, Mr. Hirji identified and quantified the heads of damages to which he believes he is entitled. The plaintiffs' claims for damages come to a total of over $1 billion as follows:

1. lost profits and loss of business opportunity - $932,773,410.38;
2. loss of rental income - $204,678.00;
3. loss for collapsed sale of his unit - $267,250.00;
4. non-pecuniary "loss for substandard housing" - $45,000.00;
5. moving costs - $5,948.59;
6. cost to repair unit - $41,198.00;
7. cost of appraisal - $866.25;
8. interest on line of credit from 2004 to 2010 - $50,435.59;
9. engineers' fees - $31,020.58;
10. damage to furniture - $2,459.00;
11. water damage to electronic equipment - $7,165.76;
12. water damage to drapes - $650.00.

**13**  As I explain in this decision, the plaintiffs have failed to prove any of their claims because of an insufficiency of reliable and credible evidence.

**B. Mr. Hirji's Credibility**

**14**  Mr. Hirji's credibility is a key factor in this case. The defendant submits that Mr. Hirji was neither a reliable nor credible witness. Its position is that his testimony should not be accepted unless it was corroborated by the testimony of another witness or documents that were admitted for the truth of their content.

**15**  I agree with the defendant for a number of reasons.

**16**  Mr. Hirji's testimony was impeached several times by evidence he gave at his examination for discovery. He would claim he had "misunderstood" the question asked at discovery, or he "misspoke" and that the court should accept his trial testimony as accurate. At one point, he testified that he believed his memory of events was better at trial than it was during the discovery. He claimed he was suffering the effects of a concussion during his discovery. Mr. Hirji was represented by counsel at the discovery. Counsel for the defendant informs me there was no mention at any time before trial that Mr. Hirji's discovery evidence may have been impacted by any medical condition, nor was there any mention at any time of Mr. Hirji having had a concussion.

**17**  Many times during cross-examination, Mr. Hirji changed his evidence from his testimony in chief. One telling example is his evidence about when he moved out of his unit for the purpose of allowing repairs to be done. Mr. Hirji insisted he had not moved out in August 2009, and he relied on a letter written by his then counsel that on its face supported him. It turned out, however, that the letter had a typographical error about that date, and in fact, the letter was consistent with the defendant's position about when Mr. Hirji moved out. Other documentary evidence supported the defendant's position.

**18**  The defendant submits Mr. Hirji seized upon the mistaken date in the letter because it suited his evidence at a particular point in time, notwithstanding it was contradicted by other evidence. According to the defendant, Mr. Hirji's tendency to "say anything" if he believed it supported his case at the time was characteristic of Mr. Hirji's demeanour throughout the trial.

**19**  In other instances too numerous to mention, Mr. Hirji would not accept a proposition, often innocuous, put to him in cross-examination until confronted with a document that tended to prove the proposition was true. In response, sometimes Mr. Hirji insisted his testimony remained accurate, other times he agreed his testimony was wrong, and other times he tried to excuse the differences in his evidence based on his misunderstanding the question. The result is that large portions of Mr. Hirji's evidence in chief were impaired by his evidence during cross-examination. The amount of these differences negatively impacts his reliability as a witness.

**20**  The evolution of the pleadings in this case also support the concerns the defendant has raised about Mr. Hirji's credibility. In the original Statement of Claim Mr. Hirji alleges that the problems with water leaks and faulty repairs subjected him and his family to "suffer mentally and emotionally". In the First Amended Statement of Claim filed on July 9, 2008, the plaintiffs alleged that having to "cope up with the daily hassle, inconvenience and [unsanitary] conditions created by the leakage, for a period of almost ten years...has contributed to a significant health problems for the Plaintiffs, in that (a) [Mr. Hirji] suffered a heart attack in August of 2007;". During cross-examination, Mr. Hirji admitted he never suffered a heart attack and that the allegation that he had was false, and this was known to him in July 2008. He explains its inclusion in the claim filed on July 9, 2008 by saying he did not realize that inaccuracy was in the pleading when he signed it.

**21**  Despite this, the Second Amended Statement of Claim filed June 11, 2009, contained a wholly re-worded paragraph which stated, in part, that as a result of the problems with the repairs, the plaintiffs have "suffered physical and emotional distress, as a result of stress and mould, with the result that Mr. Hirji suffered a heart attack in August 2007". Mr. Hirji stated the continued inclusion of this false fact was because he got his facts "mixed up". I find that very difficult to accept given his otherwise strong command of "facts" relating to this law suit.

**22**  Another example of Mr. Hirji's impaired credibility is his claim relating to the loss of rental income. Mr. Hirji advances a claim that the defendant's failure to repair his unit in a timely fashion caused him to lose rental income. The defendant alleges that not only is there no evidence to substantiate a loss of rental income, it is possible the claim was fabricated.

**23**  The original Statement of Claim filed on February 7, 2007 does not include any facts or allegations related to rental income. Yet Mr. Hirji claims he was suffering a loss of about $1,600 per month each month from May 2001 onwards. Mr. Hirji also alleged that he obtained a bank loan on the strength of that rental income, although he admitted during cross-examination that this assertion was not true.

**24**  I find it very difficult to accept that Mr. Hirji would not have pursued a claim worth that much money if it was extant when he started the litigation. The claim relating to lost rental income was first included in the Second Amended Statement of Claim filed June 11, 2009. This was also the first time any claim for business loss was included in the pleadings.

**25**  The defendant points to the timing of these amendments and says "[i]t is inconceivable that a highly litigious person such as Mr. Hirji would not plead facts supportive of a business loss or loss of sale of the unit if he had believed these losses had been incurred". The defendant further states in its written submissions:

It is submitted that the above evidence suggests that Mr. Hirji was making new claims and new facts upon which to base those claims as this action progressed. It is further submitted that Mr. Hirji did so for the purpose of increasing the value of his lawsuit thus putting maximum pressure on [the defendant] and the other named defendants to bend to his demands to repair the Unit exactly in the manner he himself thought it should be repaired and pay him significant amounts of damages in a settlement he routinely testified throughout the proceedings that he wanted.

**26**  These are serious allegations. Based on my review, however, these allegations are not exaggerated and have a sound basis in the evidence.

**27**  The above examples are illustrative; there were numerous instances where, through cross-examination of Mr. Hirji and/or the testimony of other witnesses, the defendant was able to prove on a balance of probabilities that Mr. Hirji's evidence was at best dubious, and often inaccurate.

**28**  Another concern about Mr. Hirji's credibility and reliability was Mr. Hirji's habit of misstating evidence while he was cross-examining witnesses. He was continually reminded to rephrase his question to accurately reflect evidence that had been given. Given my remarks earlier in this decision about Mr. Hirji's familiarity with the court process and his competence at running his litigation, I reject Mr. Hirji's excuse that he did not intend to misstate evidence. On more than one occasion, upon being reminded of the importance of accurately stating evidence to a witness, Mr. Hirji would apologize, but then, in the next question, misstate the evidence in the same manner.

**29**  Having heard all the evidence and observed Mr. Hirji's demeanour both as a witness and a litigant, I find it highly unlikely that Mr. Hirji was confused about the directions he was given. Instead, I find this behaviour demonstrated an obstinacy that prevented Mr. Hirji from accepting documents or testimony that contradicted his version of the facts.

**30**  For all those reasons, I find Mr. Hirji was not a reliable or credible witness. Accordingly, I am not prepared to rely on his testimony unless it is corroborated by other testimony or documents entered into evidence for the truth of their content.

**C. The Defendant's Evidence**

**31**  Given my conclusion about the quality of Mr. Hirji's testimony, I find it appropriate to make some general comments about the defendant's evidence.

**32**  Eight witnesses testified on behalf of the defendant: its former legal counsel (Jamie Bleay), two former strata managers with Vancouver Condominium Services Ltd. (VCS), the company that managed Lillooet Place (Lyn Campbell and George Alexandru), four former strata council members (Jennifer Thornton, Peter Brown, Diane Wykes, and Barbara MacLellan) and a contractor hired by the defendant for general maintenance who had experience with many events at issue in this case (Rudy Sedlak). All witnesses were subjected to effective cross-examination by Mr. Hirji.

**33**  Without exception, I found these witnesses to be credible and reliable. They were honest about the limited extent of their memories about events that happened in the past, and in my view did not attempt to exaggerate or re-create evidence that they did not specifically recall. They reasonably relied upon documents to assist their memories, where appropriate. They testified in a forthright manner and with courtesy. This speaks well of their reliability as witnesses. Most of the witnesses had been subjected during this law suit to serious allegations of misconduct by Mr. Hirji. Despite this, I detected no malice towards Mr. Hirji as these witnesses testified.

**34**  Almost 200 exhibits were entered into evidence, all of them documents. Many documents were authored by Mr. Hirji. He attempted to rely on his own documents to provide supportive evidence of his claims, but, quite rightly, the defendant objected to the admissibility of such documents on that basis. The documents were accepted into evidence on the basis that they were not being relied upon for the truth of their content but to establish that the content of the document had been communicated as indicated on it. This qualification was explained to Mr. Hirji and I am satisfied that he did understand it.

**35**  An exception was made, however, for the minutes of strata council meetings. Those minutes were tendered and accepted into evidence for the truth of their contents. The distinction of how these documents were treated was explained to Mr. Hirji and I am satisfied that he understood it.

**36**  Although little reference is made in this decision to those minutes, they represent important evidence. The minutes provide corroboration of the testimony of the defendant's witnesses about events and interactions with Mr. Hirji. I found the defendant's witnesses' evidence to be very consistent among them, and consistent with the minutes. This consistency of the defendant's evidence and the credibility of its witnesses provide support to dismiss this action.

**37**  Lastly, I note that a number of photographs were entered into evidence. Mr. Sedlak testified regarding photographs (about 100) that showed conditions in the plaintiffs' unit before repairs were done, as repairs were being done, and showing the finished product. Mr. Hirji also testified about photographs that he took depicting conditions in his unit.

**38**  Having viewed those photographs and listened to the testimony of all the witnesses, I find that the defendant's witnesses' descriptions more accurately reflect what the photographs depict than Mr. Hirji's testimony. I also find that Mr. Hirji's perception of what the photographs contain is not as reliable as the comments in the various reports done by engineers, and I specifically prefer that evidence to Mr. Hirji's about the condition of his unit.

**II. ISSUES**

**39**  There are three legal issues in this case:

1. Was the defendant negligent in the manner in which it responded to the plaintiffs' complaints about water leaks and structural deficiencies in their unit?
2. Did the parties have a contract as alleged by the plaintiffs, and if so, was it breached by the defendant?
3. If the defendant is liable under either issue above, are the plaintiffs entitled to damages as a result?

**40**  At a minimum, the success of these claims requires the plaintiffs to prove on a balance of probabilities the following propositions which they put forward:

1. The defendant promised in 2001 to replace the east balcony of the plaintiffs' property and it did not do so in a timely manner.
2. Between 2002 and 2006, the defendant failed to adequately respond and address numerous complaints of water ingress of the plaintiffs' unit.
3. The defendant entered into a "contract" with Mr. Hirji to carry out any and all repairs identified in a report prepared on the basis of a joint investigation of his unit by an engineer hired by the defendant and one hired by Mr. Hirji. The defendant breached that agreement by failing to authorize all the repairs.

**41**  Before analyzing whether the facts underlying these propositions have been proven, I describe some background facts.

**III. BACKGROUND FACTS**

**A. The Strata Complex**

**42**  Lillooet Place has 65 units that are in the style of townhouses. It was built in the 1970s and the buildings are wood framed. The complex has a pool and many trees on the property.

**43**  The plaintiffs bought their unit in 1988 and have lived there continuously since. The decks in issue are both on the second level of the plaintiffs' unit. The east deck is above the carport and the west deck is mostly above the living room. There is also a ground level patio.

**44**  The demographic of the population of Lillooet Place has always been a mix of retired or older professionals and young families. This demographic has generally remained, but the balance has shifted and there is now a larger number of young families. During the period of time relevant to this litigation, the people who lived at the strata complex were mostly middle-class with many living on a fixed income. In other words, this was a comfortable complex, but not luxurious, and the owners were of modest means.

**B. The Defendant's Reaction to Leaky Condo Issues**

**45**  In the late 1980s and early 1990s, the "leaky condo" crisis was in its early stages in British Columbia. The defendant sought advice about the condition of all balconies and decks, and commissioned a report that was entered into evidence. The purpose of the report was to get a general assessment of the building envelope problems in the strata complex. The plaintiffs' unit was identified as requiring repair, as were most others.

**46**  Another report was completed in 1999. Mr. Hirji maintained throughout the law suit and trial that his unit was deliberately excluded from this initial investigation for what he assumed was a nefarious reason. Yet the evidence demonstrated that as many as 10 units were left off this initial survey, and their omission was innocuous. Units were most likely omitted because the owners of those units failed to complete and return a survey. In any event, the omitted units, including Mr. Hirji's, were later inspected and included on a survey.

**47**  At the November 9, 2000 Annual General Meeting ("AGM") the owners ratified by a 3/4 vote a resolution to raise $60,000 by way of levy charged upon owners in proportion to the unit entitlement of their respective lots. That money was earmarked for deck repairs.

**48**  During this time, deck repairs were addressed by a protocol which stipulated that any complaint of water ingress, or a dangerous or unsafe condition, would be considered an emergency repair and addressed immediately. The defendant's witnesses testified that the protocol was consistent with the common approach used by strata corporations at that time. Such a protocol was necessary to handle extensive building envelope repairs, which could be very expensive and required special levies on all owners in order to pay for them. Moreover, deck repairs were not the only items owners wanted to address. It is important to note that at the 2000 AGM, the owners approved $198,000 to be spent from the defendant's contingency reserve fund for a painting project.

**49**  At the next AGM held November 29, 2001, the owners again approved a levy to raise another $60,000 to conduct deck repairs on a priority basis. Up to that point, repairs had been done by a general contractor in accordance with the protocol.

**50**  By 2003, the owners became concerned about the cost of the deck repairs. At the 2003 AGM, the owners again approved a levy to raise $60,000 but the resolution stipulated that no funds could be expended by council, and an "appropriate process, plan and tendering process be established giving the owners the opportunity to vote on it" at a Special General Meeting ("SGM").

**51**  There were two SGMs in early 2004. At the first held on February 2, 2004, two options for proceeding with deck repairs were presented to the owners: one proposed repairs be done by a general contractor without the support or supervision of an engineer, and the other option was to have an engineering company provide consultancy services to supervise repairs. Neither resolution received the necessary 3/4 vote. Accordingly, all deck repairs were halted except for emergency repairs, but a further SGM was scheduled to address the issue. That SGM was held in March 2004, and this time, the owners did approve moving forward with a balcony remediation program under the supervision and oversight of an engineer. Marsh Touwslager Engineering Ltd. ("Touwslager Engineering") was hired for that task.

**52**  Touwslager Engineering conducted limited "field reviews" and relied on questionnaires the defendant had circulated to the owners in 2003 to prepare an initial report completed in July 2004. The defendant instructed Touwslager Engineering to inspect all balconies and to prioritize the repairs in order of need and update the report. That was done and Touwslager Engineering delivered a report dated September 24, 2004 in which each deck was given a rating based on its "life safety concerns" looking at both floor structure and guardrail conditions.

**53**  The ratings ranged between P1 (most severe damage) and P9 (no known problems). The report explained the rating system:

In order to compare the overall condition of the balconies, we prepared the rating system so that the condition of a floor structure could be compared to the condition of a guardrail. For example, we consider a decayed guardrail connection (P2) more critical than a partially decayed joist (P3). The reasoning in this case is that an occupant could fall or be pushed through the guard. Failure of the joist, on the other hand, is less likely to occur at this time and there is also a higher likelihood that the occupant would not fall to the ground below even if the joist were to fail completely. Further, there would likely be a warning if the joist were failing as the deck would start to deflect excessively. The adjacent joists may also pick up some of the load.

**54**  Mr. Touwslager, who authored the report, recommended that decks rated P1, P2 or P3 should not be used until they were repaired. Fifty seven of the 100 decks examined were so rated. Both the plaintiffs' decks were rated P4.

**55**  This report was reviewed at the next AGM held November 18, 2004. A resolution to raise $200,000 for the first of a proposed three-year project based Touwslager Engineering's estimated total cost of $700,000 to repair the 57 high priority decks failed to pass. Owners with decks having a priority rating of P1 were advised not to use the deck because of safety concerns.

**56**  The issue was revisited and at a Special General Meeting held February 2005, the owners agreed to impose a levy to raise $100,000 for deck repairs to be done on an ongoing basis. The recital to the resolution stated, among other things: "whereas the engineering company has recommended repairs be performed on fifty seven (57) balconies, and whereas the Strata Council is proposing that repairs be performed on an ongoing basis". In other words, it was always contemplated that the funds were intended to address the decks with a rating of P1, P2 or P3 first.

**C. The Defendant's Expenditures**

**57**  From the beginning of 2007 to the end of 2009, the defendant spent $104,554 repairing the plaintiffs' unit. The defendant submits the following facts (that were substantiated by the documentary evidence) put the scale of the plaintiffs' repairs into an appropriate context. At paragraph 184 of its written submissions, the defendant states:

For the fiscal years of 2007 to 2009, $104,554 amounts to:

1. 193% of the average annual contingency reserve fund of $57,000;
2. 44% of the average annual operating budget of $250,000;
3. 120% of the average annual repair and maintenance budget of $92,000, and
4. 37% of the entire $300,000 special levy for the balcony repair fund.

**58**  In addition, Mr. Alexandru testified that all the other units in Lillooet Place were repaired pursuant to the balcony remediation project at an average unit cost of between $10,000 and $15,000. The evidence also established that no other owner had alternate accommodation and moving costs paid for while repairs were done to their unit.

**IV. ANALYSIS OF THE *NEGLIGENCE* CLAIM**

**59**  The plaintiffs' complaints fall into two categories: complaints about water ingress and complaints about structural deficiencies. To be successful in their ***negligence*** claim, they have the initial evidentiary burden of proving that their complaints about water ingress and structural deficiencies were truthful and were reported to the defendant. These are factual issues.

**60**  They also have the burden of proving on a balance of probabilities that the issues identified in their complaints were either not remedied or not adequately remedied according to the applicable standard of care. I turn first to the factual issues.

**A. Factual Issues**

***1. Complaints about Water Ingress before 2001***

**61**  The Amended Claim alleges that the plaintiffs reported problems with water ingress as early as 1998. The defendant's position is that some of those complaints are beyond the applicable limitation period. The action was not commenced until February 7, 2007. The defendant says there is a six-year limitation period and therefore any damage sustained prior to February 2001 would not be recoverable.

**62**  This issue does not arise because I find there is no credible or reliable evidence that the plaintiffs made any complaints about water leaks before February 2001.

**63**  Apart from my concerns about Mr. Hirji's credibility, there is no reference in any document entered into evidence to a complaint by the plaintiffs about water ingress prior to 2001. Mr. Hirji explained the lack of documents to support his testimony of water leaks prior to 2001 by saying he was being patient, waiting his turn and not being "one to complain". All of the evidence points to the opposite being true; I find Mr. Hirji was easily aggrieved and quick to pursue his complaints. In my view, it is inconceivable that Mr. Hirji simply accepted the lack of action by the defendant prior to 2001. Because of this, I conclude it is highly unlikely Mr. Hirji did complain about water leaks prior to 2001.

**64**  But I also find there is reliable and credible evidence that supports the defendant's position that the plaintiffs made no complaints about water ingress prior to 2001. Lyn Campbell and two former council members who served between 1998 and 2001 (Diane Wykes and Peter Brown) testified that they have no memory of any complaint about water ingress made by the plaintiffs prior to 2001.

**65**  Furthermore, I am satisfied that complaints about water ingress would not have been ignored. Ms. Campbell and Mr. Alexandru testified about the procedures for handling complaints at VCS over the relevant time period. Both testified that their office had a strict policy of date stamping documents relating to any complaints received from owners. Those witnesses also testified that an extremely high priority was given to water ingress complaints; both were clear and firm in their testimony that it was "impossible" that any complaint about water ingress would have been ignored or not acted upon. I find these witnesses were credible and reliable and I accept their testimony on these points.

**66**  Additionally, no strata minutes entered into evidence mentions a complaint being made by the plaintiffs prior to 2001 about water leaks. Based on the testimony of Mr. Alexandru, Ms. Campbell and the four former council members, and the consistency of their testimony with the strata minutes that were entered into evidence, I am satisfied that the minutes accurately recorded any complaints received and considered by the defendant.

**67**  I conclude the plaintiffs did not complain about water ingress before 2001.

***2. June 2001 Complaint of Water Ingress***

**68**  On June 30, 2001 Mr. Hirji called VCS to complain about water ingress at the west deck of his unit. This phone call is recorded on a document entered into evidence. Immediately upon receipt of the telephone complaint, the manager at the time dispatched a contractor to investigate. The contractor (JCB Management, or "JCB") received instructions to repair the leak without further consultation so long as it was a simple repair. If the repair was not straightforward or simple, JCB was instructed to investigate the repair and provide a quotation so that the strata council could discuss it at the next meeting.

**69**  The quotation was $14,749 plus GST. That quotation was not an authorization for work to be done, but rather an estimate of what work was recommended and its cost. The defendant determined that some of the quotation items were not its responsibility to repair, but it approved all others. The repairs done to the plaintiffs' unit cost $12,233. The plaintiffs admitted that the repairs relating to that complaint were completed by the end of November 2001.

***3. 2002 to 2006 - Ongoing Complaints about Water Ingress***

**70**  A central part of this case is the plaintiffs' claim that they complained about water leaks consistently and regularly between 2002 and 2006, but that their complaints were either ignored or minimized. This is the primary basis upon which the plaintiffs claim the defendant is negligent.

**71**  Mr. Hirji says that at the same time he called on June 30, 2001 to complain about the west deck, he also complained about the condition of the east deck. He testified that in about November 2001, he spoke with the property manager at the time, Ms. Campbell, and that they came to an "agreement" that his east deck would get replaced the following spring.

**72**  Ms. Campbell testified that she had no recollection of that conversation. She also testified that she would never have agreed to the east deck being replaced, or even repaired, without receiving express instructions from the defendant, and she denied she received those instructions. There was no other evidence indicating the strata council gave that instruction. As noted above, I found Ms. Campbell to be a credible and reliable witness and I accept her testimony in preference to Mr. Hirji's.

**73**  I find that Mr. Hirji was not promised the east deck would be repaired or replaced. I also find it more likely than not that Mr. Hirji did not make a verbal complaint about the condition of the east deck to Ms. Campbell at any time.

**74**  The plaintiffs say within six months of the repairs on the west deck being completed, they again experienced water leaks and notified the defendant seeking repairs. Mr. Hirji described a leak after a heavy rainfall in June 2002, where water leaked into the living room, running down the walls under the drapes and valance. With regard to this particular leak, he claims the "strata" sent someone who quickly tarred a patch on the deck. He could not recall the person with whom he spoke about that leak, or whether it was someone at VCS or a council member. He does not know who did the repair. He complains this patch work was done poorly.

**75**  Mr. Hirji says the leaks continued every couple of months for the entire four year period from 2002 to 2006. He also says the leaks worsened to the point that they had to place up to 10 buckets throughout the living room to catch leaking water. He also testified that the flow of water of one of the leaks resembled a tap being turned on. Despite this, Mr. Hirji says he did not complain about every leak.

**76**  He testified, however, that he did provide to the defendant a written complaint about serious water ingress at his unit four times. Mr. Hirji relied on an email he wrote on April 19, 2007 (after this litigation was started) to a strata council member in which he wrote, among other things:

From June 2004 I have informed the council four times in writing and I have pointed out some of the letters to you in strata files, of water leaks from the back upper deck in the living room. Each time we have requested the council and their agents to take care of these leaks, and for an engineer to come and investigate the creaks [sic] each time the council and their agents completely failed and ignored our requests to take action.

**77**  Mr. Hirji was clear and firm in his evidence during cross-examination that the four documents referenced in that email constitute all of the plaintiffs' "proof" that he had complained about water leaks between 2002 and 2006, and that those complaints were ignored. This email was entered into evidence, as were the four documents to which Mr. Hirji refers.

**78**  None of these documents support Mr. Hirji's position.

**79**  The first document is a form delivered to all owners in April 2003 asking them to identify any general repairs, painting deficiencies, balcony repairs, stucco repairs or ground issues in their units that needed to be addressed. The questionnaire was sent to all owners by the defendant as a first step in addressing building envelope problems.

**80**  The form the plaintiffs completed is dated April 14, 2003. In relation to balcony repairs, Mr. Hirji wrote that repairs had been approved for his balcony about two years ago (which would have been 2001), but that nothing had been done. He also wrote on the form that both decks are "extremely rotten". No mention is made on that form of any instances of water ingress of the plaintiffs' unit.

**81**  The second document Mr. Hirji relies upon is his hand-written letter dated June 10, 2004 addressed to VCS. In that letter Mr. Hirji complains again that he believes he had been promised over two years ago that both (not just the east deck) of their upper decks would be replaced (not just repaired), and he says the "partial" repair work done in 2001 needed to be inspected because there were cracks in the walls. He goes on to mention other complaints about a painted door, people not cleaning up after their dogs, cars backing up into his lawn, and landscaping deficiencies. No mention is made in that document of any kind of water ingress of the plaintiffs' unit.

**82**  The third document is dated June 12, 2004, and titled "Balcony Remediation Questionnaire". It is a form that was sent out by Touwslager Engineering to provide it with information upon which it could give initial advice about deck repairs. The form has a series of questions about the decks. Again, no mention is made on the form completed by the plaintiffs of any kind of water ingress of their unit.

**83**  The last document is a typed letter to VCS dated October 27, 2004 from Mr. Hirji. It has "delivered by hand" printed at the top right corner. In the letter, Mr. Hirji claims to have spoken a number of times on the phone to the property manager (Mr. Alexandru) and written to him in order to report "minor water leaks in our unit since 2003 and the centre post which was not installed properly in 2001". Mr. Hirji suggests in the letter that problems with the centre post have created cracks causing damage to the unit. Mr. Hirji testified that he has a distinct memory of delivering the letter by hand and said that he kept a copy for his records.

**84**  I note that this letter only refers to "minor water leaks" from 2003 on, which is at odds with Mr. Hirji's testimony about the nature and timing of the water leaks he experienced in this time period. In any event, I am not satisfied that this letter was received by VCS.

**85**  Mr. Alexandru testified that VCS had a strict procedure for recording complaints by owners whether by phone or in writing. He said anything in writing was immediately date-stamped and phone messages would also have a date. This evidence about VCS's standard practice for receiving and responding to owner complaints was completely consistent with Lyn Campbell's testimony.

**86**  There is no date-stamp on the letter and Mr. Alexandru had no recollection of receiving a written complaint from Mr. Hirji at that time. He had no recollection of speaking with Mr. Hirji several times about water leaks. He was firm in his testimony that it would not be the case that he would have spoken to an owner "several times" and not followed up on complaints. This accords with other evidence adduced at trial where a complaint was recorded and responded to promptly. In particular, unlike the June 10, 2004 letter, no responsive document from VCS was produced, and no strata minutes were produced that references this complaint.

**87**  I find Mr. Alexandru's evidence is credible and reliable and I prefer it to Mr. Hirji's. I find Mr. Hirji's October 27, 2004 letter was never received by VCS.

**88**  In my view, there is no credible or reliable evidence that Mr. Hirji complained to the defendant about water leaks left unaddressed between 2002 and 2006.

**89**  This conclusion is consistent with a January 10, 2007 letter Mr. Hirji wrote to VCS. Mr. Hirji wrote that the letter was "final notice before the Writ of Summons" would be filed suing VCS and the strata council for "breach of contract, gross ***negligence***, mismanagement of funds and acting irresponsibly and recklessly in dealing with the problems in Unit 1084", and that he would be seeking "Special Costs and Punitive Damages from Strata Council and their agents unless I have written assurance from the Strata Council and their agents by January 23rd, that the work which was approved in 2001 and the present work in hand will be completed by a competent builder ... by the end of March at the very latest".

**90**  That letter purports to set out events "for the record" leading up to the threatened litigation. The following are the only references in that letter to water leaks after July 2001:

1. In or around 2002/3, fairly large cracks appeared at the edge of the central beam, and water started to leak heavily from the upper deck flat roof in to the living room and basement, which was replaced by [the contractor] approximately a year before.
2. In or around 2002/3, [VCS] was informed by telephone and in writing of the water leak, the large cracks next to the central beam and the very poor workmanship carried out by [the contractor]. Neither [VCS] nor the Strata council took any action to investigate this matter... Instead Strata council or [VCS] went and spent more money and patched the leak. Again, this was extremely poorly done ...

**91**  This letter refers to one water leak, and according to Mr. Hirji's own account in this letter, it was repaired with a patch, although he says it was repaired poorly. This letter was sent just prior to the Statement of Claim being filed and yet its reference to water ingress is markedly different from Mr. Hirji's testimony.

**92**  On the basis of all of the evidence, I find the plaintiffs have failed to prove on a balance of probabilities that they experienced water leaks as they described between 2002 and 2006. They have also failed to prove that they complained about any leaks to either VCS or the strata council, and that those complaints were ignored or minimized.

***4. November 6, 2006 Complaint about Water Ingress***

**93**  On or about November 6, 2006, Mr. Hirji reported a water leak at the west deck. The deck was tarped the same day or next. In addition, a member of the strata council and Mr. Touwslager attended at the plaintiffs' property the next day to investigate.

**94**  The plaintiffs were told at that time that the repair would not be fixed immediately because it did not fall within the emergency repair protocol. However, the defendant did instruct Touwslager Engineering to investigate the leak and recommend repairs. Mr. Touwslager provided two reports to the defendant in January 2007, and, on the basis of those, the defendant hired a contractor (JLK Projects Ltd.) to do the repairs, supervised by Touwslager Engineering. By the end of February 2007, the plaintiffs agree that the repairs were about 80% complete.

**95**  In early March 2007, Mr. Hirji instructed the contractors repairing the west deck to stop all the work until the "structural issues" (discussed later in this decision) were addressed. Accordingly, the deck repairs were on hold for a time at the insistence of the plaintiffs. Eventually, however, all of the exterior repair work was completed. Mr. Touwslager provided his final report on the plaintiffs' unit in May 2008 certifying that all repairs were completed.

***5. Initial Structural Complaints***

**96**  By the time the west deck repairs were about 80% complete (February 2007), Mr. Hirji began complaining about "structural concerns" in his unit. The plaintiffs' position on the nature and relevance of these "structural" issues was inconsistent during the trial. However, it is clear that Mr. Hirji believes the structural deficiencies were caused by water ingress and flawed repairs. That connection is important to his claim because the defendant's legal obligation for maintenance and repair does not apply to internal structural issues.

**97**  The plaintiffs sent an email to the strata council in February 2007 complaining about certain structural issues. They referred to the same issue in their January 10, 2007 letter to VCS (see para. 89).

**98**  Mr. Hirji claims this was not the first mention of "structural" complaints. He says that the same time that he made a complaint about the west deck in July 2001, he also complained about the condition of a centre post or beam in his unit. As noted above, I conclude that Mr. Hirji never made the verbal complaint to Ms. Campbell that he claims.

**99**  Based on my assessment of all the evidence on this point, I find Mr. Hirji made no complaints about "structural" issues prior to 2007.

**100**  Upon receipt of this new complaint about structural issues, the defendant asked Mr. Touwslager to provide an opinion. At that time, Mr. Touwslager was already working at the plaintiffs' unit addressing the west deck repairs.

**101**  It appears Mr. Touwslager may have commented on some interior issues initially. In his January 11, 2007 report to the defendant, he wrote that "[i]t appears the beam was not shored properly during the repair in 2001 and the beam was permanently seated slightly lower". He clarified later, however, that he did not intend the plaintiffs to accept these comments as his engineering opinion. In a June 12, 2007 letter to the defendant he wrote:

We have been receiving emails and other correspondence from various parties relating to the repairs at 1084 Lillooet Place. In particular, [the plaintiff] has vaguely referred to our reports and opinions with respect to the beam, fireplace, interior cracking, sloped floors, etc. We want to clearly outline our scope of work so that we can limit our involvement and reduce the strata's costs.

We provided some preliminary opinions in a transmittal dated January 22, 2007. Many comments stated "as required" and "if possible". Further review was requested and Sunderland Consulting was retained for this purpose. Therefore, we are not providing any opinions with respect to the interior framing, structural details, or interior decorating issues.

. . .

With respect to 1084 Lillooet Place, Touwslager Engineering Ltd. is currently involved only in the building envelope aspects of the roof deck on the upper floor, immediately outside the master bedroom.

. . .

Throughout our involvement, we have informed Mr. Hirji of our scope of work. While [he] has explained the various interior issues to us on several occasions, we have always indicated that others are providing opinions.

**102**  Based on Mr. Touwslager's recommendation, the defendant hired Sunderland Consultants to investigate the structural issues in the plaintiffs' unit. Mr. Sunderland inspected the unit and provided an initial report dated May 15, 2007. Included in that report were the following comments:

I understand that it is Mr. [Hirji's] contention that what appears to be settlement of, and therefore deflection in the structure above that post is the result of some shortcomings in either the post, or its support.

...

I could see no clear reason for the occurrence of settlement at the post location over the time period since the earlier repair. However, there seems to be two possibilities:

1. the post may have been installed short in the first place, and therefore the apparent deflection has been present since that work was done, or
2. the assembly of framing between the top of the foundation wall, and the underside of the upper floor structure supported by the post has been shortening for some reason not apparent without further investigation.

**103**  Mr. Sunderland then recommended certain corrective measures that could be taken before commenting on other complaints made by Mr. Hirji. He concluded however that it is "extremely unlikely that there are any framing issues in" the plaintiffs' unit. He said that the "cracking observed, except for that in the valance, is in my opinion the result of seasonal moisture variations over time". In other words, Mr. Sunderland did not agree with Mr. Hirji's contention that flawed repairs in 2001 caused the cracks.

**104**  The defendant requested an updated opinion from Mr. Sunderland to identify remedial options, and that was provided June 1, 2007. The recommended repairs were: removal of the finishes on the central post, careful examination and/or probing of the framing elements to ensure there is no decay, replacement of any decayed material, and replacing all finishes. I note this recommendation amounted to nothing more than investigating the situation further, and if decay was found, to fix it. On June 26, 2007 the strata council approved this work to be done.

**105**  Despite this, after receiving both reports from Mr. Sunderland, Mr. Hirji refused access to the contractor to get those repairs done. Mr. Hirji had decided Mr. Sunderland was somehow "biased". Because of that, the recommended repairs were not started.

**106**  Rather than insisting that Mr. Sunderland's report was adequate and sufficient, the defendant gave Mr. Hirji the opportunity to hire his own engineer in order to get a different opinion. Mr. Hirji hired Jerry Lum who provided a report dated August 20, 2007 which was reviewed by the defendant the next day.

**107**  In an attempt to create a joint scope of work, the defendant asked Mr. Lum to cooperate with Mr. Sunderland. In my view, this was a reasonable suggestion. However, Mr. Hirji refused to pay Mr. Lum's fees to collaborate with Mr. Sunderland; Mr. Hirji expected the defendant to pay for both engineers.

**108**  Again, rather than relying on Mr. Sunderland's opinion, the defendant instructed Mr. Sunderland to prepare yet another report based on his review of Mr. Lum's August 20, 2007 report. In my view, this step was completely unnecessary, but it demonstrates the defendant's patience and good faith efforts to resolve the matter amicably, and to the plaintiffs' satisfaction.

**109**  Mr. Sunderland prepared a report dated September 13, 2007 which was given to Mr. Hirji. I note that even after taking into account Mr. Lum's report, the additional repairs recommended by Mr. Sunderland were not consistent with Mr. Hirji's testimony that his unit had serious structural flaws. The additional recommendations were: reinforcing a split joist with glue, and screwing on a plywood strip along the length of the split; enlarging a hole in the subfloor to allow more room for a gas pipe; levelling the living room by either inserting a 0.6 inch shim under the support beam, or using a floor levelling topping; and filling gyproc cracks with filler and if needed, embedded fiberglass mesh.

**110**  By October 16, 2007, having received no response from Mr. Hirji about the latest report, the defendant assumed that repairs could go ahead, and it instructed the contractor and Mr. Sunderland to proceed. Those repairs started in mid-November 2007.

**111**  Not all repairs identified in Mr. Sunderland's report were approved by the defendant because it concluded, based on legal advice, that some issues were not its legal responsibility to repair. The contractor was instructed to do the work that the defendant believed was its responsibility.

**112**  The contractor reported on January 15, 2008 that the work was done. Due to some personal health concerns, Mr. Sunderland's final report and certificate of completion was not provided until April 2008. Relying on the professional certification of Mr. Sunderland and the legal advice it received, the defendant considered that it had completed all structural repairs to the plaintiffs' unit that were its responsibility.

***6. January 2008 Complaint about Water Ingress***

**113**  Mr. Hirji made another complaint of water ingress in January 2008. Based on the evidence, including an invoice from the contractor, I find that the complaint was completely remediated within three days at a cost of $115. I find it was a very minor leak and the defendant responded to it promptly.

***7. June 2008 Complaint about the East Deck and Previous Repairs***

**114**  Mr. Hirji complained on June 3, 2008, about the east deck. He complained the wood on the deck was completely rotten and he demanded that the situation be addressed immediately. Immediately upon receiving the complaint from Mr. Hirji, the defendant approved the contractor to erect tarps on the east deck.

**115**  Pictures of the east deck were entered into evidence and based on those and the testimony of Rudy Sedlak, I find that the potential for water ingress at the east deck was caused by someone lifting the boards from the deck, and then most likely stepping on the membrane creating a hole. This hole looked to be about three feet in diameter.

**116**  Out of an abundance of caution, the defendant decided to hire yet another engineer instead of instructing the contractor to repair the east deck. The engineer was instructed to investigate the east deck, and also investigate the repair work that had been done with regard to the west deck and the structural complaints. These additional instructions (beyond the east deck) were necessary because Mr. Hirji continued to complain about the repairs that had already been done, claiming they were done improperly. Mr. Touwslager and Mr. Sunderland refused to do any further work at the plaintiffs' unit. By this time Mr. Hirji had lodged a complaint against both with APEG.

**117**  The content of Mr. Hirji's complaint is telling. During the trial, Mr. Hirji stated he had no intention of "ruining" the professional reputation of either man and he attempted to downplay the significance of his complaint. This provides another instructive illustration of the dissonance between what really happened and Mr. Hirji's testimony about what happened. In an email to APEG (which was forwarded to Mr. Bleay), Mr. Hirji writes the following, among other things, about Mr. Sunderland and Mr. Touwsleger:

In my view both members have breached tenet of code of ethics. As I understand from the email you sent me, and the information I obtained from other members of APEGBC, confirms that Mr. Sunderland had no business providing reports on the structure of the unit in question, as is clearly stated by the Association, that this is not Mr. Sunderland's field of experience. This [does] not end here. The events of issues in this case very strongly suggests, that there was a conspiracy between Mr. Sunderland, and Mr. Touwslager of a fraudulent act of depriving the repairs being carried out to my unit properly, which I am entitled to, by their inaccurate reports in spite of all the information provided to them. Mr. Sunderland being a good friend of Mr. Touwslager came to Mr. Touwslager's rescue who had made some very serious mistakes. Mr. Sunderland provided inaccurate reports to get Mr. Touwslager off the hook, thus leaving a permanent defect in the unit and depriving me of proper repairs being carried out and eliminating the problem of water ingress occurring approximately every six months in our unit for the last seven years. We have been subjected to live in appalling conditions and suffering for last seven years by strata council.

. . .

[Inviting the Association to view his unit] this will also provide the evidence of an inaccurate opinion submitted by Mr. Sunderland and Mr. Touwslager where the work was agreed to be carried out but was never carried out and the certificate of completion of work issued by Mr. Sunderland. The sort of inaccuracy from a person of Mr. Sunderland's stature and his position of being a chairman of the ethics committee, who is in charge of judging other members, and passing judgment on the other members, is unbelievable, shocking, unethical, unprofessional, dishonest and disgraceful.

**118**  The defendant had to hire a new engineering firm, JRS Engineering Ltd. ("JRS") to investigate the east deck and the continuing complaints by the plaintiffs about the quality of repairs that had already been done. JRS completed a comprehensive report on October 7, 2008 and, after obtaining legal advice, the defendant made a decision about which repairs to approve given its understanding of its legal obligation towards common property. Mr. Bleay confirmed the defendant followed the legal advice he gave. The defendant instructed JRS to prepare a second report that only addressed those items that the defendant identified were its responsibility.

**119**  In the meantime, Mr. Hirji filed an application in court on October 8, 2008 seeking, among other things, that the defendant: provide a further and better list of documents; repair and remedy all defects and deficiencies in the common property; repair all damage on the plaintiffs' property by December 15, 2008; pay for alternate accommodation and moving expenses until repairs are complete. Mr. Hirji also sought the appointment of an administrator to manage the affairs of the defendant.

**120**  The application was heard on October 24, 2008. Except for the relief relating to moving expenses and alternate accommodation, the application was dismissed. With regard to the remaining relief not dismissed, the Chambers Judge adjourned the applications giving Mr. Hirji liberty to revive them within three months. In a way, this created a timeline for the defendant to get repairs it believed were its responsibility done.

**121**  JRS completed the second report which was dated November 26, 2008 (the "November Report"). The November Report stipulated that JRS was hired "to inspect and determine the scope of repairs to the unit and not to assess or allocate responsibility for carrying out any recommended repairs".

**122**  The relevant comments in the November Report about repairs included:

1. With regard to two water leaks in the house, JRS concluded "[t]he source of the water leakage is not due to a failure of the building envelope" but was "due to lack of maintenance of the sealant around the bathtub".
2. JRS looked at the deck membrane because Mr. Hirji suspected it was a possible point of water ingress. During this investigation, it was noted there was "a smell coming out of the south divider wall on the west deck" and "[i]t was reported that this wall sat open at the top for one winter". Other testimony in the trial confirmed that observation.
3. Regarding the "structural" complaints, the living room floor was noted to have a drop of approximately 1 1/4 inches at the south side.
4. The carpet had been removed and JRS noted that the plywood sheets appeared to have been removed and replaced at some point. The evidence was unclear as to who originally removed the carpet from the plaintiffs' living room. However it was clear that Mr. Hirji placed the rolled up carpet outside for a long period of time. This ruined the carpet. Mr. Hirji claims damages to replace that carpet.
5. JRS did note a "hump" in the kitchen floor measuring about 2/16 of an inch. There were at least two and possibly three layers of linoleum on the kitchen floor and some type of underlay chip board or particle board that sat on top of the plywood. The plywood appeared to be flat when observed from below.
6. There was a difference in the heights of the floor joists, with a range of between 7 1/4 and 7/16 inches. In JRS' opinion, "[t]his differential is very likely related to the quality of the original construction and not due to any structural problems associated with water ingress into the basement area".
7. With regard to the floor joists, JRS noted that there was a sill plate of cedar wood that was driven into the joists and this did not sit properly causing the bottoms of the floor joists to be compressed up to 1/4 inch, but that the "rim joist appears to be in good shape and is supported by the new piece of treated wood section that was installed as well as the original sill plate at both ends where this repair was completed".

**123**  JRS ended the report with a number of recommendations, not all of which was accepted by the defendant to be its responsibility. Nevertheless, a scope of work that addressed repairs the defendant accepted were its responsibility was approved quickly. The defendant received no response from Mr. Hirji and assumed it could proceed. The contractor was instructed to start work on December 8, 2008. However, when the contractor arrived Mr. Hirji refused access to his unit because he remained dissatisfied with the scope of work that the defendant had approved.

**124**  By letter dated December 15, 2008, Mr. Bleay informed Mr. Hirji's then counsel that the defendant wished to proceed with the repairs quickly. The scope of work that the defendant had approved was attached to that letter. Because Mr. Hirji refused access on December 8, 2008, and given the schedule of the contractor, the repairs were then slated for January 5, 2009. Mr. Bleay noted that the defendant had now lost valuable time to commence the repairs and any further interference may result in Mr. Hirji being responsible for the expense of another work stoppage. Notwithstanding this letter, Mr. Hirji again refused access to his unit in early January 2009.

**125**  This refusal by Mr. Hirji put the defendant in an almost impossible position. Mr. Hirji had gone to court seeking repairs be completed by December 15, 2008 and although that application was dismissed, the Chambers Judge had effectively set a deadline of three months for some repairs to get done. The defendant was proceeding with haste but was prevented from acting quickly by Mr. Hirji's refusal.

**126**  It is clear the parties disagreed on what repairs were the legal responsibility of the defendant; but there was no suggestion that the defendant would rely on Mr. Hirji permitting repairs to be done as any kind of admission by him that the defendant had no further obligation. There appeared to be a stalemate. The defendant instructed counsel to seek a court order granting it access to Mr. Hirji's unit to commence the repairs.

**127**  Notwithstanding those instructions, and while the parties waited for an available court date, the defendant instructed JRS to meet with Mr. Lum and prepare another report which took Mr. Lum's opinions into account. In my view, this is another demonstration of the defendant's good faith effect to resolve the matter with Mr. Hirji.

**128**  JRS met with Mr. Lum on March 10, 2009 and prepared a report dated March 20, 2009. The defendant considered this report at strata council's meeting on March 31, 2009 but sought clarity about its legal obligations with respect to the repairs identified. JRS prepared a final report dated May 12, 2009 (the "May Report"). It is this report that Mr. Hirji alleges constitutes a "contract" between the plaintiffs and the defendant. His position is that the May Report is a joint report, and because of that the defendant is legally bound to pay for all the repairs identified in it.

**129**  Mr. Hirji testified that the parties had "agreed" all repairs identified in the May Report would be undertaken at the defendant's expense. There was no other evidence consistent with Mr. Hirji's version. All of the defendant's witnesses who had knowledge of events during this time period denied that it had ever been agreed that the defendant would pay for any and all repairs JRS identified in the May Report. This is further confirmed in the documentary evidence including a May 13, 2009 email from the president of the strata council to Mr. Bleay, Mr. Alexandru, Mr. Brown, and Ms. Thornton and others. In that email, the president reports that the "joint scope of work is still being considered but no agreement has been made and no document has been signed by council". Even Mr. Lum agreed in his testimony that in no sense can the May Report be considered a "joint" report; he did not sign it.

**130**  The May Report did emanate from a joint site visit in March 2009. In attendance during that joint site visit were Mr. Hirji, Peter Brown, and Tim Scott, the president of the strata council, as well as Rudy Sedlak, Mr. Lum, and Mr. Gould, an engineer with JRS.

**131**  The May Report addresses the condition of the east deck and the "structural" issues. With regard to the east deck, JRS noted it was not vented and therefore, it was prone to rot.

**132**  The May Report notes a considerable amount of time was spent investigating the beam referred to as B-1. The top of that beam appeared to be about 3/8 of an inch lower than the wall next to it. At the west end, the beam sits on top of a concrete wall and it appears to be lower than the other end of the beam. It was noted that there had not been proper blocking of the floor joists and the floor was not properly attached to the top of the joists.

**133**  Twenty recommendations were made in the May Report. Many of them were not considered by the defendant to be its responsibility because they did not relate to common property. The defendant relied on legal advice and the opinions of engineers in coming to that conclusion. This included repair to the faucets and tub liner in the upper bathroom, inspection of the condition of a central post in the living room, repairing cracks and blemishes in the drywall, elongating a hole for the gas line that runs from the basement to the fireplace, painting and priming of walls, new carpet installation, and repairs to the sliding door and window assembly in the master bedroom.

**134**  Significant repairs were recommended with regard to leveling beam B-1 and leveling the kitchen floor, but the defendant also took the view that neither of those were its responsibility because they related to structural issues within the unit and not common property; nor were the conditions caused by water ingress from common property.

**135**  The defendant approved the engineering firm to proceed with the recommendations in the May Report that it decided, based on legal advice, were its responsibility. The defendant received a quote for that work from Rudy Sedlak for $73,296, which was approved. The plaintiffs were given the ability to choose accommodation, to be paid for by the defendant, to allow them to leave the unit while it was being repaired. Originally, the defendant agreed to pay for one month's accommodation.

**136**  The repairs started in mid-August but witnesses testified that workers reported Mr. Hirji was continually on-site, interfering with contractors by filming their work, getting in the way, and giving them instructions. This was contrary to the WCB regulations regarding the work site, and contrary to the defendant's understanding that the plaintiffs would be living in alternate accommodation during repairs.

**137**  I find that Mr. Hirji's actions were directly responsible for causing the repairs to take longer than anticipated. Despite that, the defendant paid for the plaintiffs' alternate accommodation for another month.

**138**  On October 27, 2009, the defendant met with Mr. Bleay, Mr. Sedlak, and JRS. Together they reviewed the May Report carefully. Both JRS and Mr. Sedlak informed the defendant that all repairs they had been instructed to do were completed. Relying on that and legal advice, the defendant believed its legal obligations towards the plaintiffs had been fully met.

**139**  On December 4, 2009 JRS provided its final report confirming all work was completed. The defendant again received legal advice that its responsibility towards the plaintiffs for repair and maintenance had come to an end.

***8. Complaints about the Quality of Work***

**140**  Mr. Hirji continued to complain from November 2009 onward about the method by which repairs were undertaken. None of these complaints are against the defendant; they were directed at the contractors hired by the defendant to do the work, and the engineers supervising that work. Those parties have settled with the plaintiffs.

**141**  In any event, I am satisfied based on all the evidence I heard and the pictures adduced into evidence that Mr. Hirji's complaints were of a minor nature and there is no basis to his allegation that the work was substandard. This view was not contradicted by Mr. Lum, who agreed that the unit's structural support was sound.

**B. Conclusion on Facts**

**142**  Based on the evidence discussed above and all the evidence presented at trial, I make the following findings:

1. The plaintiffs did not complain about water ingress at their unit prior to June 2001.
2. Mr. Hirji did not make a verbal complaint to Ms. Campbell about the east deck or centre post in November 2001, or at any other time.
3. Neither the defendant nor Ms. Campbell, nor anyone else, promised to repair or replace the plaintiffs' east deck in 2001.
4. I do not accept Mr. Hirji's testimony that he endured frequent water leaks of increasing severity between 2002 and 2006 in his strata unit or that any leak was so serious that it resembled a tap running.
5. I find Mr. Hirji made no complaint to VCS or the defendant about water ingress at his unit during this time period.
6. VCS had a strict policy of date-stamping and recording owner complaints. Complaints about water ingress were given a high priority. I find on a balance of probabilities that no complaint from an owner received by VCS about water ingress was ignored or dismissed.
7. Mr. Hirji's October 27, 2004 letter was not received by VCS.
8. There were only four instances of water ingress at the plaintiffs' unit and they occurred in June 2001, November 2006, January 2008, and June 2008. All four of these instances were reported to the defendant either directly or via VCS, or both.
9. The defendant and VCS responded promptly and diligently to all four instances of water ingress.
10. It is improbable that the condition of the east deck was caused by any building envelope failure. Instead, it was the structure of the deck itself (not being vented) that more likely than not caused the rot. Its condition was exacerbated by someone removing the boards and stepping through the membrane.
11. Mr. Hirji did not make any complaints about structural issues prior to January 2007. At that time, his only complaint was cracking around or above a centre post in his living room.
12. Based on the opinion of Mr. Sunderland, it is more likely than not that this cracking was caused by seasonal differences in atmospheric moisture and was unrelated to water ingress, or the 2001 repairs.
13. When repairs were being done to Mr. Hirji's unit, he interfered and interrupted the work in an unreasonable manner by asking the workers to stop, refusing access to workers and generally getting in the way by taking pictures, video, and purporting to instruct the workers.
14. This interference caused a delay in the work being done. None of that delay is attributable to the defendant.
15. All deck and "structural repairs" that the defendant agreed to pay for as of the end of 2007 were completed by January 2008.
16. The defendant received and followed legal advice about the extent of its responsibility to the plaintiffs' complaints. The defendant instructed the engineers and contractors to undertake those repairs that the defendant decided, based on legal advice, were its responsibility because of its duty to maintain and repair common property.
17. The legal advice received by the defendant was sound.
18. I find that the main structural complaints of the plaintiffs (problems with the centre beam in the living room, and the alleged instability of beam B-1) had no relationship to water ingress issues. Those structural issues were internal to the plaintiffs' unit and therefore not the responsibility of the defendant because they were unrelated to common property.
19. The repairs identified in the May Report that the defendant decided were its responsibility were completed by October 2009, and an engineer's certificate confirming that was received in December 2009.
20. The amount of money spent on the plaintiffs' unit was disproportionate to the nature of the repairs that were truly needed. This disproportionality was largely due to the defendant's cautious and reasonable response to Mr. Hirji's exaggeration, and what I have found to be misinformation about the water leaks and structural problems of his unit.
21. All of the repairs done to the plaintiffs' unit were adequate and of sufficient quality.

**C. Legal Principles**

**143**  The defendant admits it owes a duty of care to the plaintiffs, but submits that duty is limited to the repair and maintenance of common property because of s. 72 of the *Strata Property Act*, *S.B.C. 1998, c. 43*. Although this point was not pressed, the defendant pointed out the legislation provides for a court application if an owner feels the strata corporation is not fulfilling its duties under s. 72 (s. 165(a)). It says this case falls into that category. However, the plaintiffs' claim is also for breach of contract which would not seem to be captured by s. 165.

**144**  The defendant's position is that there is no difference between the standard of care it must meet to comply with s. 72 of the *Act* and the standard at common-law.

**145**  The defendant pointed to four reported decisions involving a claim of ***negligence*** against a strata corporation because of its failure to comply with the duty to maintain common property: *Wright v. Strata Plan No. 205* [*(1996), 20 B.C.L.R. (3d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G27D-00000-00&context=), aff'd [*[1998] B.C.J. No. 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1CP-00000-00&context=) (CA); *John Campbell Law Corp. v. Strata Plan 1350*, [*2001 BCSC 1342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-6157-00000-00&context=); *Leclerc v. Strata Plan LMS 614*, [*2012 BCSC 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1KJ-00000-00&context=); and *Kayne v. Strata Plan LMS 2374*, [*2013 BCSC 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M308-00000-00&context=). Also helpful are: *Oldaker v. The Owners, Strata Plan* VR 1008, [*2007 BCSC 669*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24GN-00000-00&context=) and *Weir v. Strata Plan NW* 17, [*2010 BCSC 784*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-223N-00000-00&context=). All these cases set out the relevant factors to consider when deciding if a strata corporation has been negligent in its repair or maintenance of common property.

**146**  Regardless of the source of the defendant's duty, I agree with the following points contained in the defendant's summary of legal principles about strata corporations' duty and standard of care applicable in this case as set out in its written submissions:

1. the overarching test is reasonableness in the circumstances;
2. reasonableness involves balancing interests to achieve the greatest good for the greatest number given budget constraints;
3. strata corporations are entitled to rely on advice from their professionals;
4. there was no requirement that repairs be performed immediately or perfectly;
5. a strata corporation cannot be held responsible for the failed work of others so long as it acted reasonably.

**D. Did the Defendant meet the Requisite Standard of Care?**

**147**  The plaintiffs have failed to prove that the defendant did not meet the applicable standard of care. I find the evidence demonstrates that the defendant responded promptly, diligently, and fairly to Mr. Hirji's every complaint. I make this conclusion on a bare assessment of what happened with Mr. Hirji's unit.

**148**  This conclusion is only strengthened when it is considered in the context of what was happening in the whole strata complex, and in particular, in light of the difficult financial circumstances the deck repair project created for all owners. In my view, the court must take this contextual approach because the defendant owes duties to every owner in the complex, not just the plaintiffs. It is therefore mandatory that the defendant assess the repairs it approved against the other repairs needed and the available funds.

**149**  With regard to the water leaks, I find that the defendant's actions and its instructions to VCS were reasonable. This was not a case of a strata corporation dragging its feet or ignoring complaints or advice from qualified professionals about repairing building envelope failure.

**150**  The survey by Touwslager Engineering that rated every deck in the strata complex was a responsible and reasonable approach to identifying the order in which repairs should proceed. This incremental approach was important given the cost of the repairs and the modest means of the owners.

**151**  All the evidence supports the defendant's position that the strata council acted in a fiscally prudent and cautious manner in respect of the deck repairs. Such an approach was mandatory in order for the defendant to fulfill its duty to all owners; it had to consider the overall cost and not just the nature and extent of individual owner's problems. This is why the creation of and adherence to the emergency repair protocol was a reasonable response to building envelope issues in the complex.

**152**  There was no reliable or credible evidence that the defendant was irresponsible, careless, or unreasonable in its choice of professionals. Nor is there any evidence that the defendant declined to follow professional advice that it received. It was not obliged to carry out every single repair identified by the engineers. The engineers and their reports made it clear that the issue of who bore the responsibility of the repairs was beyond the scope of their opinion.

**153**  The defendant appropriately sought and followed legal advice to determine which of the repairs identified by the engineers it was responsible for. I am also satisfied that Mr. Bleay's legal advice was sound. The defendant had a duty to repair problems with common property which included, in the plaintiffs' case, repairs arising because of building envelope failure. The defendant was not responsible for issues relating to the repair, maintenance, or structural integrity of the interior of the plaintiffs' unit. To the extent there was uncertainty about the source and therefore responsibility for repairs of "structural issues", I find the defendant's response and reaction to the engineering reports it received was consistent with the sound legal advice it received.

**154**  It is important to note that even Mr. Lum could not say that any of the "structural issues" were of such a nature so as to negatively impact the structural integrity or habitability of the plaintiffs' unit. I am also satisfied based on the evidence presented at trial that none of the structural issues were caused by or linked to water ingress at the plaintiffs' property.

**155**  With regard to the east deck repairs, the defendant hired an engineer to investigate and provide a report for what the evidence revealed to be a relatively straight-forward repair. I also find that it was a repair most likely necessitated by the careless action of someone the plaintiffs had allowed onto the east deck. It is possible that the defendant may still have met its legal obligations had it instructed a contractor to undertake the repairs without the benefit of an engineer's opinion (although I do not make that finding). The fact that the defendant agreed to take the extra step and spend more money to obtain an engineer's report is conclusive evidence of its good faith conduct towards the plaintiffs.

**156**  Having heard all of the evidence and reviewed the reports of the various engineers, as well as looking at the pictures provided by Mr. Sedlak and Mr. Hirji, I reject Mr. Hirji's position that work done on his unit was done poorly or remains unfinished. Even if the evidence had established that claim, inadequate workmanship would not have been the defendant's responsibility so long as it was reasonable in its choice of and reliance on professionals, which I have found it was.

**157**  Taking everything into account, I conclude the plaintiffs have failed to prove the defendant was negligent. I find the defendant met the standard of care with regard to all of the plaintiffs' complaints.

**VII. ANALYSIS OF THE CLAIM FOR BREACH OF CONTRACT**

**158**  The plaintiffs have failed to adduce any credible or reliable evidence that there was any agreement, much less a contract, between them and the defendant with regard to any repairs. Mr. Hirji claims the May Report amounted to an agreement between the parties that any and all repairs identified in it would be carried out at the defendant's expense. The underlying premise of this position is flawed. The May Report is not a joint report and does not purport to be one. Instead it is JRS's report, having taken into account Mr. Lum's opinion. Mr. Lum did not sign the report and in no other sense can it be said to have been a joint report.

**159**  Not only is there no evidence that the defendant or any of its representatives agreed to carry out all of the repairs, all the documentary evidence is consistent with the opposite conclusion. Those facts have been discussed earlier in this decision relating to the defendant's response to the plaintiffs' complaints.

**160**  Although not stated explicitly either in submissions or the pleadings, Mr. Hirji also believed there had been an "agreement" between Ms. Campbell and him in 2001 that the east deck would be repaired. As noted above, I have rejected Mr. Hirji's evidence on this point and therefore no such claim could succeed.

**A. Other Semi-contractual Claims**

**161**  At other points during the trial Mr. Hirji implied that on behalf of the defendant, Mr. Bleay had agreed that certain costs or expenses associated with the plaintiffs' moving out of their unit would be paid for by the defendant. In support of this position, Mr. Hirji relied on a number of invoices that he produced at the trial which related to cleaning, accommodation until all repairs were done, duct cleaning, drape cleaning, packing and transportation of household items, an electrical inspection, and repair to a broken fireplace.

**162**  Mr. Bleay denied he made any such offers. I found him to be a credible and reliable witness, who testified in a forthright fashion. His evidence was clear on this point. I am satisfied that there is no reliable or credible evidence to establish that the defendant ever agreed to pay any of those costs.

**B. Conclusion on the Contract Claim**

**163**  Not only have the plaintiffs failed to prove the basic elements of any contract between them and the defendant, I conclude even the most generous view of the reliable and credible evidence does not come close to establishing a claim for breach of contract.

**164**  The defendant's position is that this claim is a "recent fabrication" by Mr. Hirji. It points out that the first time any details were given about the claim was in the eighth further Amended Notice of Claim filed August 25, 2014. At that time the only reference to the contract was in relation to the May Report. Yet at the examination for discovery in September 2013, Mr. Hirji was asked for details about the breach of contract claim as it existed at that time; his evidence was he did not know the date of any contract, the terms of any contract, whether the contract was written or verbal, or what was exchanged in the contract. In the ninth amendment to the Statement of Claim filed during trial, there is an additional paragraph alleging a new contract, but absolutely no particulars are provided.

**165**  In my view there is no reasonable basis upon which one could advance a claim for breach of contract. I find this claim frivolous.

**VIII. DAMAGES**

**166**  The preceding discussion is sufficient to dispose of all of the plaintiffs' claims at trial, and it is unnecessary for me to consider the last issue.

**167**  I address two heads of damages claimed by Mr. Hirji because of the emphasis he placed upon them, and the fact they constitute the bulk of his damages claim. Nothing in this analysis, however, detracts from my conclusion that none of the plaintiffs' claims have been proven.

**168**  Mr. Hirji claims damages for a proposed sale of his home that did not complete. His position is that the defendant delayed the completion of repairs which impacted the proposed sale.

**169**  The evidence about the collapsed sale of the plaintiffs' unit was vague, contradictory, and inconsistent. Even the selling price was unclear. During his testimony in chief, Mr. Hirji said the unit was originally listed at sale for $650,000. His evidence on this point was impeached by his discovery evidence where he said the list price was $550,000. The copy of the contract for purchase and sale entered as an exhibit at trial clearly shows "Five Hundred and Fifty Thousand" typed in as the purchase price with the word "Five" crossed out and "Six" hand-written above it. It also shows "$550,000" typed with hand-written alteration of the beginning "5" to a "6" and then "$650,000 hand-written beside it. Also odd is the fact that the contract is dated March 27, 2008, but includes the term that the property will be in substantially the same conditions as viewed by the buyer on March 31, 2008. Interestingly, the "27" on the front page appears to be a hand-written correction to some other typed number which is unclear.

**170**  Mr. Hirji said his discovery evidence was an "honest mistake". It is difficult to accept that Mr. Hirji honestly was mistaken about the selling price. He claims the sale of the house was necessary to generate equity that he was going to use to launch his currency trading business. He testified that the business, based on software he said he developed over 14 years, represented his "life's work".

**171**  The defendant suggested that Mr. Hirji's testimony in chief was concocted to respond to the anticipated argument that it was highly unlikely any buyer would offer $100,000 over the list price without there being any competing bids. This suggestion is not unreasonable.

**172**  Similar problems plague Mr. Hirji's evidence about the reasons for the sale not going through. When testifying in chief, Mr. Hirji claimed that he was required to provide two engineer certificates to the buyer prior to the subject removal deadline, and that the defendant's delays in having the repair work completed resulted in him not being able to meet that deadline. However he admitted in cross-examination that there is no such subject written on the contract. At that point Mr. Hirji said he relied on the professional advice of his realtor, Mr. Jamal, about what conditions were necessary to close the sale. Mr. Jamal testified and did not confirm Mr. Hirji's evidence.

**173**  Mr. Hirji also acknowledged that he had no idea if the other subject conditions on the contract for purchase of sale were ever satisfied, or if they contributed to the collapsed sale. Despite this he maintained that the defendant was liable. The defendant's position about this evidence is encapsulated in the following paragraph:

This insistence on the collapse of the sale being caused by [the defendant], despite clear evidence that the sale could have collapsed just as easily because of any of the three other subject clauses, indicates a complete and irrational bias on the part of Mr. Hirji against [the defendant]. It is submitted that this bias permeates all of Mr. Hirji's evidence rendering it extremely suspect and largely, if not entirely, unbelievable.

**174**  I find Mr. Hirji's evidence about the list price of his unit and the collapse of its sale to be completely unreliable and not believable. I agree with the defendant that Mr. Hirji's position represents an irrational stance, and I find the claim frivolous.

**175**  Even if Mr. Hirji's evidence about the collapsed sale was reliable or credible (it was neither), I have concluded that Mr. Hirji and not the defendant was responsible for all the delays of repair work at his unit and therefore the claim would have failed in any event.

**176**  The failure of Mr. Hirji to establish that the defendant was responsible in any way for the collapsed sale of his unit also defeats his claim for lost profits, but there is other evidence that calls into question the veracity of this claim. The defendant's position is that this claim too was potentially a recent fabrication and irrationally pursued by Mr. Hirji.

**177**  The first time any claim related to business loss appears is in the Second Amended Statement of Claim filed June 11, 2009. In it, Mr. Hirji alleged that the defendant's delay and improper repair of his unit caused him to take "time away from his work as a self-employed computer programmer, resulting in a loss of business opportunities and revenues". In the Third Amended Statement of Claim filed December 9, 2010, Mr. Hirji claims the rental income of $1700 per month was vital to his business. Its loss (which he blames on the delay and improper repairs) resulted in him having to abandon his currency trading business which he conducted from his home. At that time he quantified his loss "based on the actual profits made in 2001" to be about $3.8 million for the time period 2007-2010. The defendant requested copies of Mr. Hirji's income tax returns which Mr. Hirji promised during the trial he would produce. They were never brought to court.

**178**  The defendant also adduced evidence that in other lawsuits filed against his own family members, Mr. Hirji sought damages for business losses, but in those pleadings he claimed the business losses were caused by his own poor health and the failure of his family members to give him a share of the family's estate.

**179**  In the third Amended Statement of Claim, Mr. Hirji claims the delays and improper repairs caused him to lose the sale of his unit at the peak of the market resulting in a loss of $135,000. He does not allege that is linked in any way to his business.

**180**  In the Ninth Amended Statement of Claim filed during the trial, the plaintiffs allege that as a result of the defendant's ***negligence*** and/or breach of contract, they were "unable to raise sufficient capital or sell [their] unit and inject the required capital in [their] currency trading business".

**181**  I find there is no reliable evidence that Mr. Hirji suffered any business loss, or that if he had, it was related to the defendant's actions.

**182**  The claim itself defies logic and common sense. Mr. Hirji makes the outrageous claim that with seed money of $500,000 (from the sale of his unit) he could have generated $2 million in one month and that the continual reinvestment of that money would result in approximately $5 million of profit monthly. Mr. Hirji extrapolates that he could have turned that original $500,000 into $932,773,410.38 over a three-year period. Mr. Hirji gave some evidence that at one time he had a prospective partner in his business, but some complication prevented that investment from going through.

**183**  I make the obvious comment that if there was any possibility that Mr. Hirji had created a viable business plan that could generate such huge profits, it is inconceivable that the market would not have responded with numerous offers of investment. Mr. Hirji's claims about how he could have made such huge profits are simply not believable. I find that Mr. Hirji's claim of business loss is frivolous.

**184**  Further, even if there had been any reliable or credible evidence upon which to found these two heads of damage, I would have found no causative link between any action of the defendant and those losses because they are too remote.

**IX. CONCLUSIONS**

**185**  For the reasons expressed herein, the plaintiffs' claims are dismissed. The parties are at liberty to arrange a hearing relating to costs so long as notice is provided to the Registry no later than 30 days from the date of judgment.

N. SHARMA J.

**End of Document**

[***Ho v. Greater Vancouver Water District, [2008] B.C.J. No. 1021***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G2PD-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.F. Kelleher J.

Heard: May 12-15, 2008.

Judgment: June 5, 2008.

Docket: S034886

Registry: Vancouver

**[2008] B.C.J. No. 1021** | 2008 BCSC 699 | 168 A.C.W.S. (3d) 523

Between Veronica Ho, and William Ker, Plaintiffs, and Greater Vancouver Water District, and Greater Vancouver Regional District, Defendants

(32 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Judgments and orders — Summary judgments — Evidence — To dismiss action — No evidence motion by defendants dismissed — Plaintiff brought action for actual and potential damages due to unusually high river against operator of reservoir and dam and owner of riverbed and bank — While there was strong authority that plaintiff could not maintain claim for prospective damages arising from increased risk property would lose support in future and evidence of loss of support was questionable, plaintiff brought evidence of cracks in concrete wall — Not appropriate to examine evidence on this motion, its existence was sufficient to dismiss motion.**

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| Motion by defendants to have plaintiff's action dismissed on the basis of no evidence. The plaintiff owned a home on a river bank and, on the nights in question, the river rose to an unusually high level. The plaintiff argued this rising water caused actual and potential damage. One defendant operated a dam and reservoir upstream from the plaintiff's property and the other defendant owned the land adjacent to the plaintiff's, including the river bed and bank. The plaintiff sought damages for ***negligence*** and a mandatory injunction to allow the plaintiff to enter the defendants' property to restore support or to require the defendants to undertake the necessary repairs. The plaintiff argued that the first defendant was negligent in allowing the water to rise and the second defendant was negligent in not promptly restoring damage. The plaintiff deposed that after the incident, he noticed cracks in a concrete strip on his property edge that had not been there before. The defendant argued that there was no evidence linking the cracks to the water rising and that even the plaintiff's expert had admitted there had been no loss of support. The plaintiff argued he was at risk for future damage.  HELD: The motion was dismissed.  There was strong authority that the plaintiff could not maintain a claim for prospective damages arising from an increased risk that the property may lose support in the future. There was also no evidence of grave damage that would appear to justify a mandatory injunction. However, the plaintiff had adduced evidence of cracks in the concrete. While the inference the plaintiff was attempting to draw between the cracks and the damages seemed unlikely, it was not appropriate to weigh the evidence on this motion. The mere evidence of the cracks was sufficient to dismiss the motion. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Rules, B.C. Reg. 221/90, Rule 40(8)

**Counsel**

Counsel for the Plaintiffs: J.B. Melville.

Counsel for the Defendants: T.R. Darby.

[Editor's note: A corrigendum was released by the Court June 9, 2008; the correction has been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **S.F. KELLEHER J.** |

**1**   The plaintiffs' home is on the south bank of the Capilano River in the District of North Vancouver. During the evening of March 12 and the morning of March 13, 2003, the river rose to an unusual extent. The plaintiffs claim that the high water caused both actual and potential damage, and have thus initiated these proceedings.

**2**  The defendant Greater Vancouver Water District operates the Cleveland Dam in the Capilano River and a reservoir upstream of the dam, known as Capilano Lake. The dam and the reservoir are upstream of the plaintiffs' home.

**3**  The defendant Greater Vancouver Regional District ("GVRD") owns the land immediately adjacent to the north of the plaintiffs. This includes the riverbed and the riverbank.

**4**  Before March 12 and 13, there was a wooden deck located to the north of the plaintiffs' property line, on the GVRD's property, overlooking the river. The deck was built by the previous owner of the plaintiffs' property.

**5**  There was also a small retaining wall, on the GVRD's property, which the previous owner had erected. The wall was located north of the wooden deck.

**6**  The high water event of March 12 and 13 resulted in the destruction of the retaining wall in the river. It also resulted in the removal of the wooden deck and a substantial portion of the south bank of the river adjacent to the plaintiffs' property.

**7**  The damage does not threaten the house itself. The closest part of the house is approximately 20 feet from the north property line.

**8**  This is a no-evidence motion by the defendants. It is brought pursuant to Rule 40(8) of the ***Supreme Court Rules***, *B.C. Reg. 221/90*:

No evidence motion

At the close of the plaintiff's case, the defendant may apply to have the action dismissed on the ground that there is no evidence to support the plaintiff's case.

**9**  The plaintiffs' case is set out in paragraphs 30, 31 and 31.1 of their statement of claim.

1. Erosion of the south bank of the Capilano River and continuing subsidence within the GVRD Property has removed the natural support for the Ho Property.
2. Portions of the landscaping improvements on the Ho Property have been damaged as a result of the loss of support. The concrete landscaping strip located within the Ho Property has cracked and/or separated in several places and some of the other landscaping improvements have been lost.

31.1. The loss of natural support and damage to the Ho Property were caused by the ***negligence*** of the Defendants. Alternatively the loss of natural support and damage to the Ho Property were caused by nuisance for which the Defendants are liable. In the further alternative, the Defendants are liable for the loss of natural support and damage to the Ho Property pursuant to the rule in *Rylands v. Fletcher*.

**10**  The plaintiffs allege ***negligence*** on the part of the Greater Vancouver Water District in permitting the high water level to occur, in not taking immediate steps to stop it and in failing to repair or restore the bank. The plaintiffs allege ***negligence*** on the part of the GVRD in not promptly restoring or repairing the south bank of the river adjacent to the plaintiffs' property.

**11**  The plaintiffs seek damages as well as a mandatory injunction requiring the defendants to permit the plaintiffs to enter the GVRD property to construct works to provide support to the whole property or alternatively, a mandatory injunction requiring the defendants to undertake all reasonable measures to restore support to the whole property.

**12**  The plaintiff William Ker gave evidence about damage which he had observed on the property. There is a concrete strip on the south side of the north property line. It is four inches thick and 12 inches wide. The strip is cracked in three places.

**13**  Mr. Ker's evidence is that he did not look at the concrete strip at the time of the high water. He said that in early April 2003 he inspected the property to determine whether an insurance adjuster had missed anything. He noticed the cracks in the concrete for the first time. He noted in particular that at one of the three cracks the concrete strip had moved. This third crack resulted in the concrete being out of alignment by approximately three inches. That is, the concrete strip was almost three inches higher at the crack than the rest of the strip.

**14**  Mr. Ker's evidence is that he regularly ran the lawn mower along this strip on a regular basis. He would have noticed the cracks if they had occurred earlier.

**15**  Counsel for the plaintiff invites the court to infer from Mr. Ker's evidence that the damage to and displacement of the concrete strip were caused by a loss of support.

**16**  However, the defendant argues there is simply no evidence that the cracks were caused by any loss of support or that the displacement at the third crack was caused by loss of support. In fact, the only evidence of loss of support is to the opposite effect. Timothy Smith, the engineering geologist who gave expert evidence on behalf of the plaintiffs, testified in cross-examination that there has been no loss of support to the plaintiffs' property to date.

**17**  This application is made based on the defendants' assertion that there has been no evidence of any loss of support. That is to say, the plaintiffs have suffered no damage.

**18**  On an application under Rule 40(8) it is not my role to evaluate the evidence. It is only to determine whether there is any evidence capable of supporting the plaintiffs' claim: ***Roberge v. Huberman***, [*1999 BCCA 196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1DS-00000-00&context=), [*62 B.C.L.R. (3d) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1DS-00000-00&context=).

**19**  Counsel for the defendants argues that there is no basis for the inference that loss of support has caused the damage to the concrete strip. The only evidence about loss of support is that of Mr. Smith. He testified that there has not been any.

**20**  The plaintiffs argue that even if there is determined to be no damage, the plaintiffs' property is now at the risk of damage. It is not fair that they be denied relief.

**21**  There is strong authority, however, that one may not maintain a claim for prospective damages arising from an increased risk that the property may lose support in the future.

**22**  A claim for loss of support requires the existence of actual damage. In ***Dalton v. Henry Angus & Co.*** (1880-81), 6 A.C. 740 (H.L.), Lord Blackburn stated at page 808:

It is, I think, conclusively settled by the decision in this House in *Blackhouse v. Bonomi* that the owner of land has a right to support from the adjoining soil; not a right to have the adjoining soil remain in its natural state (which right, if it existed, would be infringed as soon as any excavation was made in it); but a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support.

**23**  Similarly, in ***West Leigh Colliery Co. v. Tunnicliffe & Hampson Ltd.***, [1908] A.C. 27 (H.L.), Lord McNaughton stated:

It is undoubted law that a surface owner has no cause of action against the owner of a subjacent stratum who removes every atom of the mineral contained in that stratum, unless and until actual damage results from the removal. If damage is caused, then the surface owner "may recover for that damage," as Lord Halsbury says in the *Darley Main Colliery* case "as and when it occurs." The damage, not the withdrawal of support, is the cause of action.

**24**  The court has jurisdiction under ***The Chancery Procedure Amendment Act, 1858*** (***Lord Cairns' Act***) (U.K.), 1858 21 & 22 Vict. C. 27 (in force in British Columbia by virtue of s. 2 of the ***Law and Equity Act***, *R.S.B.C. 1996, c. 253*) to award prospective damages in lieu of an injunction: ***Rombough v. Crestbrook Timber Ltd.*** [*(1966), 57 D.L.R. (2d) 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G20W-00000-00&context=), [*55 W.W.R. 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G20W-00000-00&context=) (B.C.C.A.). However, this jurisdiction only arises where the plaintiff has presented a case where a mandatory injunction could have been made on a *quia timet* basis in the case of future or threatened injury.

**25**  There is no evidence here to justify a mandatory injunction. A mandatory injunction will only be granted where there is a strong probability on the facts that grave damage will occur in the future: ***Bullock Holdings v. Jerema*** (1998), [*[1998] B.C.J. No. 142*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1DN-00000-00&context=) (B.C.S.C.).

**26**  There is no evidence of grave damage here. The plaintiffs' experts indicate that there could be loss of support and in the future subsidence to part of the plaintiffs' property. However, there is no suggestion that this subsidence would come anywhere near the plaintiffs' home.

**27**  A *quia timet* injunction also requires the plaintiff to establish on the balance of probabilities that there is an imminent threat of danger or damage to property. In ***Canadian Pacific Ltd. V. Highland Valley Cattle Co.***, [*[1990] B.C.J. No. 1860*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2F9-00000-00&context=) (B.C.C.A.) (QL) the Court of Appeal explained the meaning of "imminent" at paragraph 45:

45 The principles expressed in Spry "*The Principles of Equitable Remedies*" (3d) 1984 at pp. 360-365, were relied upon by the trial judge. To justify granting a *quia timet* injunction, the plaintiff must establish on the balance of probabilities that there is an *imminent* threat of danger of damage to Canadian Pacific's property. "*Imminent*" does not necessary imply immediacy, but it does suggest the virtual inevitability of an event.

**28**  The requirements for a no evidence motion to succeed were explained in ***Roberge v. Huberman***, *supra*. A plaintiff can be non-suited when the plaintiff fails to call evidence on an essential ingredient of the case. See paragraph 18.

**29**  However, the role of the trial judge is a limited one in an application of this nature. The question is not whether the evidence meets some minimum standard. The task of a trial judge on such a motion is not to evaluate the quality of the evidence. Rather, the judge must decide whether there is evidence in support of the plaintiff's claim. See ***317159 B.C. Ltd. v. C.A. Boom Engineering***, [*[1990] B.C.J. No. 2699*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2VV-00000-00&context=) (B.C.C.A.) (QL).

**30**  Is there any evidence of damages? Mr. Ker's evidence is that the concrete strip has cracked in three places and that one part of the strip is out of alignment. The plaintiffs argue that one can infer this was caused by the high water event.

**31**  I conclude that in light of this evidence, the no evidence motion must be dismissed. It cannot be said there is no evidence of damage to the plaintiffs' property. Mr. Smith's evidence appears to be inconsistent with the inference the plaintiffs invite me to draw. But that is a matter of assessing the evidence. That is not my function in a no evidence motion.

**32**  For these reasons, the application to dismiss the plaintiffs' action is dismissed.

S.F. KELLEHER J.

\* \* \* \* \*

Corrigendum

Released: June 9, 2008

Please be advised that the attached Reasons for Judgment of Mr. Justice S. Kelleher dated June 5, 2008 have been edited.

1. "On the front page, the title of the presiding judge should read:

The Honourable **Mr. Justice** S. Kelleher

**End of Document**

[***Johnson v. British Columbia (Attorney General), [2019] B.C.J. No. 845***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5W4G-7M61-JB7K-207M-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

D.M. Masuhara J. (In Chambers)

Heard: April 1-2, 15, 2019.

Judgment: May 13, 2019.

Docket: S148500

Registry: Vancouver

**[2019] B.C.J. No. 845** | 2019 BCSC 743 | 25 B.C.L.R. (6th) 377 | 2019 CarswellBC 1298

Between Errol Patrick Johnson and Cal Dean Kane, Plaintiffs, and Her Majesty the Queen in Right of The Province of British Columbia as represented by the Attorney General of British Columbia and Roderick David MacDougall, Defendants, and Roderic David MacDougall, Third Party

(69 paras.)

**Case Summary**

**Constitutional law — Canadian Charter of Rights and Freedoms — Remedies for denial of rights — Motion by British Columbia to strike parts of claim allowed — Plaintiffs claimed damages arising from alleged sexual assaults by corrections officer while they were incarcerated — Pleadings alleged that wrongs were torts and breaches of Charter — British Columbia established, as countervail, alternative remedies that rendered Charter damages sought unnecessary — Compensatory, vindication and deterrence aspects of relief sought could be found within tort damages.**

**Constitutional law — Constitutional proceedings — Practice and procedure — Pleadings — Motion by British Columbia to strike parts of claim allowed — Plaintiffs claimed damages arising from alleged sexual assaults by corrections officer while they were incarcerated — Pleadings alleged that wrongs were torts and breaches of Charter — British Columbia established, as countervail, alternative remedies that rendered Charter damages sought unnecessary — Compensatory, vindication and deterrence aspects of relief sought could be found within tort damages.**

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| Motion by British Columbia to strike parts of the claim. The plaintiffs claimed damages arising from alleged sexual assaults by a corrections officer while they were incarcerated. The pleadings alleged that the wrongs were torts and breaches of the Charter and fiduciary duties. British Columbia argued that the Charter claims should be struck because tort damages were available and that the fiduciary duty claims should be struck because it did not owe fiduciary duties to inmates.  HELD: Motion allowed in part.  British Columbia established, as a countervail, alternative remedies that rendered the Charter damages sought unnecessary. The damages sought reflected those that were typically sought in a personal injury action. The pleaded consequences of the sexual assaults were the same as the Charter breaches. The impacts on the plaintiffs did not differ as between the tort and Charter wrongs. The compensatory, vindication and deterrence aspects of the relief sought could be found within tort damages. The question of whether a fiduciary duty existed deserved examination through a trial. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 7, s. 12, s. 24, s. 24(1)

Constitutional Question Act, [*R.S.B.C. 1996, c. 68, s. 8*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FJM6-61S3-00000-00&context=)(2)(b)

The Correction Act, R.S.B.C. 1979, c. 70, s. 2(2)

Court Order Interest Act, *RSBC 1996, c. 79*,

Crown Proceeding Act, [*R.S.B.C. 1996, Chapter 89, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-JG59-220D-00000-00&context=)

Supreme Court Civil Rules, Rule 6-1(1)(b)(ii), Rule 7-1(1), Rule 9-5, Rule 11-6

**Counsel**

Counsel for the Plaintiffs: A.A. Vecchio, Q.C., K.N. Ramji.

Counsel for the Defendants, Her Majesty the Queen in Right of the Province of British Columbia: A.D. Gay, Q.C., A. Greer, L. Martz, S. Lacusta.

Counsel for the Respondent, The Attorney General of British Columbia: P.D. Ameerali.

**Reasons for Judgment**

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

**I. INTRODUCTION**

**1**  These reasons deal with an application by the Province ("HMTQ BC") and the Attorney-General for British Columbia ("AGBC"), to strike portions of the plaintiffs' amended notice of civil claim ("ANOCC"), Notice of Constitutional Question and expert report (the "Dumond Report") relating to claims for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and breach of fiduciary duty.

**2**  The defendant Mr. MacDougall did not appear though duly served with the notices of application.

**3**  The plaintiffs claim damages arising from alleged sexual assaults or abuses by the defendant MacDougall while the plaintiffs were incarcerated at the Lower Mainland Regional Correctional Centre ("Oakalla") in Burnaby, B.C. Mr. MacDougall was a corrections officer, a classification officer, and/or a special services officer employed by Corrections Branch of HMTQ BC and was at the material times located at Oakalla. The sexual assaults and abuses are stated to have occurred in relation to Mr. Johnson in 1986 and 1987; and in 1987 in relation to Mr. Kane.

**4**  The applicants' position is that *Charter* damages are not available in this case as the plaintiffs have a sufficient remedy under the tort claims expressed in their pleadings; and that the pleadings and passages in the Dumond Report relating to post-sexual assault events should be struck as they are premised on an expanded view of the damages under the *Charter*. The Dumond Report addresses deficiencies in HMTQ BC's conduct and standard of care over the entire career of Mr. MacDougall.

**5**  The applicants submit that the plaintiffs through the impugned pleadings and passages seek to put on trial alleged acts and omissions of the government for the entire twenty-one year period of Mr. MacDougall's employment with the Corrections Branch. This is acknowledged by the plaintiffs. It is submitted that this is inappropriate as there is no nexus between the plaintiffs' specific claims and the post-assault period. The plaintiffs do not claim they suffered harm or damage beyond the alleged assaults which took place in the 1986-1987 period. The applicants submit that plaintiffs' approach is fundamentally misconceived and risks making the trial and preparation for trial far lengthier and more expensive than ought to be the case and thus has prompted the subject applications.

**6**  The applicants also argue that the ANOCC does not support the existence of a fiduciary duty.

**7**  The plaintiffs on the other hand are critical of the defendants' procedural objections and characterize the actions as delaying tactics that are an abuse of process among other problems and serve only to supress the rights of the plaintiffs to assert their *Charter* claims and shield HMTQ BC from any meaningful scrutiny of its reckless disregard for the well-being of inmates by allowing Mr. MacDougall to sexually assault over 200 men over his 21-year career with the Corrections Branch. They submit this is one of the most long-term and systematic breaches of *Charter* rights in Canadian history. The functional *Charter* purposes of vindication a deterrence, it is argued, require the examination of the acts and omissions of the defendants over the entire period. They submit that the most recent amendments which added the *Charter* claims were consented to by previous counsel for the Province and question how the motions to strike can now be heard.

**8**  I have attached the ANOCC filed November 20, 2018 and Notice of Constitutional Question. The specific passages sought to be struck are:

1. Paragraphs 8(b) to (e), 32 and 33 of Part 1, paragraph 8 of Part 2, and paragraph 3 of Part 3 of the ANOCC;
2. The Amended Constitutional Question Act Notice, also known as the Notice of Constitutional Question or "NCQ", be struck;
3. In the alternative, that paragraphs 9, 10, 17 and 18 of the NCQ be struck to the extent that they purport to ground a claim for *Charter* damages arising from events which transpired after the alleged *Charter* breaches;
4. In relation to the claim that HMTQ owed the plaintiffs fiduciary duties the following from the ANOCC:
5. paragraph 25 of Part 1;
6. the words "and in breach of their fiduciary and other duties" in paragraph 28 of Part 1;
7. the words "and in breach of its fiduciary duties" in paragraph 29 of Part 1; and
8. the words "the breaches of fiduciary duties" in paragraph 34 of Part 1;
9. The report of Robert Dumond dated November 13, 2018, and delivered by the plaintiffs as an expert report pursuant to Rule 11-6 (the "Dumond Report") be struck;
10. In the alternative, that all passages of the Dumond Report addressing the defendants' conduct and standard of care for the period after the alleged abuses suffered by the plaintiffs be struck; and in particular:
11. paragraphs 6 to 22 of the "Assumed Facts";
12. all of part III;
13. those parts of part V that address standards of care or government conduct after the year 1987;
14. all of part VI; and
15. those parts of the Conclusion that address standards of care or government conduct after the year 1987.

**9**  This case is one of many that are working their way through our court. There have been approximately 200 men who have filed civil claims against Mr. MacDougall alleging sexual assault while they were inmates at various institutions where he was employed. Several cases have either been settled or gone onto adjudication in our court and been proven or denied. I am advised that the latest of the wrongs alleged, not the present action, are said to have been committed in 1996 or 1997, which is just prior to the end of Mr. MacDougall's employment.

**10**  I have been the case management judge for many of the outstanding actions since 2008. The assignment originally had eleven actions. Mr. Ramji now represents approximately 60 plaintiffs who have brought actions against HMTQ BC and Mr. MacDougall. There were three prior plaintiff's counsel before him. I observe here that the plaintiffs represented by Mr. Ramji have not sought relief through a class action proceeding. I do not know if the many plaintiffs he represents could come within the scope of a class proceeding; however, the submissions made by plaintiffs' counsel in the hearing seem to reflect ideas that relate to such proceedings; particularly in respect to assessing and distributing damages.

**11**  Through the management process, counsel have been able to combine two or three actions that have logical connections as to time and location so that they can be heard at the same time. That exercise has reduced the number of trials to about twenty-five trials. The present action is the result of these efforts and is said by both HMTQ BC and plaintiffs' counsel to represent a good case from which a court determination could assist in reducing issues for the remaining cases in the queue.

**12**  The alleged wrongs took place years ago and the hope was to get trials underway. There is some urgency as witnesses are getting older and frailer with the resultant effects on their recall. Some witnesses are no longer available or alive. Insofar as the current case, there were originally three plaintiffs; unfortunately one passed away recently. Trial dates for several have been fixed.

**13**  The trial of the present case was set to commence February 2019 and run for six weeks. However, as result of the plaintiffs' amendments to the notice of civil claim to include *Charter* breaches and damages as well as my production order, the trial has been adjourned to September 2019 bumping back other MacDougall trials.

**14**  With respect to the sexual assaults and abuses alleged, HMTQ BC acknowledges it is vicariously liable for such wrongs, if proven.

**15**  I will start with the issue raised by the plaintiffs in respect to the question of whether the applicants have standing to bring on the subject application.

**II. DO THE APPLICANTS HAVE STANDING?**

**16**  The plaintiffs question the ability of the defendants to bring on the subject application to strike in light of the fact that former counsel on behalf of HMTQ BC had consented to the amendments. The plaintiffs assert the motions before me are an abuse of process along with other procedural wrongs. They also submit that an agreement with the former counsel precludes the application.

**17**  I note first that it was only HMTQ BC that consented to the amendments. The AGBC is a separate party to these proceedings and was not a party until the amendments were filed and therefore could not have consented. In any event, the plaintiffs and Province were fully aware that the AGBC objected to the consent order and amended pleadings prior to filing the order and amendments to pleadings. As to any agreement by former counsel for HMTQ BC that HMTQ BC would not bring on a motion to strike, it has not been established.

**18**  More substantively, the consenting to an amendment to pleadings does not bar the consenting party from arguing the legitimacy of the pleading. See: *Van Halderen v. Campney & Murphy*, [*[1997] B.C.J. No. 3138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1YT-00000-00&context=) (BCSC) at paras. 12-16; *Beaver v. Hill*, [*[2017] O.J. No. 6409*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R61-MM11-FJTD-G2W5-00000-00&context=) (ONSC) at para. 131; *Bank of Montreal v. Peddle*, [*[1998] A.J. No. 1470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-FCYK-21RT-00000-00&context=) (ABQB) at paras. 23-24; and *Tory Control systems Inc. v. Rotork Controls (Canada) Ltd.*, [*[1992] O.J. No. 1764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCS1-F8SS-624W-00000-00&context=) (OCJ) at 3.

**19**  Insofar as the plaintiffs' reliance on my production order of December 28, 2018, which required certain disclosure in respect to the pleadings relating to post-assault wrongs; I do not find that the defendants have engaged in a collateral attack or are subject to issue estoppel. Those principles are not applicable here. The production order is not being challenged and though the challenge to the pleadings here may impact that order, the clear focus of the applicants here is on the validity of the impugned pleadings. In terms of issues, they are not the same, the production order did not address the validity of the pleadings; and importantly, it was interlocutory, subject to variation on a material change, not final. At the time of my order, I expressly stated that the order was to do with production and not as to admissibility. Further, there was the expectation that an application to strike would be brought forward.

**20**  In terms of the plaintiffs' assertion of abuse of process I recognize the doctrine is a flexible one. The plaintiffs question the motives of the applicants. I agree with the submission of HMTQ BC that the doctrine of abuse of process does not concern the motivations of the parties, but rather whether there is an improper attempt to impeach a judicial finding in a manner which harms the integrity of the adjudicative process: *Toronto (City) v. Canadian Union of Public Employees (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=) at para. 46 and 51. I do not see any improper motive nor an attempt to impeach a judicial finding that harms the adjudicative process. The claim for *Charter* damages is a recent claim, the amendments were filed only a short while ago, and AGBC at an early stage expressed his concerns regarding the pleadings as well as requiring a proper Notice of Constitutional Question, including notice to the federal Attorney-General. This had not been done and is a necessary requirement. My view is that the subject applications have the potential to provide efficiencies and clarity for the case at hand and potentially other cases under management.

**21**  Having rejected the plaintiffs' submission on standing, I turn to the question of whether it is appropriate to consider the motions to strike given *Charter* breaches are involved and the nature of the wrongs.

**III. IS IT APPROPRIATE TO CONSIDER A MOTION TO STRIKE FOR *CHARTER* DAMAGES?**

**22**  The plaintiffs submit that this case involves egregious conduct against a vast number of inmates and carried on for the length of Mr. MacDougall's career with the Corrections Branch; and that HMTQ BC has direct and indirect culpability for this.

**23**  The plaintiffs submit that the motions to strike undermine the clear need for robust *Charter* protection for those who are most vulnerable in our society: individuals who are incarcerated. They cite the recent comment of Justice Perell in *Brazeau v. Attorney General (Canada)*, [*2019 ONSC 1888*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VRV-C7T1-JWXF-21XX-00000-00&context=), a class action dealing with mentally ill inmates in administrative segregation, reflecting the importance of the role of the judiciary in respect to the *Charter*:

The judiciary is the guardian of the Constitution and the *Charter* should be used for the "unremitting protection of individual rights and liberties": *Hunter v. Southam Inc.*,63 per Justice Dickson, as he then was.

**24**  They argue, as stated in *Henry v. B.C. (A.G.)*, [*[2015] 2 S.C.R. 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HBF-Y861-FGRY-B2CX-00000-00&context=) at para. 120, that the question of whether there are remedies other than s. 24(1) that adequately meet the need for compensation, vindication and/or deterrence requires an individualized inquiry and not an abstract one. The plaintiffs emphasize the distinction between *Charter* damages being a public law remedy and tort damages as being a private law remedy. The former arising from liability found against the state and not individual actors. The plaintiffs concede there is overlap between the claim for tort damages and *Charter* damages; however, argue that vindication and deterrence are not elements of tort damages and enlarge the scope of relevancy and quantum; and since the law of *Charter* damages is still evolving the impugned pleadings should be permitted and the subject motions should be dismissed. In furtherance of this, they submit that the third step in the *Charter* damages analysis, i.e., whether there are countervailing considerations that would make it inappropriate or unjust to award damages under s. 24(1), can only be properly considered by the court at the conclusion of the trial, so that the Court can assess the nature and the harm of the *Charter* breach suffered by each plaintiff and the extent and level of the states' misconduct; and whether the functional purposes of damages for compensation, vindication and deterrence can be met in tort alone. In support, the plaintiffs cite the trial decision of *Henry v. B.C. (A.G.)*, [*2016 BCSC 1038*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5JYW-JPX1-JC0G-61MS-00000-00&context=) where the relief granted came only after the conclusion of the trial.

**25**  The plaintiffs note that the *Charter* relief sought in Part 2 of the ANOCC is broad, it states:

1. Damages or such other remedy as the Court may consider just and appropriate pursuant to Section 24 of the *Charter*;
2. such further and other relief as to this Honourable Court may seem meet.

**26**  It has been clear that the focus of the plaintiffs since inception through the most recent claim of Charter breaches has understandably been monetary relief. Plaintiffs' counsel throughout the hearings leading up to the present referred solely to monetary relief--levels at the millions of dollars, such as in *Henry*. Though in closing submissions, plaintiffs' counsel referred to the potential that the court at the end of the evidence may decide that declaratory relief under the *Charter* might help to advance the goals of vindication and deterrence as was done in *A.H. v. Fraser Health Authority*, [*2019 BCSC 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VHV-R691-FK0M-S1HD-00000-00&context=). However, in that case declaratory relief was what was being sought. There has been no reference to nor interest expressed in non-monetary relief in this case. Counsel also cited *Brazeau* where Perell J. crafted an award for vindication and deterrence of $20 million for additional mental health or program resources for structural changes to penal institutions. The award he made was non-compensatory and was calculated as aggregate damages for an entire class under class proceedings legislation. There was no concern about double compensation as the fund was separate and apart from the individualized inquiries of class members claims. *Brazeau*, however, was a class action.

**27**  Counsel for the plaintiffs advised at the end of closing argument that instructions to withdraw the tort claims and claim solely for *Charter* damages would be sought. This, in my view, will require careful thought given the decision in *Quinn v. B.C.*, [*2018 BCCA 320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T2X-72H1-JNJT-B2V0-00000-00&context=) where the court held that the pleadings related to a *Charter* breach was, in effect, a pleading of a tort, and that tort claim would adequately achieve the objectives that would be served by an award of damages under the *Charter*.

**28**  I am not persuaded by the plaintiffs' argument that the cases do not support the ability to bring on motions to strike in relation to *Charter* claims. The plaintiffs provided no case law to support their position. In my view, plaintiffs' arguments seem to be focused on step 2 of the test set out in *Vancouver (City) v. Ward*, [*[2010] 2 S.C.R. 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1HX-00000-00&context=), i.e., the functional purposes, see para. 36 below. The motions here are in regard to step 3, whether *Charter* damages are inappropriate in the face of countervailing factors. The statement from *Ernst v. Alberta Energy Regulator*, [*[2017] 1 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PVD-M721-JWJ0-G15G-00000-00&context=), at para. 26 is instructive:

*Ward* held that *Charter* damages will not be an appropriate remedy where there is an effective alternative remedy or where damages would be contrary to demands of good governance. These considerations, taken together, support the conclusion that the proper balance would be struck by holding that damages are not an appropriate remedy.

**29**  As is the statement in *Quinn* at para. 61:

[61] "Not every bare allegation claiming *Charter* damages must proceed to an individualized, case-by-case consideration of its particular merits": *Ernst v. Alberta Energy Regulator*, [*2017 SCC 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PVD-M721-JWJ0-G15G-00000-00&context=) at para. 26 (*per* Cromwell J., writing for himself and Karakatsanis, Wagner, and Gascon JJ.). Even if a claimant establishes that a *Charter* right is breached and that damages are functionally justified, the state may establish countervailing considerations that render s. 24(1) damages inappropriate or unjust. The range of countervailing considerations remains to be developed as this area of the law matures, but *Ward* identifies that the existence of alternative remedies and good governance concerns are two apparent countervailing considerations: *Ward* at para. 34.

[62] In my opinion, the existence of alternative remedies both in private law and through the operation of the *CFCSA* are both compelling countervailing factors that demonstrate the Respondents' claim for *Charter* damages has no reasonable prospect of success and should not consume scarce judicial resources by going to trial. As Moldaver J. identified in *Henry*:

[38] Where the state can show that another remedy is available to effectively address a *Charter* breach -- whether under the *Charter* or in private law -- a damages claim may be defeated at the third step of *Ward*. For instance, if a declaration of a *Charter* breach would adequately achieve the objectives that would otherwise be served by a damages award, then granting damages as well as a declaration would be superfluous, and therefore inappropriate and unjust in the circumstances [citations omitted].

**30**  Referring to *Charter* damages as a public law remedy and the crucial importance of the rights contained in the *Charter*, while true, does not bulletproof a claim from a motion to strike. The Supreme Court of Canada decision in *Ward* set out a framework for determining when such damages can be advanced. *Ward* does not create an exception to the established rules of court when it comes to *Charter* claims. It is clear that a motion to strike is an available and proper procedure when it come to claims based on a *Charter* breach. Countervailing factors can be raised at this stage. A review of cases such as the following demonstrates this: *Ernst* at para. 24-31, 153-165; *Quinn* at para. 61-73, leave to appeal ref'd; *McCreight v. Canada (Attorney General)*, [*2012 ONSC 1983*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFN1-FC6N-X0YF-00000-00&context=) at para. 75 varied but not on this point: [*2013 ONCA 483*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-F016-S263-00000-00&context=); and *Ouellette v. May*, [*2018 ABQB 596*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T1W-21S1-FFTT-X2YT-00000-00&context=) at paras. 48-49.

**31**  In terms of the plaintiffs' reference to an individualized non-abstract inquiry. I note that in *Henry*, the only relief sought before Hinkson C.J. was a *Charter* remedy. A private law remedy was not before Hinkson C.J. as there is in this case. An individualized inquiry is what will occur for the plaintiffs in respect to their tort claims in this case.

**32**  Given my finding that the motions have been properly brought, I turn now to consider the motions on their merits.

**IV. THE MOTIONS TO STRIKE - THE REASONABLE PROSPECT OF SUCCESS**

**33**  The test for striking pleadings is whether it is plain and obvious that the claim has no reasonable prospect of success. The motion is a tool that provides for effective and fair litigation. It promotes efficiency and correct results. However, the tool must be approached with care and should not be used to stifle evolutions in the law. The approach is to be a generous and err on the side of permitting a novel but arguable claim to proceed to trial. See: *R. v. Imperial Tobacco Canada Ltd.*, [*[2011] 3 S.C.R. 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XK-00000-00&context=).

**34**  For the purposes of this application, the applicants do not contest the plaintiffs' claims of having been assaulted as pleaded and that HMTQ BC is liable for that abuse, have a reasonable prospect of success. They object however, to the supplementing of those claims with *Charter* and fiduciary duty breaches. The applicants submit that the objected to pleadings do not seek to establish novel points of law but are claims which have already been decided by the courts unfavourable to the plaintiffs' position. As a result, the supplements have no reasonable prospect of success.

**35**  The applicants submit that the *Charter* claims should be struck on the ground that the availability of an alternative remedy - tort damages - makes the claim for *Charter* damages inappropriate, particularly as the acts or omissions said to constitute *Charter* breaches are concurrently pleaded as torts.

**36**  A claim for *Charter* damages involves four steps. The first is to establish a *Charter* breach. The second is to show that damages would serve one or more of the related functions of compensation, vindication, or deterrence. The third step allows the defendants to demonstrate "countervailing factors" which render constitutional damages inappropriate or unjust. Finally, if constitutional damages would be appropriate and just the matter turns to quantum. See: *Vancouver (City) v. Ward*, [*[2010] 2 S.C.R. 28*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1HX-00000-00&context=) at paras. 4, 33-34.

**37**  As noted, the applicants assume for this motion that the first two steps can be made out from the ANOCC. Their focus is on the third, the demonstration by the applicants of countervailing factors. In this case, the applicants submit that the availability of tort damages, is a countervailing factor. In *Ward*, it was held that while a "potential claim" in tort does not bar *Charter* damages, a "concurrent" action in tort, or other private law claim, does bar *Charter* damages where the result would be double compensation at para. 36.

**38**  The applicants submit that the consequences of the torts and ***negligence*** as pleaded by the plaintiffs both in a practical sense and substantively are identical to the consequences of the alleged *Charter* breaches. The applicants point out that all of the pleaded consequences of the alleged *Charter* breaches are identical to the pleaded consequence of the torts; consequences that had pleaded prior to the amendments adding a *Charter* claim. See paras. 34-39 of the ANOCC and also reproduced at para. 49 below.

**39**  It is also submitted that it is plain and obvious that HMTQ BC does not owe fiduciary duties to inmates at a provincial correctional facility.

**40**  The applicants also submit that even if the court declines to strike the *Charter* damages claim, those portions of the Notice of Constitutional Question which address the conduct of government after the alleged sexual assaults should be struck.

**41**  In addition, the applicants submit that the plaintiffs, through their Notice of Constitutional Question paragraphs 9, 10, 17, and 18, have attempted to make alleged conduct of HMTQ BC post the alleged wrongs against the plaintiffs relevant. The applicants note that the ANOCC contains no allegations relating to events that post-date the alleged wrongs by Mr. MacDougall in relation to the plaintiffs. There is no loss or damage alleged to have been suffered by the plaintiffs as a result of government conduct that post-dates the alleged sexual assaults. It is submitted that parts of the Notice of Constitutional Question which do not arise from the pleadings should be struck, particularly, if the noted paragraphs are intended to concern post-wrong events.

**42**  Likewise, they argue that an expert report, the Dumond Report, ordered by the plaintiffs which outlines various shortcomings of the corrections branch over Mr. MacDougall's 21 years (the "Dumond Report") should be struck, or at least those portions which address the conduct of government in the years following the alleged sexual assaults.

**43**  The objection of the applicants is that the plaintiffs' recent pleading amendments, the Notice of Constitutional Question, and the expert evidence seek to turn this case into something beyond what is appropriate as a matter of law. It is submitted that the plaintiffs appear to believe that by turning this action into a constitutional case they stand to get more money as they believe they can put years of post-abuse government conduct on trial even though they do not claim that they suffered harm or damage as a result of anything that happened after 1986-87. It is argued that the plaintiffs seek to turn the current proceeding into a wide-sweeping inquiry into the conduct of government over the totality of Mr. MacDougall's career. HMTQ BC submits that there is no legal support or practical justification for this approach.

**44**  The response of the plaintiffs were arguments that I have already mentioned including: the differences in function and purpose between public and private law; that constitutional remedies are far broader and flexible than private law remedies; that the question of damages and double compensation can only be properly assessed at the end of the evidence at trial; and that the stage 3 analysis of *Ward* cannot be done in the abstract. They stress the egregious nature of the wrongs of each defendant. They submit that to strike the pleadings:

...would prevent the Plaintiffs from exposing the full extent of the misconduct that allowed the breach in the first place and allowed MacDougall to remain a correctional officer for 21 years. This would prevent the Plaintiffs from introducing the very evidence that *Ward* identifies as critical to the quantification of a *Charter* damages claim, and it would also prevent the Plaintiffs from further advancing the principles for *Charter* damages that is explicitly contemplated by the decision in *Ward*.

1. To use a concrete example, the egregiousness of the breach of *Charter* rights in this case - and, in turn, the award needed to achieve the goals of vindication and deterrence - all depend on knowing the full extent of the specific and systemic failures on the part of the Crown that allowed MacDougall's sexual predation to go uninvestigated and ignored for such a long period. If each Plaintiff sexually assaulted by MacDougall can only access documents that would prove or disprove the specific *Charter* breach in relation to each Plaintiff's sexual assault, none of the actions would allow the Court to assess the complete and full extent, and egregiousness, of the Crown's failure to protect its citizens' *Charter* rights. If the Court was restricted to making many separate and narrow *Charter* damages awards on a piecemeal basis in respect of all of MacDougall's sexual assaults (which would like be lower quantum awards as a result) the award would be unlikely to achieve the goals of vindication and deterrence.
2. *Ward* specifically requires the Court to consider the seriousness of the State's misconduct. The evidence from the whole MacDougall time frame, both pre- and post-assaults, is necessary, probative and required if the functional goals of vindication and deterrence are to be properly considered by the Court, Can this be done properly by the Court in a piecemeal analysis over 20 separate trials?

**45**  In my view, the position of the applicants must prevail.

**46**  The comment by the Supreme Court of Canada in *Ward* at para. 34 bears repeating here:

34 A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just". The Charter entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other Charter remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

[Emphasis added]

**47**  The circumstances in the present case are analogous to that in *Quinn* but are stronger, as the pleadings here concurrently allege that the wrongs are both breaches of the Charter and torts.

**48**  The damages sought in this case reflect those that are typically sought in a personal injury action: general, loss of opportunity, special, punitive, and aggravated. *Charter* damages under s. 24(1) are added to the end of the listing.

**49**  I also observe that in *Henry* (upheld on appeal see: [*2017 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R4H-S261-F7G6-62X0-00000-00&context=)), a case where only *Charter* damages were claimed at trial, Hinkson, C.J., applied the tort law's functional approach and held that the principle against double recovery as stated in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), applied to *Charter* damages. At para. 35 he stated:

While the allegations against the Settling Defendants and non-settling defendants were based upon different allegations of fault, the relief sought was essentially the same: compensation for a wrongful conviction and some 27 years of incarceration. I find that the results alleged to have occurred from the causes of action pleaded against the City and the Province were indivisible.

**50**  The result was that the settlement amounts received by Mr. Henry from the settling defendants were deducted from the award from trial.

**51**  In the present case, the pleaded consequences of the sexual assaults are the same as the *Charter* breaches. The impacts upon the plaintiffs of the alleged wrongs do not differ as between the tort and *Charter* wrongs. The consequences are stated as follows:

1. As A DIRECT RESULT AND CONSEQUENCE OF THE ASSAULTS, THE BREACHES OF FIDUCIARY DUTIES AND ***NEGLIGENCE*** OF THE DEFENDANTS AND EACH OF THEM, AND THE VICARIOUS LIABILITY OF THE DEFENDANT, PROVINCIAL CROWN, THE PLAINTIFFS HAVE SUSTAINED SEVERE PHYSICAL, PSYCHOLOGICAL AND EMOTIONAL INJURIES AND HAS SUFFERED INJURY, LOSS, DAMAGE AND EXPENSE AS A CONSEQUENCE THEREOF. THE PARTICULARS OF SUCH INJURY, LOSS, DAMAGE AND EXPENSE INCLUDE, BUT ARE NOT LIMITED TO, SOME OR ALL OF THE FOLLOWING:
2. feelings of shame, fear and loneliness;
3. loss of self esteem, self respect and self worth;
4. feelings of degradation;
5. loss of sleep and appetite;
6. impaired or diminished ability to deal with persons in authority;
7. impaired or diminished ability to trust others;
8. impaired or diminished ability to obtain and maintain normal, long-lasting friendships;
9. impaired or diminished ability to form and sustain intimate relationships with the opposite sex;
10. impaired or diminished ability to enjoy sexual relations;
11. impaired or diminished ability to enjoy and participate in recreational, social, athletic and/or employment activities;
12. impaired or diminished ability to deal with and/or control anger;
13. impaired or diminished ability to obtain and/ or maintain employment;
14. impaired or diminished ability to function when employed;
15. impaired or diminished emotional and intellectual development;
16. physical, emotional and psychological trauma;
17. emotional dysfunction including, but not limited to, post-traumatic stress disorder;
18. depression and anxiety;
19. development of suicidal thoughts;
20. suicidal attempts;
21. development of a sense of self-hatred;
22. development of feelings of insecurity;
23. requirement for ongoing psychological and psychiatric treatment and counselling;
24. sexual trauma and dysfunction;
25. addiction to alcohol and drugs;
26. personality change;
27. nightmares;
28. loss of opportunity to pursue or obtain an adequate education;
29. reduced prospect of future health, happiness and gainful employment; and
30. such further and other particulars as counsel may advise prior to trial.
31. The Plaintiffs have further suffered loss of career, professional, educational and employment opportunities as a result of the personal injuries sustained as a consequence of the Assaults. Without limiting the generality of the foregoing, the Plaintiffs have suffered loss of past income and will suffer loss of future income.
32. As a result of the injuries referred to herein, the Plaintiffs have suffered, and will continue to suffer, loss of enjoyment of life and a diminished quality of life.
33. As a result of the injuries referred to herein, the Plaintiffs have suffered, and will continue to suffer, special damages, injuries, loss and expense.
34. AS a result of the injuries referred to herein, the Plaintiffs have incurred, and continue to incur, expenses in obtaining psychiatric counselling, psychological counselling, or both, and treatment which will be required on both an ongoing and crisis basis.
35. As a result of the injuries referred to herein, the Plaintiffs have incurred, and continue to incur, expenses, the particulars of which will be provided as they become available and upon request prior to trial.

**52**  I agree with the applicants that in addition to the compensatory aspect of the relief sought for both tort and *Charter* breach, the aspect of vindication and deterrence, can be found within tort damages, if awarded. It has been held that tort law contains within it vindicating power, see for example: *Lahey Estate v. Craig*, [*[1992] N.B.J. No. 110*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW71-JN14-G13B-00000-00&context=) (NBQB) at p. 7 where the views of Justice Linden regarding the broad purpose of tort actions in Canadian Tort Law, fourth edition, (1988), at pages 12-16 were adopted:

By dramatizing in open court certain acts of "wrong-doing", tort law may condemn "anti-social elements" and at the same time "exalt the good". Slipshod manufacturers, inadequate drivers, and careless doctors are subject to judicial disapproval in open court. Even if a defendant is insured, even if he could not care less about the outcome, even if he refuses to alter his future course of conduct, the law publicly marks him as a "wrong-doer" and vindicates the plaintiff's complaint. In this way tort law, like criminal law, furnishes an opportunity to foster community feeling about common moral values. Obviously failure to conform to the standards of tort law is not as morally reprehensible as murder, rape, robbery or arson. Nevertheless, all of these acts are torts as well as crimes. Under either legal categorization, such conduct is unacceptable to right- thinking individuals. Under either description, it should be, and is, publicly denounced.

**53**  The vindication and deterrence function can also be seen as operating through punitive and aggravated damages which have been claimed in this case. See for example the well known cases of *Whiten v. Pilot Insurance Co.*, [*[2002] 1 S.C.R. 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=) at para. 94 and *Hill v. Church of Scientology*, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) at para. 196. The applicants point out that in cases of sexual assault, aggravated damages are built into the award of general damages, and those damages, along with the publication of reasons, can provide sufficient punishment and deterrence: *J.C. v. Shaw*, [*2011 BCSC 1529*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22P0-00000-00&context=) at para. 110 and 132. In this case the plaintiffs seek punitive and aggravated damages. Deterrence is also seen as an element of vicarious liability. See: *Bazley v. Curry*, [*[1999] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42M-00000-00&context=) paras. 32-33.

**54**  In *Henry*, Hinkson C.J. held that the *Charter* damages awarded based on the functional approach in tort law were sufficient for the purposes of vindication and deterrence. He held to do otherwise would be double recovery.

**55**  I agree with the applicants that the post-events pleadings are not appropriate. They take the court's task well-beyond the scope of the available damages and have the potential of appropriating the damages available to other plaintiffs who are either represented or not by present counsel. There is no nexus or causative link to the present plaintiffs and the post-event wrongs. There is no suggestion in the governing cases that *Charter* cases permit the court to expand its scope and engage as a commission of inquiry.

**56**  I also note that plaintiffs' counsel had no real response to how subsequent plaintiffs could receive damages for vindication and deterrence if an award is made to the present plaintiffs in respect to conduct which is beyond the specific wrongs to the present plaintiffs. I queried counsel if some form of aggregate damages, such as in class proceedings, was being sought and how distribution would be affected. There did not seem to be a meaningful response. I find nothing in the authorities that supports the expansion of a claim as proposed by the plaintiffs.

**57**  As to the plaintiffs' submissions as to the seriousness of the state conduct, they draw this from the Supreme Court of Canada's decision in *Ward* at para. 52 which I note was in relation to determining quantum and not countervailing factors.

**58**  I conclude that the applicants have established a countervail, i.e. alternative remedies, that renders the *Charter* damages sought unnecessary.

**59**  I turn now to whether it is plain and obvious that the claim for breach of fiduciary duty has no reasonable prospect of success.

**V. DOES THE ANOCC DISCLOSE A BREACH OF FIDUCIARY DUTY?**

**60**  The applicants submit that it is plain and obvious that the pleadings do not disclose a cause of action for breach of fiduciary duty. They cite Cromwell J. in *Alberta v. Elder Advocates of Alberta Society*, [*2011 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1WY-00000-00&context=) at para. 28 that "vulnerability alone is insufficient to support a fiduciary claim" and rely upon the first requirement to establish a fiduciary duty set out at para. 30; namely, that the evidence must show that the alleged fiduciary gave an undertaking of responsibility (express or implied) to act in the best interests of a beneficiary. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake. The applicants rely upon paras. 37 and 44 of the case in which the court states that "the special characteristics of governmental responsibilities and functions means that governments will owe fiduciary duties in limited and special circumstances;" and that "the Crown's broad responsibility to act in the public interest means that situations which it is shown to owe a duty of loyalty to a particular person or group will be rare". See also: *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [*2012 SCC 71*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X221-00000-00&context=) at para. 124.

**61**  The applicants submit that in the present case, no facts are pleaded which could support a claim for the existence of a fiduciary duty owed by the defendants. They say that no facts are pleaded that HMTQ BC or its corrections officers gave an undertaking of responsibility to act in the best interests of a beneficiary, or that they had they had a statutory obligation to do so. They also argue that no facts are pleaded which could support the existence of a duty of loyalty as opposed to a duty of care nor facts that could support a claim that there was a "forsaking" by HMTQ BC of the interests of all others in favour of the interest of inmates. The applicants note that the applicable statute at the time, *The Correction Act*, R.S.B.C. 1979, c. 70 does not create any duties owed by the Corrections Branch to inmates, and certainly does not give rise to any duty of loyalty. On the contrary, it is noted that s. 2(2) of the said act says that the Corrections Branch is charged with "protecting the community".

**62**  In this regard, the applicants note two cases where the assertion of a fiduciary duty in a prison context was rejected by the courts: *Johnson v. Ontario*, [*2016 ONSC 5314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KK5-BC11-DY89-M0SB-00000-00&context=) and *Squires v. Canada (Attorney General)*, [*2002 NBQB 309*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-JPGX-S2HJ-00000-00&context=).

**63**  The plaintiffs in response rely upon the framework for identifying a fiduciary duty set out in *Frame v. Smith*, [*[1987] 2 S.C.R. 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23F8-00000-00&context=); namely, that Mr. MacDougall used his position, power, and discretion to exploit the vulnerability of the inmates to sexually assault them.

**64**  The plaintiffs' pleadings in respect to fiduciary duties are broad and overlap with the tort claims. I also note that *Frame v. Smith* was decided some years before *Elder*, that the circumstances of finding a fiduciary duty in respect to public institutions are stated to be rare, and that the tort claims including vicarious liability are more straight forward; however, I am not persuaded by the applicants' that a fiduciary duty claim has no reasonable prospect for success. The *Elder* facts are very different from the present. Both the *Johnson* and *Squires* cases are distinguishable. They are not of this jurisdiction. The former is about general conditions, overcrowding and supervision in a prison facility and the latter relates to violence between inmates. In the present case, the circumstances pleaded here are starker and direct - a corrections officer sexually assaulting inmates who he had a level of control over. I do not see how the applicants' forsaking of all other interests as argued by the applicants is a problem here. In my view, questions of whether a duty exists and the contents of such a duty deserve examination through a trial.

**65**  I now turn to the Dumond Report

**VI. DUMOND REPORT**

**66**  The Dumond Report covers the entirety of Mr. MacDougall's 21-year career with the Corrections Branch and that this is consistent with the pleadings in the ANOCC. The plaintiffs argue that the report is central to the issue in litigation, namely, the ***negligence*** of HMTQ BC over Mr. MacDougall's 21-year career. Further, the plaintiffs question the applicability of Rule 9-5 to strike an expert report.

**67**  Rule 9-5 is available for such an application and was applied by Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [*2016 BCSC 1781*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KWF-MK11-DY89-M40F-00000-00&context=). Given my determination above striking the *Charter* claims and the post-assault events, the applicants' alternative position for the striking of certain paragraphs from the report is approved.

**VII. CONCLUSION**

**68**  The applicants' application to strike the pleadings, Notice of Constitutional Question as well as certain passages of the Dumond Report as specified above is allowed.

**69**  If parties wish to address costs they should schedule an appropriate time to do so.

D.M. MASUHARA J.

\* \* \* \* \*

Amended pursuant to Supreme Court

Civil Rule 6-1(1)(b)(ii)

Original NoCC filed November 4. 2014

NO. S-148500

Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

ERROL PATRICK JOHNSON[,] and CAL DEAN KANE [and] [PETER UGESH MUNI][Editor's note: Text in brackets is struck out in the original.]

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE

OF BRITISH COLUMBIA as represented by the ATTORNEY

GENERAL OF BRITISH COLUMBIA and RODERICK DAVID

MACDOUGALL

DEFENDANTS

**AMENDED NOTICE OF CIVIL CLAIM**

**This action has been started by the Plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

1. file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
2. serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

1. file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
2. serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the Plaintiff,

1. if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
2. if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
3. if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
4. if the time for response to civil claim has been set by order of the court, within that time.

**Part 1: STATEMENT OF FACTS**

1. The Plaintiff, Errol Patrick Johnson, is unemployed, is currently residing in the City of Surrey, in the Province of British Columbia, and has an address for delivery at [Suite 8 1540 Springhill Drive, in the City of Kamloops. in the Province of British Columbia. V2E 2H1.] [Editor's note: Text in brackets is struck out in the original.] Donovan & Company, 6FL, 73 Water Street, Vancouver, BC, V6B 1A1
2. The Plaintiff, Cal Dean Kane, is unemployed, is currently residing in the City of [Cache Crook] Kamlopps, in the Province of British Columbia, and has an address for delivery at [Suite 8 1540 Sprighill Drive, in the City of Kamloops, in the Province of British Columbia, V2E 2H1.] Donovan & Company, 6FL, 73 Water Street, Vancouver, BC, V6B 1A1 [Editor's note: Text in brackets is struck out in the original.]

[3. The Plaintiff, Peter Ugesh Muni, is unemployed, is currently residing in the City of Richmond, in the Province of British Columbia, and has an address for delivery at Suite 8--1540 Springhill Drive, in the City of Kamloops, in the Province of British Columbia, V2E 2H1.] [Editor's note: Text in brackets is struck out in the original.]

[4.] [Editor's note: Text in brackets is struck out in the original.] 3. The Defendant, Her Majesty the Queen in Right of the Province of British Columbia, is the Provincial Crown of British Columbia, is represented by the Attorney General of British Columbia and has an address for delivery at P.O. Box 9278 Stn. Prov. Gov't., in the City of Victoria, in the Province of British Columbia, V8W 9J7 (the "Provincial Crown").

[5.] [Editor's note: Text in brackets is struck out in the original.] 4. The Defendant, Provincial Crown, is a department of the Provincial Government of British Columbia and is a proper Defendant to the within proceedings pursuant to Section 2 of the Crown Proceeding Act, *R.S.B.C. 1996, Chapter 89*.

[6.][Editor's note: Text in brackets is struck out in the original.] 5. The Defendant, Roderick David MacDougall ("MacDougall"), whose current occupation is unknown to the Plaintiff, was last known to reside at # 1101 - 6611 Southoaks Crescent, in the City of Burnaby, in the Province of British Columbia. V5E 4L5.

[7.] [Editor's note: Text in brackets is struck out in the original.] 6. At all material times, the Corrections Branch of British Columbia ("B.C. Corrections") was a governmental department within the Off ce of the Attorney General of Canada.

[8.] [Editor's note: Text in brackets is struck out in the original.] 7. At all material times, the Defendant, MacDougall, was employed by B.C. Corrections for the Defendant, Provincial Crown, as a Corrections Officer, a Classification Officer and/or a Special Services Officer.

[9.] [Editor's note: Text in brackets is struck out in the original.] 8. The Defendant, MacDougall, was employed by B.C. Corrections for the Defendant, Provincial Crown, as follows:

1. January 19, 1976, start date at Lower Mainland Regional Correctional Centre ("Oakalla") in the City of Bumaby, in the Province of British Columbia, as a Corrections Officer;
2. September 4, 1990, transfer to Fraser Regional Correctional Centre ("Fraser"), in the City of Maple Ridge, in the Province of British Columbia, as a Corrections Officer;
3. January 25,1993, temporary secondment to Surrey Justice Probation as a Probation interviewer;
4. July 12, 1993, transfer to Alouette River Correctional Centre ("Alouette River") as a Corrections Officer; and
5. June 20, 1997, resigned.

[10.] [Editor's note: Text in brackets is struck out in the original.] 9. The Defendant MacDougall was convicted of sexual assault, indecent assault and extortion on November 15, 2000 and was sentenced for 2 years less one day. The British Columbia Court of Appeal increased his sentence to 3 years and 7 months on April 3, 2001. The RCMP made recommendations for further criminal charges against the Defendant MacDougall in 2002 and again in 2010 but the Defendant the Provincial Government has declined on both further occasions to prosecute the Defendant MacDougall.

[11.] [Editor's note: Text in brackets is struck out in the original.] 10. At all material times, trie Defendant, Provincial Crown, through B.C. Corrections, was responsible for the creation, funding, operation and administration of all aspects of Oakalla, Fraser, Surrey Justice Probation and Alouette River (collectively, the "Institutions").

[12.] [Editor's note: Text in brackets is struck out in the original.] 11. At all material times, the Defendant, MacDougall, was in a position of authority and trust to the Plaintiff.

**Assaults suffered by each of the Plaintiffs**

**ERROL PATRICK JOHNSON**

[13.] [Editor's note: Text in brackets is struck out in the original.] 12. Between approximately 1986 and 1987, the Plaintiff, Errol Johnson, was incarcerated at Oakalla when he was approximately 21 or 22 years of age. As such, at all material times, he was a prisoner at Oakalla.

[14.] [Editor's note: Text in brackets is struck out in the original.] 13. While the Plaintiff, Errol Johnson, was incarcerated at Oakalla and was in the Defendant MacDougall's office on three occasions, the Defendant, MacDougall, sexually assaulted and/or abused him.

[15.] [Editor's note: Text in brackets is struck out in the original.] 14. The particulars of the sexual assaults and/or abuses committed by the Defendant, MacDougall, upon the Plaintiff, Errol Johnson, include, out are not limited to, the following:

1. one instances of sexual touching, groping and fondling of his genitalia by the Defendant, MacDougall; (b) three instances of forced fellatio upon him by the Defendant, MacDougall;
2. two instances of attempted digital penetration of his anus by the Defendant, MacDougall; and
3. such further and other particulars as counsel may advise prior to trial.

[16.] [Editor's note: Text in brackets is struck out in the original.] 15. The Plaintiff, Errol Johnson, says, and the facts are, that the Defendant, MacDougall, further breached his fiduciary duties and abused his fiduciary position in facilitating the Assaults by:

1. promising him a transfer to Ford Mountain Correctional Centre;
2. threatening that he could "make things worse" for him if he told anyone about the Assaults; and
3. such further and other particulars as counsel may advise prior to trial.

**CAL DEAN KANE**

[17.] [Editor's note: Text in brackets is struck out in the original.] 16. In approximately 1986, the Plaintiff, Cal Kane, was temporally incarcerated at Oakalla when he was approximately 18 years of age. As such, at all material times, he was a prisoner at Oakalla.

[18.] [Editor's note: Text in brackets is struck out in the original.] 17. While the Plaintiff, Cal Kane, was incarcerated at Oakalla and was in the Defendant MacDougall 's office on approximately twenty-five to thirty separate occasions, the Defendant, MacDougall, sexually assaulted and/or abused him.

[19.] [Editor's note: Text in brackets is struck out in the original.] 18. The particulars of the sexual assaults and/or abuses committed by the Defendant, MacDougall, upon the Plaintiff, Cal Kane, include, but are not limited to, the following:

1. twenty-five to thirty instances of sexual touching, groping, fondling and masturbation of his genitalia by the Defendant, MacDougall;
2. twenty-five to thirty instances of forced fellatio upon him by the Defendant, MacDougall;
3. twenty-five to thirty instances where the Defendant, MacDougall, attempted to force him to perform fellatio upon the Defendant, MacDougall
4. twenty-five to thirty instances where the Defendant, MacDougall, attempted to force him to touch, grope, fondle and masturbate the genitalia of the Defendant, MacDougall; and
5. such further and other particulars as counsel may advise prior to trial.

[20.] [Editor's note: Text in brackets is struck out in the original.] 19. The Plaintiff, Cal Kane, says, and the facts are, that the Defendant, MacDougall, further breached his fiduciary duties and abused his fiduciary position in facilitating the Assaults by:

1. promising him day passes;
2. promising him that he would get him into school
3. threatening that he would have other inmates physically harm, or kill, him if he told anyone about the Assaults; and
4. such further and other particulars as counsel may advise prior to trial.

[**PETER UGESH MUNI**] [Editor's note: Text in brackets is struck out in the original.]

[21. On or about April 17, 1986, the Plaintiff, Peter Muni, was temporarily incarcerated at Oakalla when he was approximately 19 years of age. As such, at all material time, he was a prisoner at Oakalla.] [Editor's note: Text in brackets is struck out in the original.]

[22. While the Plaintiff, Peter Muni, was incarcerated at Oakalla and was in the Defendant MacDougall's office on one occasion, the Defendant, MacDougall, sexually assaulted and/or abused him.] [Editor's note: Text in brackets is struck out in the original.]

[23. The particulars of the sexual assaults and/or abuses committed by the Defendant, MacDougall, upon the Plaintiff, Pater Muni, include, but are not limited to, the following:] [Editor's note: Text in brackets is struck out in the original.]

[(a) one instance of digital anal penetration upon him by the Defendant, MacDougall;] [Editor's note: Text in brackets is struck out in the original.]

[(b) one instance of forced fellatio upon him by the Defendant, MacDougall;] [Editor's note: Text in brackets is struck out in the original.]

[(c) such further and other particulars as counsel may advise prior to trial.] [Editor's note: Text in brackets is struck out in the original.]

[24. The Plaintiff, Peter Muni, says, and the facts are, that the Defendant, MacDougall, further breached his fiduciary duties and abused his fiduciary position in facilitating the Assaults by:] [Editor's note: Text in brackets is struck out in the original.]

[(a) promising him preferential treatment at Oakalla;] [Editor's note: Text in brackets is struck out in the original.]

[(b) promising him day passes;] [Editor's note: Text in brackets is struck out in the original.]

[(c) telling him that he could protect him from harm at Oakalla; and] [Editor's note: Text in brackets is struck out in the original.]

[(d) such further and other particulars as counsel may advise prior to trial.] [Editor's note: Text in brackets is struck out in the original.]

**The Assaults**

[25.] [Editor's note: Text in brackets is struck out in the original.] 20. The particulars of the sexual assaults and/or abuses committed by the Defendant, MacDougall, upon each of the Plaintiffs as set out above are hereinafter referred to as the Assaults.

[26.] [Editor's note: Text in brackets is struck out in the original.] 21. The Assaults were committed while each of the Plaintiffs were under the care and control of the Defendants, the Provincial Crown and MacDougall

[27.] [Editor's note: Text in brackets is struck out in the original.] 22. The Defendant, MacDougall, wrongfully, intentionally and without the consent of each of the Plaintiffs, committed the Assaults and each of the Plaintiffs have suffered grievous harm therefrom. Duties owed to the Plaintiffs by MacDougall

[28.] [Editor's note: Text in brackets is struck out in the original.] 23. The Plaintiffs say, and the facts are, that the Defendant, MacDougall, breached his fiduciary duties that were owed to each of them. The Plaintiffs further say that the Defendant, MacDougall, abused his fiduciary position by committing the Assaults against each of the Plaintiffs.

[29.] [Editor's note: Text in brackets is struck out in the original.] 24. The Plaintiffs further say, and the facts are, that the Defendant, MacDougall, further breached his fiduciary duties and abused his fiduciary position in facilitating the Assaults as set out above in paragraphs 15, 19 and 23.

**Duties owed by the Provincial Crown**

[30.] [Editor's note: Text in brackets is struck out in the original.] 25. The Plaintiffs say that the Defendant, Provincial Crown, owed fiduciary obligations to each of them as a consequence of the power and control it held over each of them, and due to their particular vulnerability at the Institutions, at the time of the Assaults.

[31.] [Editor's note: Text in brackets is struck out in the original.] 26. By virtue of the Defendant Provincial Crown's jurisdiction and position of power over the operation of the Institutions, and by virtue of its administrative functions, the Defendant, Provincial Crown, owed various duties to each of the Plaintiffs including, but not limited to, the following:

1. to use reasonable care in ensuring the safety, well-being and protection of the Plaintiffs from any person who might endanger or might be injurious to the health or well-being of the Plaintiffs while they were under its care;
2. to protect the Plaintiffs from sexual abuse and/or assault;
3. to protect the Plaintiffs from emotional and psychological abuse;
4. to protect the Plaintiffs from coercive and threatening conduct and/or intimidation;
5. to adequately, properly or effectively supervise the environment at the Institutions, and the conduct of its employees and/or agents, in order to ensure that no harm would befall the Plaintiffs;
6. to provide and maintain a safe environment for the Plaintiffs and, in particular, to provide an environment free from sexual assaults and threats;
7. to provide or implement standards of conduct for its employees and/or agents in order to ensure that no employee and/or agent would endanger the health or well-being of the Plaintiffs;
8. to provide and/or implement an organized program and/or system within the Institutions, through which sexual abuse could be recognized and/or reported;
9. to educate the Plaintiffs in the use of a system through which sexual abuse could be recognized and reported;
10. to use reasonable care in assigning supervisory roles for its employees and/or agents within the Institutions;
11. to use reasonable care in performing employee screening, including reference and/or background checks of its employees and/or agents who were expected to have contact with inmates, including the Plaintiffs;
12. to conduct any or reasonable investigations into the character, background or psychological profile of its employees and/or agents and, in particular, the Defendant, MacDougall; (m) to conduct any or reasonable investigations into the ability or qualifications of its employees andror agents, including the Defendant, MacDougall, to work with inmates;
13. to use reasonable care and diligence in investigating known or suspected allegations of sexual abuse that were taking place within the Institutions;
14. to take reasonable steps to prevent the Assaults when it knew, or ought to have known, that similar assaults were occurring;
15. to investigate allegations of sexual abuse and/or assaults by its employees and/or agents after such sexual abuses and/or assaults were reported;
16. to exercise reasonable supervision, direction or control over the Defendant, MacDougall, which would have disclosed the Assaults and similar assaults;
17. to report any known instances of sexual abuse and/or assault to the appropriate authorities, including the Royal Canadian Mounted Police; and
18. such further and other particulars as counsel may advise prior to trial.

[32.] [Editor's note: Text in brackets is struck out in the original.] 27. The Plaintiffs say that the Defendant, Provincial Crown, and other employees at the Institutions knew, or ought to have known, that the Defendant, MacDougall, was committing the Assaults against the Plaintiff and other inmates and thereby further breached the duties set out in paragraph 30 above.

[33.] [Editor's note: Text in brackets is struck out in the original.] 28. The Plaintiffs say that the Defendants, and each of them, were negligent and in breach of their fiduciary and other duties that were owed to each of the Plaintiffs.

[34.] [Editor's note: Text in brackets is struck out in the original.] 29. The Plaintiffs further say that the Defendant, Provincial Crown, as the employer of the Defendant, MacDougall, was both negligent and in breach of its fiduciary duties by:

1. failing to exercise proper control over its employees and/or agents, including the Defendant, MacDougall;
2. allowing the Defendant, MacDougall, to inflict harm and to sexually abuse and/or assault the Plaintiffs;
3. failing or neglecting to fulfil the duties set out in paragraph 25 above; and
4. such further and other particulars as counsel may advise prior to trial.

[35.] [Editor's note: Text in brackets is struck out in the original.] 30. The Plaintiffs say that the Defendant, MacDougall, by reason of his position within the Institutions, was an employee and/or agent of the Defendant, Provincial Crown as represented by B.C. Corrections, and, as such, the Defendant, Provincial Crown, is vicariously liable for the sexual abuse perpetrated by the Defendant, MacDougall, and for the injun'es and damages sustained by the Plaintiff as particularized herein.

[36.] [Editor's note: Text in brackets is struck out in the original.] 31. The Plaintiffs further say that the Defendant, Provincial Crown, is vicariously liable for the sexual abuse perpetrated by the Defendant, MacDougall, and for the injuries and damages sustained by the Plaintiffs as particularized herein, because the Defendant, MacDougall, was, among other things:

1. on duty and on the premises of his employer, the Defendant, Provincial Crown and/or B.C. Corrections, at the time of the Assaults; and
2. using his position of power, authority and influence as conferred by the Defendant, Provincial Crown, to have access to, and authority over, the Plaintiff so as to facilitate the Assaults.

***Charter* Breaches**

32. The Provincial Crown, through its employees and agents, knew or ought to have known, that the Defendant MacDougall was sexually assaulting the inmates in his care, including the Plaintiffs. Despite such knowledge, actual or constructive. the Defendant the Provincial Crown did not take any steps to investigate any rumors, allegations and complaints about the Defendant MacDougall and take any steps to prevent any further sexual assaults by the Defendant MacDougall.

33. The Provincial Crown's ***negligence***, breach of fiduciary duty and misconduct resulted in the Plaintiffs being sexually assaulted and such Assaults were also a breach of the Plaintiffs' constitutional rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*") as more particular set out herein:

a. such Assaults constitute an infringement of and deprivation of the right to life, liberty and security of the person as guaranteed by Section 7 of the *Charter*, and

[37.] [Editor's note: Text in brackets is struck out in the original.] b. such Assaults constitute cruel and unusual treatment or punishment, contrary to Section 12 of the Charter.

**Injuries to the Plaintiff**

[38.] [Editor's note: Text in brackets is struck out in the original.] 34. As a direct result and consequence of the Assaults, the breaches of fiduciary duties and ***negligence*** of the Defendants and each of them, and the vicarious liability of the Defendant, Provincial Crown, the Plaintiffs have sustained severe physical, psychological and emotional injuries and has suffered injury, loss, damage and expense as a consequence thereof. The particulars of such injury, loss, damage and expense include, but are not limited to, some or all of the following:

1. feelings of shame, fear and loneliness;
2. loss of self esteem, self respect and self worth;
3. feelings of degradation;
4. loss of sleep and appetite;
5. impaired or diminished ability to deal with persons in authority;
6. impaired or diminished ability to trust others;
7. impaired or diminished ability to obtain and maintain normal, long-lasting friendships;
8. impaired or diminished ability to form and sustain intimate relationships with the opposite sex;
9. impaired or diminished ability to enjoy sexual relations;
10. impaired or diminished ability to enjoy and participate in recreational, social, athletic and/or employment activities;
11. impaired or diminished ability to deal with and/or control anger;
12. impaired or diminished ability to obtain andfor maintain employment;
13. impaired or diminished ability to function when employed;
14. impaired or diminished emotional and intellectual development;
15. physical, emotional and psychological trauma;
16. emotional dysfunction including, but not limited to, post-traumatic stress disorder;
17. depression and anxiety;
18. development of suicidal thoughts;
19. suicidal attempts;
20. development of a sense of self-hatred;
21. development of feelings of insecurity;
22. requirement for ongoing psychological and psychiatric treatment and counselling;
23. sexual trauma and dysfunction;
24. addiction to alcohol and drugs;
25. personality change;
26. nightmares;
27. loss of opportunity to pursue or obtain an adequate education;
28. reduced prospect of future health, happiness and gainful employment; and
29. such f urther and other particulars as counsel may advise prior to trial.

[39.] [Editor's note: Text in brackets is struck out in the original.] 35. The Plaintiffs have further suffered loss of career, professional, educational and employment opportunities as a result of the personal injuries sustained as a consequence of the Assaults. Without limiting the generality of the foregoing, the Plaintiffs have suffered loss of past income and will suffer loss of future income.

[40.] [Editor's note: Text in brackets is struck out in the original.] 36. As a result of the injuries referred to herein, the Plaintiffs have suffered, and will continue to suffer, loss of enjoyment of life and a diminished quality of life.

[41.] [Editor's note: Text in brackets is struck out in the original.] 37. As a result of the injuries referred to herein, the Plaintiffs have suffered, and will continue to suffer, special damages, injuries, loss and expense.

[42.] [Editor's note: Text in brackets is struck out in the original.] 38. As a result of the injuries referred to herein, the Plaintiffs nave incurred, and continue to incur, expenses in obtaining psychiatric counselling, psychological counselling, or both, and treatment which will be required on both an ongoing and crisis basis

[43.] [Editor's note: Text in brackets is struck out in the original.] 39. As a result of the injuries referred to herein, the Plaintiffs have incurred, and continue to incur, expenses, the particulars of which will be provided as they become available and upon request prior to trial.

**General**

[44.] [Editor's note: Text in brackets is struck out in the original.] 40. In addition to the Plaintiffs" damages as set forth above, the Plaintiffs say that the conduct of each of the Defendants, MacDougall and the Provincial Crown, showed a reckless disregard for the well-being and emotional and psychological health of each of the Plaintiffs. The conduct of the Defendants, MacDougall and the Provincial Crown, was callous, arrogant and offended the ordinary community standards of moral and decent conduct

[45.] [Editor's note: Text in brackets is struck out in the original.] 41. The actions of all of the Defendants, and each of them, showed conscious indifference to the rights, safety and welfare of each of the Plaintiffs and, accordingly, the Plaintiffs hereby claim for aggravated and punitive damages against all of the Defendants and each of them.

**Part 2: RELIEF SOUGHT**

1. general damages;
2. loss of opportunity damages;
3. special damages;
4. punitive damages;
5. aggravated damages;
6. costs;
7. interest pursuant to the *Court Order Interest Act*;

8. Damages or such other remedy as the Court may consider just and appropriate pursuant to Section 24 of the *Charter*; and

[8] [Editor's note: Text in brackets is struck out in the original] 9. such further and other relief as to this Honourable Court may seem meet.

**Part 3: LEGAL BASIS**

1. The Plaintiffs allege that the Defendant, MacDougall, sexually abused each of them and, as such, MacDougall is liable for damages.
2. At all material times, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia was the employer of MacDougall and, as such, it is vicariously liable for the actions of MacDougall.

3. At all material times, the Provincial Crown breached the Plaintiffs' constitutionally protected *Charter* rights by failing to properly investigate allegations, rumors and knowledge of sexual assaults and failed to reasonably supervise the Defendant MacDougall which resulted in the Plaintiffs being subjected to the Assaults.

Plaintiffs' address for service:

[c/o Springford & Simcoe LLP] [Editor's note: Text in brackets is struck out

in the original]

[Barristers and Solicitors] [Editor's note: Text in brackets is struck out

in the original]

[#8--1540 Springhill Drive] [Editor's note: Text in brackets is struck out

in the original]

[Kamloops, BC V2E 2HI] [Editor's note: Text in brackets is struck out in the

original]

Donovan & Company,

6FL, 73 Water Street,

Vancouver. BC. V6B 1A1

Fax Number for service (if any): [(250) 828 6642] [Editor's note: Text in brackets is struck out in the original] 604 683 4282

Email address for service (if any): Karim\_ramii@aboriginal-law.com

Place of Trial: Vancouver, British Columbia

The address of the Registry is: 800 Smithe Street, Vancouver, BC V6Z 2EI

[Date: August 6, 2014 "Kevin T. Simcoe"] [Editor's note: Text in brackets is struck out in the original]

Date:

Signature of lawyer for plaintiffs

[KEVIN T. SIMCOE] [Editor's note: Text in brackets is struck out in the

original] KARIM N. RAMJI

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
2. prepare a list of documents in Form 22 that lists
3. all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
4. all other documents to which the party intends to refer at trial, and
5. serve the list on all parties of record.

**Appendix**

**Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

The Plaintiffs claim damages against the Defendants for historical sexual abuse.

**Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

[ ] a motor vehicle accident

[ ] medical malpractice

[x] another cause

A dispute concerning:

[ ] contaminated sites

[ ] construction defects

[ ] real property (real estate)

[ ] personal property

[ ] the provision of goods or services or other general commercial matters

[ ] investment losses

[ ] the lending of money

[ ] an employment relationship

[ ] a will or other issues concerning the probate of an estate

[x] a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

[Check all boxes below that apply to this case]

[ ] a class action

[ ] maritime law

[ ] aboriginal law

[x] constitutional law

[ ] conflict of laws

[x] none of the above

[ ] do not know

**Part 4:**

*Court Order Interest Act*, *RSBC 1996, c. 79*

*Crown Proceeding Act*, *RSBC 1996, c. 89*

*Canadian Charter of Rights and Freedoms, Constitution Act* 1982

**Original NoCQ filed September 7,**

**2018**

No S-148500

Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

ERROL PATRICK JOHNSON and CAL DEAN KANE

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF

THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY

THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND

RODERICK DAVID MACDOUGALL

DEFENDANTS

**AMENDED CONSTITUTIONAL QUESTION**

**ACT NOTICE**

**under section 8(2)(b)of the**

***Constitutional Question Act***,

***R.S.B.C. 1996, c.68***

Name of Applicant: The Plaintiffs Errol Patrick Johnson and Cal Dean Kane

TO: Minister of Justice and Attorney General of British Columbia 1001 Douglas Street

Victoria, BC V8W2C5

AND TO: Attorney General of Canada

900-840 Howe Street

Vancouver, BC V6A 2S9

TAKE NOTICE, pursuant to Section 8(2)(b) of the *Constitutional Question Act*, an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on Octobers, 2018, seeking a remedy pursuant to s. 24(1) of the *Constitution Act*, 1982 being Schedule B to the *Canada Act* 1982 (U.K.), 1932, c. 11 as set out in the Notice of Civil Claim attached to this Notice of Constitutional Question as Schedule A.

AND FURTHER TAKE NOTICE THAT the material facts giving rise to this application are as set out in the Notice of Civil Claim attached to this Notice of Constitutional Question as Schedule A.

AND FURTHER TAKE NOTICE THAT at the hearing the applicants will make argument on the legal basis as set out in the Notice of Civil Claim attached to this Notice of Constitutional Question as Schedule A and, in particular, will argue that:

1. The defendant Roderick David MacDouqall was an employee or agent of Her Majesty the Queen in Right of the Province of British Columbia (the "Provincial Crown") in his employment by the Corrections Branch of British Columbia ("B.C. Corrections").

2. The Provincial Crown is vicariously liable for actions of MacDouqall as its employee or agent, including his actions that breached the Plaintiffs' rights under the *Canadian Charter of Rights and Freedoms* as set out below.

Errol Patrick Johnson ("Plaintiff Johnson")

3. The Provincial Crown is also directly liable for the *Charter* breaches set out below as a result of its ***negligence***, breach of fiduciary duty and misconduct in failing to properly investigate allegations, rumors and knowledge of sexual assaults by MacDouqall. failing to reasonably supervise him, and failing to take reasonable steps to protect the Plaintiff Johnson and his *Charter* rights as further particularized in the Notice of Civil Claim

4. The Assaults (as def ned and described in paragraphs [12-15] of the Amended Notice of Civil Claim) perpetrated by MacDouqall on the Plaintiff Johnson. infringed Plaintiff Johnson's right not to be subjected to cruel and unusual ireatrnent or punishment as guaranteed by s. 12 of the *Charter*. The Assaults constitute treatment, or in the alternative, punishment, that shocks the conscience and is degrading to human dignity.

5. The Assaults deprived Plaintiff Johnson of his rights to liberty and security of the person guaranteed by s. 7 of the *Charter*.

(a) As to the deprivation of Plaintiff Johnson's liberty interest, by being touched and forced by MacDouqall to engage in sexual activity without his consent and against his will. Plaintiff Johnson was subjected to state-imposed constraints on his personal and sexual autonomy. Whether to engage in sexual activity with another person is a fundamental personal decision that an individual has the right to make without state interference. Plaintiff Johnson was deprived of that right when MacDouqall sexually assaulted him.

(b) As to Plaintiff Johnson's security of the person interest, the Assaults interfered with Plaintiff Johnson's bodily integrity and his psychological integrity. The Assaults were the non-consensual application of physical force to Plaintiff Johnson's body and inflicted serious psychological stress on Plaintiff Johnson as particularized in the Notice of Civil Claim.

6. The deprivations of Plaintiff Johnson's rights to

liberty and security of the person were not in accordance

with the principles of fundamental justice in that:

(a) Each of the Assaults constituted an infringement of another of Plaintiff Johnson's *Charter* rights, namely his rights under s. 12 of the *Charter* as set out above; and

(b) Each of the Assaults was arbitrary and irrational as it served no penal purpose or other legitimate state interest. The Assaults were gratuitous abuse of Plaintiff Johnson carried out for MacDouaall's own sexual gratification or other illegitimate purposes, facilitated by his position of authority.

7. The infringements of Plaintiff Johnson's rights as guaranteed by ss 7 and 12 of the *Charter* as set out above are not justified under s. 1 of the *Charter* since MacDouaall's Assaults were not prescribed by any law. Further, the sexual assault of an inmate by a correctional officer cannot be a reasonable limit on the inmate's *Charter* rights that is demonstrably justified in a free and democratic society.

8. The breaches of Plaintiff Johnson's rights under ss. 7 and 12 of the *Charter* as set out above entitle him to a remedy under s. 24f 1V In addition to a declaration that his *Charter* rights were violated, Plaintiff Johnson is entitled to an award of damages under s. 24(1).

9. *Charter* damages are necessary and appropriate to serve the functional purposes of compensation, vindication Plaintiff Johnson's *Charter* rights, and deterrence. Plaintiff Johnson has suffered significant general and pecuniary damages caused by the Defendants' conduct, as pleaded at paragraphs [34-391 of the Amended Notice of Civil Claim. However, compensatory damages alone are inadeguate to serve the functions of vindication and deterrence for the following reasons:

(a) The *Charter* breaches were gratuitous abuse engaged in for the sake of McDougall's personal sexual gratification and abuse of his position of authority, against a highly vulnerable individual, for no legitimate purpose.

(b) The *Charter* breaches were egregious and severe in light of:

i. their nature, number, frequency, violence and invasiveness of the Assaults the and period of time over which they continued:

ii. The circumstances of Plaintiff Johnson at the time of the Assaults including his vulnerability as an inmate with no ability to protect himself or seek assistance, and his age and capacity;

iii. The circurrstances of MacDougall at the time of the Assaults including his position of authority, his predatory tendencies, and his history of similar assaults on other inmates: and

iv. The knowledge, recklessness and/or indifference of the Provincial Crown to MacDouaall's assaults and abuse of his position of authority.

(c) The Provincial Crown, through its employees and agents, knew or ought to have known, that the Defendant MacDougall was sexually assaulting the inmates in his care, including the Plaintiffs. Despite such knowledge, actual or constructive, the Defendant :he Provincial Crown did not take any steps to investigate any rumors, allegations and complaints about the Defendant MacDougall and take any steps 10 prey en: any further sexual assauhs by the defendant MacDougall.

(d) The Provincial Crown had a responsibility for the protection and well-being of the inmate population and failed to do so. It failed to properly investigate allegations, rumors and knowledge of sexual assaults and failed to reasonably supervise the Defendant MacDougall, will pemired :he Assauhs to occur.

10. The foregoing factors call for a robust *Charter* damages award that will not only compensate Plaintiff Johnson for the damages he has suffered but also vindicate his *Charter* rights after such serious violations and to deter similar *Charter* breaches. *Charter* damages will also motivate the Provincial Crown to take appropriate steps to ensure that i:s errplovees and agents do not have the opportunity to engage in such abuses in the future.

Cal Dean Kane ("Plaintiff Kane")

11. The Provincial Crown is also directly liable for the *Charter* breaches set out below as a result of its ***negligence***, breach of fiduciary duty and misconduct in failing to properly investigate allegations, rumors and knowledge of sexual assaults by MacDougall. failing to reasonably supervise him, and failing to take reasonable steps to protect the Plaintiff Kane and his *Charter* rights as further particularized in the Notice of Civil Claim.

12. The Assaults fas defined and described in paragraphs [16-19] of the Amended Notice of Civil Claim) perpetrated by MacDougall on the Plaintiff Kane, infringed Plaintiff Kane's right not to be subjected to cruel and unusual treatment or punishment as guaranteed by s. 12 of the *Charter*. The Assaults constitute treatment, or in the alternative, punishment, that shocks the conscience and is degrading to human dignity.

13. The Assaults deprived Plaintiff Kane of his rights to liberty and security of the person guaranteed by s. 7 of the *Charter*.

(a) As to the deprivation of Plaintiff Kane's liberty interest, by being touched and forced by MacDougall to engage in sexual activity without his consent and against his will. Plaintiff Kane was subjected to state-imposed constraints on his personal and sexual autonomy. Whether to engage in sexual activity with another person is a fundamental personal decision that an individual has the right to make wthout state interference. Plaintiff Kane was deprived of that nght when MacDougall sexually assaulted him.

(b) As to Plaintiff Kane's security of the person interest, the Assaults interfered with Plaintiff Kane's bodily integrity and his psychological integrity. The Assaults were the non-consensual application of physical force to Plaintiff Kane's body and inflicted serious psychological stress on Plaintiff Kane as particularized in the Notice of Civil Claim.

14. The deprivations of Plaintiff Kane's rights to liberty and security of the person were not in accordance with the principles of fundamental justice in that:

(a) Each of the Assaults constituted an infringement of another of Plaintiff Kane's *Charter* rights, namely his rights under s. 12 of the *Charter* as set out above: and

(b) Each of the Assaults was arbitrary and irrational as it served no penal purpose or other legitimate state interest. The Assaults were gratuitous abuse of Plaintiff Kane carried out for MacDougall's own sexual gratification or other illegitimate purposes, facilitated by his position of authority.

15. The infringements of Plaintiff Kane's rights as guaranteed by ss 7 and 12 of the *Charter* as set out above are not justified under s. 1 of the *Charter* since MacDougall's Assaults were not prescribed by any law. Further, the sexual assault of an inmate by a correctional officer cannot be a reasonable limit on the inmate's *Charter* rights that is demonstrably justified in a free and democratic society.

16. The breaches of Plaintiff Kane's rights under ss 7 and 12 of the *Charter* as set out above entitle him to a remedy under s. 24(1). In addition to a declaration that his *Charter* rights were violated. Plaint Kane is entitled to an award of damages under s. 24(1).

17. *Charter* damages are necessary and appropriate to serve the functional purposes of compensation, vindication Plaintiff Kane's *Charter* rights, and deterrence. Plaintiff Kane has suffered significant general and pecuniary damages caused by the Defendants' conduct, as pleaded at paragraphs [34-39] of the Amended Notice of Civil Claim. However, compensatory damages alone are inadequate to serve the functions of vindication and deterrence for the following reasons:

(a) The *Charter* breaches were gratuitous abuse engaged in for the sake of McDougall's personal sexual gratification and abuse of his position of authority, against a highly vulnerable individual, for no legitimate purpose.

(b) The *Charter* breaches were egregious and severe in light of:

i. their nature, number, freguency. violence and invasiveness of the Assaults the and period of time over which they continued:

ii. The circumstances of Plaintiff Kane at the time of the Assaults including his vulnerability as an inmate with no ability to protect himself or seek assistance, and his age and capacity:

iii. The circumstances of MacDougall at the of the Assaults including his position of authority, his predatory tendencies, and his history of similar assaults on other inmates: and

iv. The knowledge, recklessness and/or indifference of the Provincial Crown to MacDougall's assaults and abuse of his position of authority.

(c) The Provincial Crown, through its employees and agents, knew or ought to have known, that the Defendant MacDougall was sexually assaulting the inmates in his care, including the Plaintiffs Despite such knowledge, actual or constructive, the Defendant the Provincial Crown did not take any steps to investigate any rumors, allegations and complaints about the Defendant MacDougall and take any steps to prevent any further sexual assaults by the Defendant MacDougall.

(d) The Provincial Crown had a responsibility for the protection and well-being of the inmate population and failed to do so. It failed to properly investigate allegations, rumors and knowledge of sexual assaults and failed to reasonably supervise the Defendant MacDouaall. will permitted the Assaults to occur.

[1.] [Editor's note: Text in brackets is struck out in the original] 18. The foregoing factors call for a robust *Charter* damages award that will not only compensate Plaintiff Kane for the damages he has suffered but also vindicate his *Charter* rights after such serious violations and to deter similar *Charter* breaches, *Charter* damages will also motivate the Provincial Crown to take appropriate steps to ensure that its employees and agents do not have the opportunity to engage in such abuses in the future.

[2. The Provincial Crown's ***negligence*** breach of fiduciary duty and misconduct resulted in the Plaintiffs being sexually assaulted and such Assaults were also a breach of the Plaintiffs' constitutional rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*") as more particular set out herein:] [Editor's note: Text in brackets is struck out in the original.]

[a. such Assaults constitute an infringement of and deprivation of tho right to life, liberty and security of the person as guaranteed by Section 7 of the *Charter*, and] [Editor's note: Text in brackets is struck out in the original.]

[b. such Assaults constitute cruel and unusual treatment or punishment, contrary to Section 12 of the *Charter*.] [Editor's note: Text in brackets is struck out in the original.]

[3. At all material times, the Provincial Crown breached the Plaintiffs' constitutionally protected *Charter* rights by failing to properly investigate allegations, rumors and knowledge of sexual assaults and failed to reasonably supervise the Defendant MacDougall which resulted in the Plaintiffs being subjected to the Assaults.] [Editor's note: Text in brackets is struck out in the original.]

Date: [07/Sep/2018] [Editor's note: Text in brackets is struck out in the original] 07/Jan/2019

Signature of lawyer far the applicants

KARIM RAMJI

This [Notice of Application] Amended Notice of Constitutional Question is prepared by the Solicitor for the Plaintiffs, Karim Ramji. Donovan & Company, whose place of business and address for service is 6FL. 73 Waiter Street, Vancouver, BC, V6B 1A1. Telephone: 604 688 4272/Fax: 604 688 4282

\* \* \* \* \*

**SCHEDULE "A"**

**[Not Attached]**

No S-148500

Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

ERROL PATRICK JOHNSON, CAL DEAN KANE AND PETER UGESH MUNI

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF

THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY

THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND

RODERICK DAVID MACDOUGALL

DEFENDANTS

**AMENDED CONSTITUTIONAL QUESTION ACT**

**NOTICE**

**under section 8(2)(b)of the**

***Constitutional Question Act,***

***R.S.B.C. 1996, c.68***

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**End of Document**

[***Keefer Laundry Ltd. v. Pellerin Milnor Corp., [2008] B.C.J. No. 1595***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M37K-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.H. Smith J.

Heard: January 15-17, 22-26, January 29-February 2,

5-9, 12-16, February 26-March 1, 5-8, May 28-June 1,

4-8, 11-15, 18-22, September 24-25, December 17-20, 2007,

February 11-15 and 18, 2008.

Judgment: August 22, 2008.

Docket: S024116

Registry: Vancouver

**[2008] B.C.J. No. 1595** | 2008 BCSC 1119 | 49 B.L.R. (4th) 222 | 2008 CarswellBC 1761 | 172 A.C.W.S. (3d) 519

Between Keefer Laundry Ltd., Plaintiff, and Pellerin Milnor Corporation and Tessler G.W. Fabcare Inc., Defendants

(161 paras.)

**Case Summary**

**Commercial law — Sale of goods — Implied conditions — Fitness for purpose — Breach of contract — Buyer's remedies — Breach of warranty by seller — Action by purchaser of laundry equipment to recover losses for breaches of seller of warranty dismissed — Although equipment failed to meet guaranteed production requirements, release executed by purchaser applied to release seller from virtually all claims, as they were raised by purchaser prior to execution of release — Rust and corrosion problems arising after release executed did not constitute breach of structural warranty or implied warranty of fitness, as equipment still fit for use — Sale of Goods Act, s. 18.**

|  |
| --- |
| Action by Keefer against Milnor, claming damages of $11 million for the repair and replacement of laundry equipment purchased from Milnor. Keefer was a laundry business in British Columbia which purchased two washers from a Milnor supplier for a new plant it purchased in the 1996. Keefer made it clear to the supplier that it would be using the washers to launder linens belonging to its different customers, so it would have to run the washers constantly and to separate the loads. Keefer spent nearly $1.5 million USD on the washing equipment, including a monorail system for delivering laundry to wash tunnels, two presses, two elevators, two storage conveyors, one shuttle conveyor, nine dryers and one control package. Milnor provided Keefer with a letter guaranteeing the equipment would meet Keefer's production capacity for the first year after start-up. A further letter guaranteed the equipment from structural problems for five years. Keefer found fault with the Milnor equipment almost immediately after start-up. Complaints were made to Milnor about virtually every aspect of the system. Milnor investigated the complaints and either repaired problems, stated it was unable to confirm the problems, or blamed Keefer for improper or inefficient use of the equipment. In 2000, Keefer accepted a warranty extension and $7,900 from Milnor in exchange for releasing Milnor from any outstanding claims with respect to the equipment. Keefer ultimately decided to purchase new equipment in 2002 from a German manufacturer. It sold some of its Milnor equipment for $140,000 and continued to operate the remaining equipment with its new equipment, claiming the plant then operated much more efficiently.  HELD: Action dismissed.  The equipment failed to meet Keefer's production requirements, so Milnor was in breach of both the express warranty of fitness and the implied condition of fitness for purposes. Milnor was entitled to rely on the document agreed to by Keefer in 2000 as an effective release of Keefer's claims. Most of the deficiencies raised by Keefer in its pleadings had been raised with Milnor prior to the execution of the release. Rust and corrosion problems developing after the release was executed did not constitute a breach of the structural guarantee provided by Milnor and were not a breach of the implied statutory condition. The rust did not render the equipment unfit for use. |

**Statutes, Regulations and Rules Cited:**

Sale of Goods Act, [*RSBC 1996, CHAPTER 410, s. 18*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JG59-214N-00000-00&context=), s. 18(a)

**Counsel**

Counsel for the plaintiff: Douglas G.S. Rae, Q.C, and Shadrin Brooks.

Counsel for defendant: Gordon A. Fulton, Q.C. and Heather D. Craig.

[Editor's note: Corrigenda were released by the Court September 26, 2008 and January 21, 2009; the corrections have been made to the text and the corrigenda are appended to this document.]

**Reasons for Judgment**

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

**1**   The Plaintiff Keefer Laundry Ltd. ("Keefer") provides commercial laundry service to customers such as hotels, hospitals, restaurants and airlines. As part of a move into a new plant, Keefer bought new equipment for washing bed, bath and table linen. The equipment was manufactured by the defendant Pellerin Milnor Corporation ("Milnor").

**2**  Keefer says this equipment, which was expected to process 10,000 pounds of laundry an hour, turned out to be defective and unreliable. According to Keefer, the equipment broke down frequently, sometimes damaged laundry, and often mixed together laundry belonging to different customers. Some of the equipment eventually rusted. Even when working, Keefer says the equipment was incapable of meeting its promised production. Keefer says it incurred repair and eventual replacement costs and that it was unable to pursue potential new business because of its constant equipment problems. It seeks damages totalling approximately $11 million.

**3**  Milnor disputes the severity of the alleged problems and says any problems that it did not repair were caused by Keefer's improper use of the equipment. Milnor also relies on provisions in warranty documents limiting its liability and on what it says was a release executed by Keefer.

**4**  The issues in the case are:

1. What warranties did Milnor provide to Keefer?
2. To what extent, if any, was Milnor in breach of those warranties?
3. Is Milnor liable for breach of the implied statutory condition that the equipment be reasonably fit for its intended purpose?
4. Did Keefer release Milnor from some or all of its liability?
5. If Milnor is liable, what are Keefer's damages?

**Background**

**5**  Keefer was, until recently, a family-owned company and has been in the laundry business for approximately 100 years. For most of that time, it operated in Vancouver's Chinatown area, most recently at a plant that was expanded to 33,000 square feet in 1983. By the mid-1990s, Keefer wanted to expand again, but further expansion in the historic Chinatown area was not possible, so Keefer bought a 55,000 square foot building in Burnaby.

**6**  Milnor is a designer and manufacturer of commercial laundry equipment based in Kenner, Louisiana. It uses a network of dealers to sell its laundry equipment around the world.

**7**  The defendant and third party Tessler G.W. Fabcare Inc. ("Tessler") supplied and serviced laundry equipment and was an authorized Milnor dealer until Milnor terminated the relationship in July 2000. Tessler is apparently no longer in business and did not defend this action at trial, although Phillip Payne, its former president, testified.

**8**  The major piece of equipment Keefer uses for washing sheets, pillowcases, towels, and table linen is a continuous batch washer ("CBW"), sometimes called a "tunnel washer." This is a series of washing machines, or "modules", linked to form a long stainless steel tunnel. The modules operate simultaneously, with each one performing a different stage of the wash or rinse process. Laundry is automatically transferred from one module to the next while water flows through the system in the opposite direction. Individual modules can also be drained and refilled separately. Detergent, bleach and other chemicals are injected into individual modules. Each module contains a rotating cylinder-a much larger version of what might be seen in a front-loading household or coin-operated washing machine. While the cylinder rotates, raised ribs on its inside surface lift and drop the laundry, providing mechanical action that assists the cleaning process.

**9**  The cylinder in a Milnor tunnel washer has a perforated scoop at the top. During a wash cycle, the cylinder moves back and forth through approximately 250 degrees of rotation, but makes a larger rotation at the end of the cycle. That larger rotation collects the laundry in the scoop, from where it slides into the next module. Perforations in the scoop allow drainage of water, reducing the amount of dirty water and chemicals that transfer with the laundry to the next module. This is a major difference between the Milnor tunnel washer and those made by its competitors, in which transfer between modules usually takes place at the bottom of the machine. The "top transfer" method was a feature that Milnor stressed in its promotional material and one that Keefer found particularly attractive.

**10**  The length of the wash cycle is determined according to the type of laundry. Tablecloths and napkins are generally the most heavily-soiled goods that Keefer processes and require a longer time in each module. Detergent, bleach and other chemicals are also adjusted according to pre-set formulae for each type of laundry and each customer.

**11**  On leaving the last module of the tunnel, laundry goes to a hydraulic press, which squeezes out excess water. Laundry leaves the press as a circular, compressed mass, referred to in the industry as a "cake", which is then moved to a dryer.

**12**  The equipment Keefer bought for its new plant included two Milnor tunnel washers, each with 12 modules and a total length of about 50 feet, two hydraulic presses and nine dryers, each of which could hold two "cakes" at a time. Milnor also supplied a conveyor system for moving the compressed "cakes" of laundry from the presses to the dryers. This consisted of an elevator that lifted them from the press to a storage conveyor, from which they were picked up by a shuttle conveyor that took them to the dryers.

**13**  Although Keefer processed most of its work in the tunnel washers, it also had a number of conventional washing machines that it used for certain items. Milnor supplied a separate "loose goods conveyor" to move items from those washing machines to the dryers.

**14**  Drying time also varies with they type of laundry. Some items, such as sheets, are in the dryer for only a brief period, with more drying to take place when they are ironed. These are known in the trade as "condition goods." Other items, such as towels, require longer drying times and are known as "full-dry" goods. Keefer generally used one tunnel primarily for washing condition goods and the other for full dry goods, although there was considerable dispute at trial about the importance of that division and the extent to which it was observed. In order for the system to operate efficiently, there must be sufficient dryer capacity to keep up with the tunnel washers. A backlog of goods waiting for dryers will cause the tunnel washers to automatically go "on hold."

**15**  Before buying the new equipment at issue in this case, Keefer had used two smaller, older-model Milnor tunnel washers in its Chinatown plant for 16 years, but had used presses, dryers and related equipment from other manufacturers. The Milnor tunnel washers in Keefer's old plant were a model known as the G1, which had four ribs in each module. Each rib was 4 1/2 inches high. In the early 1990s, Milnor began making its modules with only three ribs. By the time Keefer purchased new equipment in 1999, Milnor was making a G3 model, which had either three 4 1/2" ribs or one 4 1/2" and two 6 1/2" ribs. Howard Wong, who was president of Keefer at the relevant time, testified that he knew the G3 model was larger than Keefer's old G1 machines, but said he understood the basic design was unchanged.

**16**  Milnor began making presses, shuttles and dryers in 1985. It originally made "two-stage" presses, which used two separate operations to squeeze water out of the laundry. In 1998, it began making a "single-stage" press. In a single-stage press, the goods go into a heavy stainless steel can designed to withstand the pressure applied by a hydraulic ram, which applies pressure through a circular platen. A membrane filled with water also puts the pressure on the goods. That membrane must be refilled periodically.

**17**  Sometimes, a commercial laundry will process linen that it has itself supplied, but most of Keefer's work involved linen owned by the customers. It was therefore important to Keefer that any system keep loads for different customers separate.

**18**  Keefer generally ran two shifts per day for a total of 14 to 16 hours of operating time, 365 days a year. Maintenance was done in the evenings over the course of an 8-hour shift.

**Negotiations and Purchase**

**19**  Keefer bought its Burnaby site in 1996 and sought information from manufacturers about equipment for a new plant. Milnor responded to a Keefer questionnaire, but the matter went no further at that time because Keefer decided to postpone its move. Keefer sought proposals from manufacturers again in 1998. Mr. Wong testified that he wanted the new plant to process 10,000 pounds of linen an hour and wanted the computer that controlled the system to be capable of tracking and recording each load by customer name.

**20**  On September 2, 1998, Mr. Payne of Tessler advised Milnor about some of Keefer's requirements, based on information he had received from Mr. Wong. This information included an approximate mix of the linen to be handled by the new equipment: 50 per cent flatwork (sheets and pillowcases), 40 per cent towels and 10 per cent table linen. Milnor was also advised that about 90 per cent of the goods would be customer-owned and that Mr. Wong wanted two shuttle conveyors so that the system could continue to operate if one shuttle was shut down.

**21**  Although Tessler was the local dealer for Milnor equipment, any system had to be designed and customized by Milnor for Keefer's needs. Terry Satchwell, Milnor's vice-president for sales, attended meetings with Mr. Wong and Mr. Payne during the fall of 1998 and James Pellerin, the president of Milnor, also attended on one occasion. During that period, Milnor staff provided a series of quotations, including layout drawings and flow diagrams

**22**  The contract for Keefer's purchase of the Milnor equipment is contained in a purchase order signed by Mr. Wong, on behalf of Keefer as purchaser, and Mr. Payne, on behalf of Tessler, as vendor. The purchase order is dated December 22, 1998, but was not signed until some time in January 1999. It called for the purchase of equipment at a total price of $1,499,920 US, of which all but about $124,000 was for equipment made by Milnor.

**23**  The purchase order referred to two 12-module CBWs "rated at 130 pound capacity per transfer, designed and configured to process heavily soiled table linen." It also included the following additional equipment:

1. an overhead monorail system (not made by Milnor) to deliver the soiled linen to the wash tunnels;
2. two Milnor single-stage presses, to be connected to the outputs of each tunnel.;
3. two Milnor single-cake automatic elevators to raise the linen from the press to the storage conveyors;
4. two storage conveyors, each capable of storing up to two cakes of linen;
5. one Milnor shuttle conveyor, capable of transferring up to two cakes of linen at a time to the dryers;
6. nine Milnor double-batch gas dryers;
7. a Milnor control package, including the Mentor computer system, which controls and tracks the processing of linen, and the Mildata system, which tracks and records production data.

**24**  In addition to the equipment, the purchase order provided that "Milnor's start-up team" would attend at Keefer's plant on three occasions for a total of 15 days to provide installation, testing and training of Keefer employees.

**25**  The purchase order also incorporated Milnor's "limited standard warranty," which warranted that the goods would be "free from defects in material and workmanship" for one year from the date of shipment. The Limited Standard Warranty also said:

ANY SALE OR FURNISHING OF ANY EQUIPMENT BY MILNOR IS MADE ONLY UPON THE EXPRESS UNDERSTANDING THAT MILNOR MAKES NO EXPRESSED OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR USE OR PURPOSE. MILNOR WILL NOT BE RESPONSIBLE FOR ANY COSTS OR DAMAGES ACTUALLY INCURRED OR REQUIRED AS A RESULT OF: THE FAILURE OF ANY OTHER PERSON OR ENTITY TO PERFORM ITS RESPONSIBILITIES, FIRE OR OTHER HAZARD, ACCIDENT, IMPROPER STORAGE MISUSE, NEGLECT, POWER OR ENVIRONMENTAL CONTROL MALFUNCTIONS, DAMAGE FROM LIQUIDS, OR ANY OTHER CAUSE BEYOND THE NORMAL RANGE OF USE. REGARDLESS OF HOW CAUSED, IN NO EVENT SHALL MILNOR BE LIABLE FOR SPECIAL, INDIRECT, PUNITIVE, LIQUIDATED, OR CONSEQUENTIAL COSTS OR DAMAGES, OR ANY COSTS OR DAMAGES WHATSOEVER WHICH EXCEED THE PRICE PAID TO MILNOR FOR THE EQUIPMENT IT SELLS OR FURNISHES.

WE NEITHER ASSUME, NOR AUTHORIZE ANY EMPLOYEE OR OTHER PERSON TO ASSUME FOR US, ANY OTHER RESPONSIBILITY AND/OR LIABILITY IN CONNECTION WITH THE SALE OR FURNISHING OF OUR EQUIPMENT TO ANY BUYER.

**26**  Although the purchase order was a contract between Keefer and Tessler, Milnor provided further information and/or assurances directly to Keefer in the form of three letters from Mr. Pellerin to Mr. Wong. One of these letters, dated January 20, 1999, set out what was referred to at trial as the "production guarantee." The letter said the equipment "will meet the production capacity as defined on the attached 'CBW Production Capabilities.'"

**27**  The attached document set out load sizes, wash times and hourly production capacity for various kinds of goods. A 130-pound load of sheets or pillowcases was said to go through a tunnel washer in 18 minutes, producing an hourly capacity of 5,200 pounds for each machine operating at 100 per cent capacity, 4680 pounds at 90 per cent capacity and 4,420 pounds at 85 per cent. The document said towels would go through the tunnels in the same amount of time, but in slightly smaller loads, resulting in maximum processing of 4,880 pounds an hour. Table linen was expected to need 32 minutes, resulting in maximum hourly production of 2,925 pounds.

**28**  Mr. Pellerin's letter said that a number of factors under Keefer's control would determine how close the system could come to operating at 100 per cent capacity. These factors included efficiency of loading and the sequencing of goods. The letter pointed out that the tunnels could process more full dry goods than the dryers could accommodate and recommended that "no more than seven dryer loads should be processed sequentially before no dry or condition work follows." Mr. Pellerin added:

Typical overall system efficiency for operators running goods similar to yours ranges between 85 and 90 per cent. Should these production capabilities not be demonstrated to Keefer Laundry's satisfaction, Milnor will make necessary adjustments, fix any defective equipment, or replace it, so as to demonstrate them. In the event we are unable to demonstrate them to the laundry's satisfaction, we will accept return of the equipment and return all monies paid to us.

[Emphasis added]

The production guarantee was stated to be in force "throughout the first year after start up."

**29**  A further letter from Mr. Pellerin to Mr. Wong, dated January 21, 1999, set out what has been referred to as the "structural guarantee." It stated:

Pellerin Milnor Corporation guarantees that the CBW, press, and dryer structural members will be free from metal fatigue or weldment failure for a period of five years, or 20,000 operating hours from the date of installation, whichever is longer. Failed components will be replaced at no charge, freight charges for your account. This warranty is voided in the event of failures due to lack of maintenance, misuse or abuse, or operation contrary to manufacturer's instructions.

**30**  Mr. Pellerin wrote a third letter, dated January 25, 1999, answering some questions that Mr. Wong had asked through Tessler. One of the questions was rephrased by Mr. Pellerin as whether a single shuttle conveyor transferring goods to the dryers could keep up with the output of two tunnels. The letter provided a "time study" that suggested it could. Mr. Wong says that he was concerned throughout the negotiations about whether the system would require one or two shuttles and he relied on this letter as Milnor's assurance that one would be sufficient.

**31**  There is conflicting evidence about whether these three letters were offered by Milnor as a further inducement to Keefer to buy Milnor equipment or whether Mr. Wong requested them after making his purchase decision. Milnor also disputes Mr. Wong's assertion that he delayed signing the purchase order until after he had received the three letters.

**32**  Although the purchase order was an agreement between Keefer and Tessler, Mr. Wong subsequently made arrangements to pay Milnor directly because, he said, he was not comfortable with a recent ownership change at Tessler.

**Keefer's Complaints**

**33**  Installation of the new equipment at the Keefer plant began in August 1999 and Keefer began operating it in October. Almost immediately, Mr. Wong began to complain of problems with the equipment and he continued to express dissatisfaction on frequent occasions for more than two years. These complaints touched on almost every aspect of the system and were the subject of extensive written and oral communication among Keefer, Tessler and Milnor, as well as internal communication within Milnor. In many cases Milnor repaired or attempted to repair the problem. In other cases, Milnor said it was unable to confirm the existence of problems that Keefer complained of and, in still other cases, it blamed Keefer for improper or inefficient use of the equipment. For present purposes, it is sufficient to briefly summarize the major issues that arose.

**34**  Keefer's most serious ongoing complaint was about "fallback." That term describes a problem in which some of the goods in one module of the tunnel washer fail to transfer out of it and are then mixed with the next load coming in. If that next load belongs to a different customer, the result is a mixing of different customers' goods.

**35**  Large amounts of fallback can also result in a module becoming overloaded or goods becoming roped together through a number of modules. Either of those conditions can jam and stop the system. When such plugging occurs, it may be necessary to drain all water in the tunnel and have workers crawl into it to manually clear the jam. This process can take several hours, with more time required to sort and rewash the affected laundry.

**36**  Mr. Wong testified that fallback occurred daily in the first few months after the new Milnor tunnels began operating. He said jamming was also a frequent, sometimes daily, occurrence, most commonly in the tunnel that was used primarily for towels and table linen. Mr. Payne estimated that there were about 15 jamming incidents in the first three months of operation. Ken Chu, Keefer's operations manager, testified that jamming was a weekly occurrence during this period and Kenneth Ip, Keefer's chief engineer, said there were six to nine such incidents.

**37**  Mr. Wong testified that Keefer initially attempted to deal with this problem by reducing the size of loads and increasing the amount of water it was using. By early November 1999, Mr. Wong said he formed the opinion that the fallback problem was the result of internal design differences between the new G3 model tunnel washer and the old G1 model Keefer had previously used. In a letter to Milnor dated November 4, 1999, Mr. Wong said the raised ribs inside the modules were higher than in the old model, the opening of the transfer scoop was smaller and one of the ribs was too close to that opening. Mr. Wong said that he purchased the new tunnels in the belief that the internal configuration was unchanged, although he admitted at trial that he never specifically asked for details of the ribs.

**38**  As set out earlier, the G1 tunnels Keefer used at its old plant had four ribs, each 4 1/2 inches high, in each cylinder. By the time Keefer purchased the G3 model, Milnor had reduced the number of ribs in each cylinder to three and was producing cylinders with either three 4 1/2" high ribs or one 4 1/2" and two 6 1/2" ribs. The cylinders with the two higher ribs were referred to as the "work wear" model and were designed for more heavily soiled laundry. Mr. Pellerin decided that Milnor would supply Keefer with work wear cylinders, rather than the "standard linen" cylinders because Keefer wanted equipment capable of processing heavily soiled table linen. There was no specific discussion of this change with either Mr. Wong or Mr. Payne and both testified they were unaware of it, although a reference to it can be found in lengthy specification documents that were provided to Mr. Payne.

**39**  In his letter to Milnor dated November 4, 1999, Mr. Wong said:

The design is flawed and the solution is to increase the scoop opening. This may be done by reducing the height of the ribs. But I am not sure this will be the final solution.

**40**  In response, Milnor sent welders to the Keefer plant on two occasions in late November and early December 1999 and all ribs were cut to either three or four inches. Although Mr. Wong had suggested a reduction in the height of the ribs, it is not clear why the ribs were cut to a height even lower then the ribs in the old model. Mr. Pellerin suggested this was at the request of Mr. Wong, but that is inconsistent with the general tone and content of Mr. Wong's letter, which compared the new model unfavourably with the old one.

**41**  Both Mr. Chu and Mr. Ip testified that jamming incidents were less frequent after the ribs were cut, but complaints of fallback and mixing continued. At approximately the same time that the ribs were cut at Keefer, Milnor decided to stop making tunnels with the higher-rib work wear configuration.

**42**  The Milnor welders returned to Keefer in January 2000. This time they welded metal plates onto some of the transfer scoops, blocking some of the perforations. The idea was to assist the transfer process by increasing the amount of water that was transferred forward with the laundry.

**43**  Another major problem that arose shortly after the new equipment went into operation was the tearing of some linen. Milnor initially took the position that linen was being damaged by excessive amounts of bleach, but the problem was eventually found to be caused by "hydroburst" - the result of water being pressed out of the fabric too quickly and/or at too high pressure. In order to solve that problem, the presses were "derated", meaning they were to be operated at lower pressures. Keefer says this resulted in less water being removed and a need for longer drying times.

**44**  Keefer also complained that the shuttle, which transferred laundry from the storage conveyer into the dryers, was too slow and would sometimes drop loads of laundry onto the floor. Other complaints by Keefer in the early weeks of operation included oil leaks and uneven pressure in the presses, excessive drying times, linen "pancaking" and burning on the inside of dryers, inadequate lint removal and software difficulties.

**45**  On December 12, 1999, Mr. Wong said he wanted the G3 tunnels replaced with older-style models. This request was made both through Mr. Payne, who sent a fax to Mr. Pellerin, and directly by Mr. Wong in a voice mail message to Mr. Satchwell. In his fax, Mr. Payne said Mr. Wong had requested the exchange because of "continuous business interruption with this new product," adding that "trouble free performance continues to elude us." Mr. Payne also told Mr. Pellerin that load mixing and plugging were occurring "with painful regularity."

**46**  No one from Milnor ever specifically responded to the exchange request and Mr. Wong did not repeat it until more than two years later. In an internal email dated December 17 (addressing the fact that another customer had apparently heard about problems at Keefer) Mr. Pellerin said it was not unusual for new plants to experience start-up problems.

**47**  Throughout the first half of 2000, Keefer continued to make frequent complaints to Milnor, either directly or through Tessler, about various aspects of the system. These complaints included:

1. reduced load size to minimize ongoing fallback problems;
2. inability of the system to track customer data;
3. oil leaks, rust and damage to the presses, including one incident in which bolts sheared off a press head, causing it to fall off;
4. linen falling on the floor due to gaps between the shuttle and other equipment;
5. uneven internal surfaces in the wash tunnels as a result of welding materials that had splattered;
6. excessive dry times, for example, a 220 lb. load of towels requiring 28 to 30 minutes in a dryer instead of the expected 19 minutes. Long dry times were putting the tunnels on hold;
7. water consumption in excess of what was permitted by municipal regulations;
8. continued "pancaking" of linen in the dryers.

**48**  On March 9, 2000, Mr. Wong wrote to Mr. Pellerin and said the system "is not producing or coming close to our specifications which were promised." On April 4, 2000, Mr. Wong again wrote to Mr. Pellerin to list specific problems, which included continuing fallback and plugging in the tunnels and ongoing problems with the shuttle.

**49**  By May, Mr. Payne was seeking extra payment from Milnor for work he and other Tessler staff had done on the Keefer site. He contended that much of this work went beyond the normal warranty servicing required of a dealer and was related to development of new Milnor products. On May 24, 2000, Mr. Payne wrote to Mr. Pellerin summarizing what he said were the major problems at Keefer. He said that fallback problems were continuing and that although the system was supposed to process loads of 130 pounds per module "it rarely sees 120 lbs and often plugs at 100-110 pounds." He added that Milnor had, since October 1999, sent 66 different revised components for the system.

**50**  Ken Gaulter, Milnor's engineering manager, visited Keefer's plant in July 2000 and tested the system by running it with empty modules between loads. Any goods that came out of what was supposed to be an empty module would be the result of fallback. By then, Mr. Wong was reporting that the fallback problem was being seen primarily with small items such as pillowslips, napkins and small towels. The tests did not identify a significant fallback problem, although they were limited because a hotel strike at the time had greatly reduced the volume of laundry that Keefer was processing.

**51**  Mr. Gaulter said that there were other areas of the plant where mixing of goods could occur and noted that jamming of the tunnels could be caused by Keefer sending too many consecutive loads of full dry goods through the system. This would cause the tunnels to go on hold while waiting for dryers, with water level dropping during that time. However, he agreed that the drying times for some types of goods were longer than they should have been.

**52**  In an internal report on his trip to Keefer, Mr. Gaulter said that the tunnels were on hold four to six hours a day. He also said jamming could be caused by double loads being dropped into the tunnels from the overhead system (which was not made by Milnor). Mr. Gaulter said the efficiency of the system was also reduced by single cakes of linen going into the dryers.

**53**  On August 8, 2000 Mr. Wong wrote to Mr. Gaulter and told him Keefer was continuing to experience fallback with sheets at 110 lbs per load. He also said efforts to shorten drying times had been unsuccessful.

**54**  Mr. Gaulter returned to Keefer in September 2000 and conducted more fallback tests. He confirmed that some fallback was occurring, but says the amount that he observed was not consistent with the magnitude of the problem being reported by Keefer. He suggested that Keefer leave an empty module between certain types of loads when those loads were from different customers. Mr. Gaulter also said that on his visits to the Keefer plant, he never saw the difficulties with the shuttle that Keefer had been reporting.

**55**  On September 11, 2000, Mr. Wong wrote to Mr. Gaulter about the design differences between the G3 CBW and Keefer's old G1 model, including the different rib configuration and the smaller entrance to the transfer scoop. He said that Keefer might not have purchased the new model if it had been informed of all the design changes and added:

As a result we will always be faced with linen fallback, fall forward, jamming and mixing in the CBW ... There are design flaws in the new CBW system. I have no solution to these problems.

**56**  Meanwhile, discussions had begun between Keefer and Milnor about possible new starting dates for the warranties on various pieces of equipment and about some compensation for problems, including the damaged goods. These culminated in the execution of a document that Milnor now relies on as a release by Keefer of most of the claims made in this action. I will describe that document and how it came into being later in these reasons.

**57**  Keefer continued to express its dissatisfaction through 2001. Its complaints included continued mixing of laundry, presses leaking oil and failing to extract enough water, inadequate lint removal in the dryers, and failure of various parts that had to be replaced, including press diaphragms, seals between modules, and some of the motors.

**58**  In December 2001, Keefer identified rust in a number of locations in the tunnel washers where they had been welded and, by this time, was also seeing rust stains on some linen. Keefer blamed this problem on inadequate or improper welding, but Milnor initially said it was the result of other factors, including excess use of bleach and iron entering the system through the city water supply.

**59**  Milnor representatives, including Mr. Pellerin and Mr. Gaulter, attended meetings at the Keefer plant, along with experts retained by both sides, in late February and early March 2002, but these discussions failed to resolve the issues. In or about April 2002, Keefer decided to purchase new equipment from a German manufacturer, Kannegiesser.

**60**  A Kannegiesser tunnel washer, two presses, storage conveyor, shuttle and six dryers were installed in November 2002. Two years later, Keefer bought a second Kannegiesser tunnel and press along with a storage conveyor, shuttle, and six more dryers. At that point, one Milnor tunnel was removed along with three of the Milnor dryers. That tunnel, along with its press and elevator, was eventually sold to a laundry in Korea for a total sale price of $140,000 US. The other Milnor tunnel continued to operate with a Kannegiesser press, the Milnor elevator and shuttle, and seven Milnor dryers.

**61**  Keefer says that since installing the Kannegiesser equipment its plant has been much more efficient and reliable, with a higher production capacity. However, it says by that time it had lost business opportunities, including some long-term contracts that became available as hospitals and health authorities were closing their own laundry operations and contracting out laundry service.

**The Warranties**

**62**  The contract for purchase and sale of the Milnor equipment was the purchase order dated December 1998. That was a contract between Keefer and Tessler to which Milnor was not a party. However, a stranger to a contract of purchase and sale may still be a party to a separate contract of collateral warranty, entered into with one of the parties to the main contract. Such a warranty can be found where representations induce a party to enter into the main contract: see ***West Coast Title Search Ltd.v. Datamex Ltd.,*** [*[1993] B.C.J. No. 1822*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MV-00000-00&context=) (Q.L.).

**63**  Not every representation will amount to a collateral warranty. In ***Gallen v. Allstate Grain*** [*(1984), 53 B.C.L.R. 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M33H-00000-00&context=), [*9 D.L.R. (4th) 496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JF75-M33H-00000-00&context=) (C.A.), the Court of Appeal said (at page 51) that it is important to distinguish between a warranty, breach of which gives rise to damages and a "bare and innocent" misrepresentation, which only gives a right of rescission. I would add that a misrepresentation would also give rise to damages if it is made negligently or fraudulently, but in those cases the plaintiff must prove the ***negligence*** or fraud. No such evidence is necessary if there is a breach of a collateral warranty.

**64**  In this case, there was an explicit warranty in the form of Milnor's Limited Standard Warranty, which warranted that Milnor machines would be free from defects in material and workmanship for one year. It also purported to exclude any liability for consequential losses or any amount in excess of the purchase price. Milnor concedes that the separate letters setting out the production guarantee and the structural guarantee are also collateral warranties.

**65**  Keefer submits that the "shuttle letter" constitutes a further collateral warranty. Mr. Wong, at the outset of discussions, indicated that he wanted two shuttles. Although all subsequent Milnor proposals were based on a single shuttle and Mr. Wong apparently did not object to that, the fact the shuttle letter was written indicates the matter was still one of concern to him.

**66**  The letter addresses the question of whether the single shuttle would be able to keep up with the output of the tunnel washers "such that neither CBW is placed in a hold condition." The letter sets out a "time study" based on an assumption that one tunnel would be processing sheets and the other would be used for full dry work. The time study tracks the movement of the shuttle over a hypothetical two and a half minute period. The letter then states:

Further analysis of the preceding time sequence suggests the shuttle is capable of two cycles of receiving/discharging with repositioning each 2 minutes and 20 seconds, which equates to 51.4 shuttle transfers/hour. If all of these transfers are made with two batches, the shuttle capacity exceeds 100 cakes an hour and is no problem. Any single cake transfers eat into the reserve on the shuttle, but impact the dryers even more.

**67**  In order for that statement to be fully understood, it must be read in conjunction with the operating assumptions set out in the production guarantee. These refer to most goods going through the tunnels at a maximum rate of 40 loads an hour. Two tunnels would therefore produce, at most, 80 loads an hour. The shuttle letter suggests the shuttle can easily handle that volume.

**68**  The concern the shuttle letter addresses is whether either or both tunnels would be put on hold. The significance of that concern is also made clear when it is read in conjunction with the production guarantee. A tunnel going on hold would reduce the number of loads being processed in an hour and would therefore reduce the rate of production set out in the production guarantee.

**69**  In ***Gallen***, the Court of Appeal said at page 51 that the distinction between a warranty a representation:

turns on whether the representation became a part of the contractual relationship between the maker and the recipient. That, in turn, depends on the intention of the parties, as derived from objective evidence, including, but not limited to, evidence that tends to show whether the representation was intended to be acted upon and was in fact acted upon.

**70**  The Court in ***Gallen*** was determining whether an oral representation became part of the contractual relationship. In this case, the representation at issue is in writing. That document was created at approximately the same time as two other documents that clearly were intended to form part of the contractual relationship.

**71**  In my view, the best evidence of whether the parties intended the shuttle letter to form part of the contract is the language of that document, compared to the language in the production guarantee and the structural guarantee. Both of the latter documents specifically use the word guarantee, which the shuttle letter does not. Both of them promise to replace equipment that doesn't perform in accordance with the terms of the guarantee. The shuttle letter says nothing about the consequences of inadequate performance. I conclude that, if the shuttle letter was intended to have the same contractual force as the other two documents, it would have been written in similar language and, most importantly, would have similarly spelled out the consequences of a breach.

**72**  I also note that, for practical purposes, the shuttle letter gave Keefer nothing it did not have as a result of the production guarantee. While the shuttle letter refers only to the capacity of the shuttle, the production guarantee relates to all Milnor equipment, including the shuttle. The effect of the production guarantee is that Milnor was warranting an hourly production rate for the entire system. If those rates were not realized, it was not necessary for Keefer to demonstrate which component of the system was responsible for the problem.

**73**  I therefore hold that while the shuttle letter contained representations by Milnor, those representations did not amount to a separate contractual warranty.

**Was There a Breach of the Production Guarantee?**

**74**  Much of Keefer's evidence of operating problems that hindered production comes from Mr. Wong, whose credibility was vigorously attacked by defence counsel in cross examination. For example, in bid documents submitted for potential new hospital contracts, Mr. Wong made representations about Keefer's production capacity that would have been, at best, misleading in the context of the ongoing production problems he has testified to.

**75**  However, Mr. Chu, Mr. Ip, and Mr. Payne gave evidence that, while not identical to that of Mr. Wong in every detail, was generally consistent with his description of the nature and frequency of the operating difficulties Keefer had with the Milnor equipment. Mr. Wong has subsequently sold his interest in Keefer, but received what is, in effect, an assignment of this litigation. Therefore, although Mr. Chu and Mr. Ip still work for Keefer, Mr. Wong is no longer their employer and the current owner has no financial stake in the outcome of this case. As for Mr. Payne, I found him to be a knowledgeable and forthright witness notwithstanding the falling-out between Milnor and his former company, Tessler.

**76**  There is also objective, contemporaneous evidence of production problems, although perhaps not as much as one would hope for. The Mildata software package supplied by Milnor tracked every load through the system. Unfortunately, the data for the first year of the system's operation was deleted at the end of 2000. However, in March, 2000, Milnor obtained a single day's production report for purposes of its own analysis and both parties relied on that document, albeit for different purposes, at trial. There is no evidence to suggest that there was anything unusual about that particular day, so the report constitutes a useful snapshot of the system in operation, at least during the early months.

**77**  The report shows that each tunnel washer discharged its first load of the day shortly after 8 a.m. and its last load a few minutes before 10 p.m. During that period, both tunnels were frequently on hold, waiting to discharges loads, for periods ranging from a few seconds to more than 10 minutes. The total time on hold for the day was four hours and 10 minutes for tunnel #1 and about an hour less than that for tunnel #2. Each tunnel processed a total of just over 32,000 pounds of laundry. Even when the hold times are ignored, the report shows average hourly production for each machine, while operating, to have been only about 3,500 pounds an hour.

**78**  Those production figures are not strictly accurate because all loads are shown at an identical weight of 120 lbs., indicating Keefer staff did not enter the actual weight of each load into the system. However, the system was clearly operating far below the levels referred to in the production guarantee.

**79**  The single day's production report also shows uneven use of the nine dryers. For example, one dryer was running for only seven and a half hours and waiting for loads a total of more than six hours, while another was running for more than 13 hours.

**80**  The production guarantee had a term of one year, so only production figures for 2000 are strictly relevant. However, I note that Keefer also produced monthly figures for subsequent years that indicate production roughly consistent with the evidence for 2000. These "soil reports" show that, for example, in July and August, 2001 and 2002 (Keefer's busiest months of the year) each tunnel was running for approximately 520 hours a month, an average of about 16.75 hours a day. The average hourly production was below 3,000 pounds for each tunnel.

**81**  Milnor contends that the single day's production report from March 2000 shows Keefer was not running the system as it was designed and in the manner specified in the production guarantee. The report shows that tunnel #1 was used primarily for sheets and pillow cases ("condition work") but also processed some towels and other full dry goods. Milnor says the system was intended to operate with all full dry goods being processed in tunnel #2. Mr. Chu testified that is generally how the system was operated, but tunnel #1 would also be used for full dry goods when there were no sheets or pillowcases to process.

**82**  In fact, there is nothing in the production guarantee that requires all full dry goods to be processed in tunnel #2. That specification appears only as an assumption in the shuttle letter, which I have already held did not form part of the contract. However, the production guarantee does says that Keefer should not process more than seven dryer loads of full dry goods "sequentially" before following it with condition work. Surprisingly, Mr. Chu testified that he was unaware of that provision. But the question of whether Keefer complied with the specification in any event turns on the definition of the word "sequentially" in the context of the production guarantee.

**83**  The single day's data from March 2000 indicates that, at least in tunnel #2, Keefer was processing more than seven dryer loads of full dry goods in a row. For example, at one point tunnel #2 was processing full dry goods continuously for more than two hours-a total of 49 wash loads. (A dryer load consists of two wash loads.) If the production guarantee is intended to refer to more than seven dryer loads of full dry goods being processed sequentially in a wash tunnel, Keefer clearly was not complying with that restriction.

**84**  However, Keefer argues that the production guarantee must be interpreted as referring to seven loads of full dry goods entering the dryers sequentially. Even if one tunnel was continually processing full dry goods, the flow of those goods into the dryers would be constantly interrupted by condition goods coming out of the other tunnel, meaning there would not be seven consecutive full dry loads going into the dryers.

**85**  On that interpretation, the only time the system could produce seven dryer loads of full dry goods sequentially would be when both tunnels were processing full dry goods. The March 2000 production data indicates there were brief periods when that occurred, but I agree with Keefer that those incidents could explain only a very small proportion of the times that one tunnel or the other was on hold.

**86**  Evidence of facts mutually known to the parties prior to the execution of a contract (the factual matrix) is admissible to determine the meaning of terms used in the contract: ***Delisle v. Bulman Group Ltd.*** [*(1991), 54 B.C.L.R. (2d) 343*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X1BD-00000-00&context=) at 345, [*[1991] 4 W.W.R. 637*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X1BD-00000-00&context=).

**87**  In this case, the factual matrix included the fact that towels, which are full dry goods, constituted about 40 per cent of Keefer's work load. That figure was included in the original specifications that were supplied to Milnor in September 1998. If all full dry work was being processed in one tunnel, which Milnor says it anticipated, that would mean one tunnel producing full dry work approximately 80 per cent of the time. In those circumstances, it is difficult to see how Keefer could avoid periods where that tunnel was producing more than seven consecutive dryer loads of full dry goods.

**88**  I therefore find the interpretation proposed by Keefer to be the correct one and that Keefer's method of operation was substantially in compliance with the production guarantee. I am also satisfied that the equipment manufactured by Milnor, looked at as a single system, failed to meet the production levels set out in the production guarantee. Having demonstrated that failure and its own compliance with the terms of the guarantee, it was not necessary for Keefer to prove which elements of the system were responsible for the failure. It follows that Milnor was in breach of that collateral contract.

**89**  The production guarantee was in effect for only a year. However, I find that Mr. Wong's December 1999 demand for replacement of the tunnel washers constituted a sufficient and timely triggering of Milnor's obligations to repair or replace the equipment.

***Sale of Goods Act***

**90**  If I am wrong in my conclusion that Mr. Wong properly demanded replacement of the equipment under the production guarantee, that would mean the production guarantee expired with no demand being made under it. If that is the case, I must consider whether Milnor was in breach of the implied condition of fitness for purpose under s. 18 of the ***Sale of Goods Act***, *R.S.B.C. 1996, c. 410* (the "***Act***"). S. 18(a) of the ***Act*** reads:

18 Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:

1. if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

[emphasis added]

**91**  Keefer relies on ***Traders Finance Corporation Ltd. v. Haley*** [*(1966), 57 D.L.R. (2d) 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-JF1Y-B4C4-00000-00&context=) (Alta. C.A.), affirmed, ***Ford Motor Co. of Canada v. Haley***, [*[1967] S.C.R. 437*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22NC-00000-00&context=), [*62 D.L.R. (2d) 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22NC-00000-00&context=), for the proposition that a manufacturer who deals directly with the buyer and has the knowledge referred to in that section may be treated as a seller for the purpose of the ***Act*** even if it is not directly a party to the sale contract.

**92**  ***Haley*** dealt with the purchase of trucks for the purpose of hauling gravel. Johnson J.A., for the Alberta Appellate Division, found that the manufacturer's employee expressly warranted directly to the purchaser that the trucks "... were fit for the purposes for which the appellant purchased them." Evidence showed the trucks in question were much more prone to breakdown and required more repairs than other trucks working the same jobs side by side with them. Johnson J.A. said at paragraph 9:

Where, as here, a purchaser goes to a manufacturer, makes known the purpose for which he requires equipment, is told that specific pieces of equipment shown to him would do the required job, then, notwithstanding who may be the parties to the ultimate agreement of sale, the manufacturer is, in my opinion, the seller within the *Sale of Goods Act*.

**93**  However, Johnson J.A. added at paragraph 12:

I have questioned whether it is necessary on this appeal to invoke the provisions of the *Sale of Goods Act*. The learned trial Judge has found, and the evidence amply bears him out, that a warranty was given by the respondent. Such warranty, although given by a person not a party to the agreement, is nonetheless binding upon him.

**94**  In ***Clare v. I.J. Manufacturing Ltd****.*, [*2003 BCSC 856*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-220M-00000-00&context=), [*15 B.C.L.R. (4th) 320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-220M-00000-00&context=), this Court distinguished ***Haley*** on the basis of the express warranty. Edwards J. said at paragraph 40:

Damages were awarded by the Appellate Division and upheld by the Supreme Court of Canada for breach of the express warranty made by the manufacturer directly to the plaintiff purchaser, not for breach of a statutorily implied warranty of reasonable fitness under the Alberta *Sale of Goods Act.*

He added at paragraph 44 that "a party cannot advance a claim for breach of any of the implied warranties provided for in the ***Sale of Goods Act*** against a party with whom it has no privity of contract."

**95**  In this case, there were express warranties given to Keefer by Milnor and, because of those collateral contracts, I find that there was privity of contract between Keefer and Milnor. I also find the requirements of s. 18 were met because Keefer's requirements, including the desired quantities, were made clear to Milnor, which was in the business of manufacturing that equipment. Mr. Wong, although very knowledgeable about the laundry business and laundry equipment, was relying on Milnor's recommendations and representations about the specific equipment it made and the appropriateness of that equipment for Keefer's purpose.

**96**  A failure to achieve anticipated production levels may constitute unfitness for the purpose within the meaning of the ***Act***: ***Ryan Co. v. Crossroads Equipment Co.*** [*(1976), 16 N.B.R (2d) 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW51-FG12-60BB-00000-00&context=), [*[1976] N.B.J. No. 242*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW51-FG12-60BB-00000-00&context=) (Q.L.). Excessive repairs and interruptions in business operations are also sufficient to render equipment unfit for its intended purpose: ***Haley***.

**97**  If, as ***Clare*** and ***Haley*** make clear, a manufacturer's liability to an ultimate buyer under the ***Act*** depends on the existence of a separate, express warranty, the protection of the ***Act*** will often be superfluous. However, reliance on the ***Act*** may in some cases allow a purchaser to avoid limitations contained in the express warranty. For example, in ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [*[1989] 1 S.C.R. 426*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23NF-00000-00&context=), 57 D.L.R. (4d) 321, the buyer was able to rely on the similar Ontario statute when the seller's express warranty had expired. The same circumstances exist in this case.

**98**  It is also well established that the terms of an express warranty may exclude application of the statutory warranty, and Milnor says that is what its Limited Standard Warranty did. In ***Hunter Engineering***, Dickson C.J.C. said at 449:

The mere presence of an express warranty in the contract does not mean that the statutory warranties are inconsistent. If one wishes to contract out of statutory protections, this must be done by clear and direct language, particularly where the parties are two large, commercially sophisticated companies.

**99**  Wilson J. in the same case adopted the following statement at 498:

Although a vendor may exclude conditions implied by the *Sale of Goods Act*, he must use explicit language, in the absence of which the court will not be prepared to find that the conditions have been excluded.

**100**  ***Hunter Engineering*** dealt with two contracts, only one of which was held to have effectively ousted the statutory warranty. That contract said "The Provisions of this paragraph represent the only warranty of the Seller and no other warranty or conditions, statutory or otherwise shall be implied." Wilson J. said at 498 that the explicit reference to the statutory warranty was "crucial" and prevented the application of the ***Act***.

**101**  Although Wilson J. relied on the reference to the statutory warranty, I do not take her to have said that an explicit reference to the statute will be necessary if the intention to contract out of the statute is made clear by other language. In this case, there is no reference to statutory warranties but there is an explicit statement that "Milnor makes no expressed or implied warranties of merchantability or fitness for any particular use or purpose" (emphasis added). The statute refers to "the particular purpose for which the goods are required" and "an implied condition that the goods are reasonably fit for that purpose."

**102**  The language of the warranty document is sufficiently clear and sufficiently close to the language used in the statute to indicate a clear intention to contract out of a statutory warranty of fitness for a particular purpose. However, the statute also refers to an "implied condition." The difference between a condition and a warranty is set out in s. 15 of the ***Act*** - breach of a condition allows the buyer to treat the contract as repudiated, while breach of a warranty only gives rise to a claim for damages. Where a buyer has accepted delivery of the goods, the difference is of little practical significance because s. 15(4) states:

1. If a contract of sale is not severable and the buyer has accepted the goods or part of them, or if the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

**103**  For purposes of a remedy in this case, any breach of the statutory condition would have to be treated as only a breach of warranty, but the difference is still relevant for the purpose of interpreting a clause that purports to exclude the statutory provisions. In ***Gregorio v. Intrans-Corp*.** [*(1994) 115 D.L.R. (4th) 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X244-00000-00&context=), [*18 O.R. (3d) 527*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X244-00000-00&context=), the Ontario Court of Appeal considered a manufacturer's warranty that stated:

Except for the above warranty, Peterbilt and Selling Dealer make no other express or implied warranties and NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Laskin J.A. said at page 207:

The express terms of the Peterbilt warranty do not exclude the statutory conditions of fitness for a purpose and merchantable quality ... There is a difference between a breach of warranty and a breach of condition. Words that exclude only implied warranties do not also exclude implied conditions.

**104**  The exclusion clause that was upheld in ***Hunter Engineering*** referred to "no other warranty or conditions." In this case, the Milnor Limited Standard Warranty does not refer to conditions and simply says that Milnor makes "no expressed or implied warranties of merchantibility of fitness for any particular use or purpose." That phrase is effectively identical to the one used in ***Gregorio***. I therefore must conclude that the wording of Milnor's Limited Standard Warranty is not sufficiently explicit to exclude the operation of the implied condition in the ***Act***.

**The Release**

**105**  The Limited Standard Warranty ran for one year from the date equipment was shipped. In the fall of 2000, Milnor agreed to extend the warranty dates and Keefer agreed to accept a payment of $7,900 U.S. In a letter to Mr. Wong setting out these terms, Mr. Satchwell referred to a conversation on October 12, 2000 in which he said the parties "went over all the outstanding issues with your new installation involving either Tessler or ourselves". The document then said the payment was to cover:

... all your outstanding claims against either us or Tessler including parts warranty, labour warranty (which has now expired), damaged linen etc.(in other words, everything). This check will be issued once we receive a copy of the check you have written to Tessler for payment in full of your account.

Once this occurs, Tessler is free of all obligations to your company and the only obligation and/or guarantees we would have would be our standard parts warranty running from the following dates ...

**106**  The new warranty commencement dates referred to were January 1, 2000 for the tunnels and April 1, 2000 for the presses and dryers. The letter was dated October 16, 2000, but a further copy was sent to Mr. Wong for his signature on December 2. Mr. Wong signed the document, but next to the new warranty date for the tunnels wrote in the words "except for the extended warranty on the structural integrity of the CBW."

**107**  Milnor submits this document constitutes a release, arising from a compromise that included consideration being paid for that release. Keefer says the release was limited to the specific issues that were being negotiated at the time.

**108**  In ***Bank of British Columbia Pension Plan v. Kaiser***, [*2000 BCCA 291*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61CM-00000-00&context=), [*137 B.C.A.C. 37*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61CM-00000-00&context=) at para. 17, the Court of Appeal adopted the following principles from *Chitty on Contracts* (London: Sweet & Maxwell, 1994) on the interpretation of releases:

1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.
2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.
4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

**109**  In the same case, and in ***Hannan v. Methanex Corp.*** [*(1998), 46 B.C.L.R. (3d) 230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1T9-00000-00&context=), [*[1998] 7 W.W.R. 619*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1T9-00000-00&context=), the Court adopted the following statement of La Forest J.A. (as he then was) in ***White v. Central Trust Co***. [*(1984), 7 D.L.R. (4th) 236*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-DXPM-S0BV-00000-00&context=), [*54 N.B.R. (2d) 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW61-DXPM-S0BV-00000-00&context=) (NBCA) at 247-248:

Like other written documents, one must seek the meaning of a release from the words used by the parties. Though the context in which it was executed may be useful in interpreting the words, it must be remembered that the words used govern. As in other cases, too, the document must be read as a whole. This is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest of terms. Thus reference is frequently made to recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of general words. As Lord Westbury stated in the House of Lords' case of *Directors of London & South Western R. Co. v. Blackmore* (1870), L.R. 4 H.L. 610 at p. 623: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

By referring to what was in the contemplation of the parties, Lord Westbury was, of course, not opening the door to adducing evidence of what was actually going on in their minds, still less to making inferences about it. Such considerations are relevant solely to issues such as undue influence, mistake, fraud and the like which have no application here. What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.

**110**  The general principle governing interpretation of contracts is also set out by G.H.L. Fridman in *The Law of Contract,* 5th ed. (Toronto: Carswell, 2006) at p. 15:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifest intentions. It is not what an individual party believed or understood what the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

[emphasis added]

**111**  Read in isolation, the release document in this case appears very broad. It lacks the formal, sometimes convoluted and archaic language often seen in releases drafted by lawyers, but is, if anything, clearer for having been written in everyday language. It refers to "all your outstanding claims," adds the phrase "in other words, everything" and states that the "only obligation and/or guarantees we have would be our standard parts warranty." The question is whether the context of the surrounding circumstances shows that the parties intended it to have a narrower application.

**112**  On May 30, 2000, Mr. Payne wrote to Mr. Pellerin to say that Mr. Wong wanted the warranty extended "due to start up difficulties" as well as compensation for linen damage and compensation for the additional work Keefer staff had done on system modifications. In subsequent discussions and correspondence Mr. Satchwell invited Mr. Wong to suggest new warranty start dates for the various pieces of equipment. Without such an extension, the warranty was set to expire in the summer of 2000 - one year from the date each piece of equipment was shipped from the Milnor plant.

**113**  Mr. Satchwell also said that Milnor had given Tessler a credit of $7,000 U.S. and that those funds were to be passed on to Keefer as compensation for damaged sheets and for labour expenses incurred by Keefer in "assisting Milnor/Tessler in resolving some of the technical problems."

**114**  Mr. Wong wrote to Mr. Satchwell on August 22, 2000, proposing that the warranties run from January 1, 2000 for the tunnels, June 1, 2000 for the presses and August 7, 2000 for the dryers. The letter set out a claim for damaged goods and "labour cost to perform warranty work" of $13,140.50 Cdn, over and above the credit that had been received through Tessler. The description of the labour charges being claimed included "jamming, mixing, press, motor, conveyor, shuttle and dryer problems." Mr. Wong also added that mixing, fallback and damage of goods in the tunnels were "still problems."

**115**  On September 11, 2000, Mr. Wong wrote to Mr. Gaulter to say his staff had done a detailed internal inspection of the tunnels and identified a number of differences between the design of the G3 model and the G1 models that Keefer had used at its old plant. These differences included the number and configuration of the ribs and the size and shape of the transfer scoop. He said:

We were not informed of all these design changes in the new CBW from the Classic. If we were provided with this information, we may not have purchased this new generation CBW. As a result we will always be faced with linen fallback, fall-forward, jamming and mixing in the CBW. Lately we have been faced with daily damages to the full dry goods .... There are design flaws in the new CBW system. I have no solution to these problems.

**116**  On December 21, 2000 - a matter of days after signing the release - Mr. Wong wrote to Mr. Gaulter saying: "we have remaining problems that need to be resolved." The problems referred to included continued fallback of facecloths, pillow slips and hand towels, increased chemical costs due to increasing the amount of detergent as recommended by Milnor, water leaks in the seals between some modules, continued oil leakage from both presses, motor failures in the elevators and conveyors, and insufficient lint collection in the dryers.

**117**  In ***Fontini's Restaurant Corp. v. White Spot Ltd***. [*(1998), 38 B.L.R. (2d) 251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S24V-00000-00&context=), [*[1998] B.C.J. No. 598*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JG02-S24V-00000-00&context=) (Q.L.) (BCSC), the plaintiff alleged fraudulent or negligent misrepresentations about the profitability of a restaurant business it purchased. When the plaintiff later sold the business, the consent of the defendant had to be obtained to terminate a franchise agreement. The defendant provided that consent and also released the plaintiff from obligations under a sublease. As part of that transaction, the plaintiff signed a general release from "all actions, causes of action, claims, demands and suits." Referring to one of the principals of the plaintiff company, this Court said at para. 12:

It seems evident therefore that in the Spring and Summer of 1995 when she and her husband decided to sell the business she was well aware of the circumstances which she now puts forward as being the basis for her claim against the defendant. As a result thereof, according to her own testimony, she felt that they had been "cheated". With that alleged knowledge in mind they later signed the release of the defendant "from any and all actions, causes of action, claims, demands and suits". That broad language would appear to preclude the bringing of this action as any liability for any antecedent negligent or fraudulent misrepresentations must have been "in the contemplation of the parties at the time when the release was given".

The Court added at para. 17 that a release is not invalidated by the fact that more evidence of a cause action subsequently comes to light if that cause of action was in the contemplation of the parties at the time release was executed.

**118**  In my view, the circumstances surrounding this release are indistinguishable from the circumstances that were before the court in ***Fontini's***. The release in this case, while it lacks formal phraseology, contains language that shows a clear intention to resolve all outstanding issues. Mr. Wong was careful to write in the fact that the structural guarantee was not being released. At the time, he was fully aware of all alleged defects in the ability of the system to process linen in the manner and in the quantity that he expected. As a sophisticated business person, he could not reasonably have been in any doubt about the meaning of phrases like "in other words, everything" or "all outstanding claims" or "the only obligation and/or guarantees we have ..."

**119**  Keefer relies on ***Privest Properties v. Foundation Co. of Canada*** [*(1997), 36 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B11K-00000-00&context=), 145 D.L.R. (4d) 729. That case involved the costs of and losses flowing from the need to remove asbestos fireproofing material from a building. The defendant relied on a release signed by the building owners years earlier. That release referred to an agreement "between the parties with respect to the matters in issue between them" and purported to be a release of all "claims and demands, whatsoever." Recitals referred to a specific dispute "with respect to a claim for Federal Sales Tax rebate and with respect to damages as a result of certain allegations by the owner" and referred to an action the building owner had started "claiming inter alia, a certain sum of Federal Sales Tax rebate and damages."

**120**  The trial judge held the release covered the subsequent claims for removal of asbestos, in part because, at the time the release was signed, the owner was aware of controversy surrounding the use of asbestos and knew or could have discovered that the fireproofing material used in building contained asbestos. The Court of Appeal found that to be in error. The Court noted that the release referred to "certain allegations" and said there was no indication those allegations had anything to do with fireproofing. Referring to ***White v. Central Trust*** the Court said at para. 13.

Applying this reasoning to the case at bar, we think it is clear that the parties were "really contracting about" the specific disputes referred to in the recitals to the Agreement that was the subject of the Supreme Court action taken in 1978 against Foundation, and that the plaintiffs' claim for economic loss arising as a result of its decision some years later to remove the fireproofing from the Building cannot be said to have been in their contemplation "as at the date of these presents."

**121**  The Court said the finding that the plaintiffs' agent knew or should have known about the existence of the asbestos did not mean that the claim at issue was within their contemplation for the purposes of the release:

Even accepting that finding, it is a very large leap to the inference that the plaintiffs, Mr. Kendrick's principals, were at the time the Agreement was executed, contemplating anything beyond claims of the kind referred to in the recitals, or can be taken to have intended to release a claim of the size and nature of this one in consideration of the comparatively small amount of money the plaintiffs received (from trust) under the Agreement. In the absence of any authority that requires such an inference, it is not one we would make. Overall, then, we do not find that the parties were "really contracting about" a claim of the kind that forms the subject-matter of this action.

**122**  Keefer relies on that passage and says it is "inconceivable" that it would have released claims of the magnitude now at issue in exchange for a comparatively trivial payment. However, the determining factor in ***Privest*** was not the size of the payment that accompanied the release, but the issues that had been raised. Although the trial judge in ***Privest*** found that the plaintiffs knew or should have known when they executed the release that asbestos was present, there was no evidence they had made any complaint about it, or that they had contemplated any possibility of the losses that would result from a future need to remove it.

**123**  The release document in this case refers to a discussion of October 12 where "all outstanding issues" were discussed. It could be argued that those words are the equivalent of a recital in a more formal release and the release covers only the specific matters discussed at that meeting. There is no evidence that expressly sets out, point by point, what was or was not said at that meeting. Mr. Satchwell testified that "all technical issues" were discussed and referred to jamming and leaks as specific examples.

**124**  However, any uncertainty or ambiguity is removed by the subsequent statement that "the only obligations we would have" are the ones listed in the document. To use the language of Professor Fridman quoted above, I do not think it would be possible for any reasonable, objective person, knowing all the facts, to conclude that statement means anything less than what the plain, ordinary meaning of the words conveys.

**125**  In this case, Keefer had complained to Milnor about defects or problems with every aspect of the system along with general failure of the system to meet the production guarantee. At the risk of being repetitive, the following is a list of the specific complaints made by Keefer on one or more occasions at some point before December 2000, when Mr. Wong signed the release:

1. fallback and mixing of goods, sometimes to the point that it would cause the tunnels to jam, and a reduction in batch sizes in an attempt to deal with the problem;
2. problems at the entry chute, with insufficient water spray to push all goods into the first module and inability of the system to detect double loads entering the first module;
3. excessive lint due to the lack of a lint filter and to the presence of rough edges, crevices and weld splatter inside the tunnels where lint would adhere;
4. oil leaks in the press, first caused by failure of tubing and o-rings then by ongoing leakage from the main shaft;
5. hydroburst damage in sheets, requiring the press to be "de-rated;"
6. inability of the press to maintain even and sufficient pressure;
7. inability of the press to extract water from small loads;
8. shearing off, on one occasion, of the bolts on the press head;
9. rust on the press head and other parts;
10. premature failure of the rubber diaphragms used in the presses;
11. failure of the material on the press roller;
12. failure of the coupling between the elevator motor and gear reducer;
13. elevator motors burning out;
14. the shuttle returning to a "home" position after each load, rather than going directly to pick up the next load;
15. the shuttle losing its bearings and dumping goods on the floor;
16. the shuttle could transport two cakes of laundry at a time only if they were from the same customer and of the same linen type;
17. the shuttle wobbled when it moved, leaving gaps between it and other components and resulting in a need to operate the shuttle at slower speed;
18. conveyor belts unable to move smoothly;
19. failure of the shuttle motor/torque arm;
20. excessive dry times;
21. linen "pancaking" and burning inside the dryers;
22. failure of bearings in the dryers, requiring all of the bearings to be replaced;
23. failure of dryer pilot lights and ignition systems; and
24. the automatic lint removal system in the dryers did not work properly.

**126**  With one major exception discussed below, that list represents a fairly extensive catalogue of the specific alleged failures of the system that Keefer relied upon at trial. All of them are alleged to have contributed, to a greater or lesser degree, to the fact that Keefer could not achieve the production levels it was promised. By the time Mr. Wong signed the release on behalf of Keefer, all of them had been the subject of discussion between Keefer and Milnor. Keefer, on one occasion, had gone so far as to demand replacement of the tunnel washers. These issues were all clearly "in the contemplation" of the parties.

**127**  Keefer also argues that, although there were many "issues" between Milnor and Keefer at the time of the release, only some of them had resulted in "claims", in the sense of specific monetary demands, and the release refers to "outstanding claims." I cannot accept that submission because the release in fact refers first to a discussion at which it is said "we went over all outstanding issues" then refers to a cheque covering "outstanding claims." Any possible distinction between the words "issues" and "claims" is, in the context of the release and the surrounding circumstances, eliminated by what I find to be the unambiguous phrases "in other words, everything" and "the only obligation and/or guarantees we have would be our standard parts warranty."

**128**  Accordingly, I find that most of the defects Keefer relies upon, most importantly the inability of the system to meet the production guarantee, existed and were in the contemplation of both parties at the time the release was signed. To the extent that Keefer's claim is based upon those matters, it must fail.

**Negligent Misrepresentation**

**129**  Keefer alleges that Milnor made a number of negligent misrepresentations, both directly to Keefer and in its promotional material and that Keefer was induced by those representations to enter into the contract. Keefer submits that all of these representations, taken together, were in effect a representation that the G3 system would be fit for Keefer's purpose "of laundering a large volume of a variety of linen in Keefer's commercial laundry operation."

**130**  Milnor argues that Keefer has failed to prove the elements of negligent misrepresentation, as those elements are set out in ***Queen v. Cognos***, [*[1993] 1 S.C.R. 87*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609G-00000-00&context=) at 110, 99 D.L.R. (4d) 626, and that liability for any such representation is in any event excluded by the language of the Limited Standard Warranty.

**131**  I do not find it necessary to consider the issues relating to negligent misrepresentation because the alleged misrepresentations Keefer relies on generally relate to the same issues that Keefer relied on to establish breach of the production guarantee and breach of the implied condition in the ***Sale of Goods Act***. To the extent Keefer relied on any representations in addition to those set out in the collateral warranties, and to the extent any of those representations turned out to be false or inaccurate, Keefer was aware of and had complained about those matters by the time the release was signed in December 2000. Therefore, even if Keefer could establish a claim in negligent misrepresentation, that claim was released in December 2000 for the reasons set out above.

**Rust, Corrosion and the Structural Guarantee**

**132**  The one major issue to which the release document can not apply is that of rust and corrosion inside the wash tunnels. Aside from the fact that Keefer asserts this is a breach of the structural guarantee, which is specifically excluded from the release, the problem is one that did not emerge until approximately a year after the release was signed.

**133**  On November 30, 2001 Mr. Wong advised Milnor that Keefer staff had discovered pinholes at the welded joints of the outside shells of three modules of tunnel #2 and that water was leaking out of the pinholes. At approximately the same time, Keefer staff had begun to notice rust stains on some linen. On December 1, 2001, Keefer staff performed and internal inspection of the tunnels. Mr. Chu testified that he saw rust at a number of points where parts had been welded, including places where ribs had been cut and where perforations in transfer scoops had been blocked.

**134**  On January 7, 2002, Mr. Wong wrote to Mr. Pellerin saying that Keefer was now experiencing daily occurrences of rust staining on linen. He said Keefer had spent "countless man-hours and thousands of dollars trying to keep the Milnor system working" and demanded that Milnor either provide two new tunnel washers or finance the purchase of a replacement system from another manufacturer.

**135**  In a response dated January 24, 2002, Mr. Pellerin said that rust stains on linen were not necessarily related to rust on the surface of the machinery. He said the stains on the linen could be caused by iron entering the system from other sources, including iron in the water supply, while corrosion of the tunnel was likely caused by Keefer using excessive amounts of bleach. He said no similar problems were being encountered by other users of Milnor equipment and rejected the suggestion that the machines be replaced.

**136**  Larry Katchuik, a welder retained by Keefer, noted rust in a number of locations where the metal had been welded, more so in tunnel #2 than in tunnel #1. These locations included areas where transfer scoop perforations had been blocked and the blocking plates were trapping lint. In Mr. Katchuik's opinion, the welding was below acceptable standards. He said defects in the welding included inconsistent penetration, apparent welding at too high a temperature, poor alignment of metal pieces before welding and inadequate post-weld grinding and polishing. Such defects in the welding create weak points that are more susceptible to corrosion or areas where rust can be trapped.

**137**  Keefer also retained Craig Reid, a metallurgical engineer. His agreed that poor weld quality was leading to accelerated corrosion of the welds and adjacent parent metal. He also concluded that there were "designed-in" crevices that were corroding and accumulating rust from elsewhere in the system and that rust was forming where blocker plates had been installed in the transfer scoops. Mr. Reid said the rust was much worse in tunnel #2 than tunnel #1 and that periodic acid cleaning would be necessary to control corrosion, but that would not likely be a long-term solution.

**138**  David Hendrix, an expert retained by Milnor, said in his report that the tunnel interiors were "rusted and corroded at various locations along their lengths." While he acknowledged that some corrosion had occurred at "unfinished" welds, Mr. Hendrix did not consider that to be the major source of rust and laundry staining. Mr. Hendrix said the rust problem was the result of a "complex interaction" of factors. These factors included excessive use of bleach, which he said would be responsible for corrosion that was present in areas that had not been welded.

**139**  Mr. Reid did not disagree that bleach was a significant factor. He specifically attributed the fact that there was much more corrosion in tunnel #2 to the fact that tunnel #2 was generally used for more heavily soiled goods that required more bleach. But he said weld quality was a determining factor in the ability of the weld to resist the corrosive influence of bleach.

**140**  Mr. Reid and Mr. Hendrix also agreed on a number of other sources of iron and rust, including the corrosive nature of the city water supply, which would particularly affect galvanized pipes upstream of the Milnor equipment, high iron content in the water, and foreign objects, such as pins, entering the system with the laundry.

**141**  The real question, in my view, is whether the structural guarantee is properly interpreted as including a guarantee against rust and corrosion. If it is, the fact that there were a number of causes or potential causes is not particularly relevant. The only causes that the guarantee excludes are "failures due to lack of maintenance, misuse or abuse or operation contrary to manufacturers instructions." Milnor, as a manufacturer of laundry equipment, obviously expects bleach to be used in its machines and Keefer was never told of any specific limit on the amount that could be used. The occasional entry of pins and other small foreign objects is also something that obviously must be expected in commercial laundry operations. If laundry equipment is affected by variations in the quality and chemical content of local water supplies, Milnor had to expect such variations because it markets its equipment throughout the world.

**142**  Milnor argues that the presence of rust or corrosion does not constitute a structural failure within the meaning of the structural guarantee. The operative portion of the guarantee reads:

Pellerin Milnor Corporation guarantees that the CBW, press, and dryer structural members will be free from metal fatigue or weldment failure for a period of five years, or 20,000 operating hours from the date of installation, whichever is longer. Failed components will be replaced at no charge, freight charges for your account. This warranty is voided in the event of failures due to lack of maintenance, misuse or abuse, or operation contrary to manufacturer's instructions.

**143**  After setting out those terms, Mr. Pellerin's letter continued with the statement that "I have absolute confidence in the structural integrity of these items." Mr. Wong also referred to the guarantee as one dealing with structural integrity when he signed the purported release document and wrote in the words "except for the extended warranty on the structural integrity of the CBW."

**144**  Terms such as "failure" and "structural integrity" usually refer to matters much more severe then rust. A building or other structure is usually said to fail when it collapses or when, because of some inherent defect, it becomes unsafe or unusable. The *Shorter Oxford English Dictionary* defines to verb to fail, when used in reference to a structure or "other material thing" as to "give way under pressure" and when used in reference to machinery as to "break down, cease to function." The welds clearly did not fail in either of those senses. They might be said to have failed if, for example, the machinery broke at the site of a weld or if pieces of metal came loose. In fact, Mr. Wong, in his evidence at trial, referred to just such a "structural failure" that occurred at one point in the tunnels in Keefer's old plant when, he said "large pieces of metal came out." That previous incident must be considered part of the factual matrix against which the structural guarantee is interpreted.

**145**  The fact that some the welds rusted indicates that they were unable to fully tolerate the normal and expected conditions under which the equipment was used. In that sense, the tunnel washers might be said to have not been completely fit for the purpose for which they were intended. That could be considered an additional way in which there was a breach of the implied condition of fitness under the ***Sale of Goods Act***. But it would be stretching the language unreasonably to characterize that defect as a failure within the meaning of the structural guarantee.

**146**  As for the ***Sale of Goods Act***, I have no doubt that rust under normal operating conditions may render a piece of equipment unfit for its purpose, but that must depend on the severity of the problem and the actual impact it has on the use of the equipment. I have already found that, because of its failure to meet production goals, the equipment was unfit for its purpose, but Keefer released any claim relating to that. In order to succeed on this branch of the case, Keefer must show that the rust made the equipment unfit for its purpose in ways different from and additional to the general production problems. In my view, the evidence does not allow any such conclusion.

**147**  Both tunnel #1 and tunnel #2 remained in operation long after rust was first discovered. Tunnel #1 was still in operation at Keefer at the time of trial. The documents that assisted Keefer in demonstrating the failure of the system to meet its intended production fail to show any further reduction in its fitness due to the rust problem.

**148**  The rust was first discovered late in 2001, but the "soil reports" referred to above show that in 2002 there was no significant change either in the number of loads processed in tunnel #2-which displayed the most rust-or the total weight of laundry being processed. They also show that there was no significant change in the production of the two tunnels relative to one another, even though tunnel #2 was said to have a much more serious rust problem. Keefer's use of both tunnels declined in 2003-after the first new Kannegeisser tunnel was installed - but the larger decline was in the use of tunnel #1. It therefore appears that the rust problem, in and of itself, had no noticeable impact on Keefer's ability to use the equipment, and in particular tunnel #2, for its intended purpose.

**149**  Keefer says that the first Kannegeisser tunnel was purchased to replace Milnor tunnel #2 and includes the cost in its claim for damages. But the evidence is clear that Keefer made the decision to purchase the new tunnel because of the failure to meet anticipated production levels and that the rust issue was, at most, a minor additional consideration. Mr. Chu testified that the main reason for buying that new tunnel was that the Milnor equipment was not providing the promised production capacity. Michelle Ong, an accountant who was part of Keefer's management team, said that the Kannegeisser tunnel was purchased at a time when Keefer hoping to obtain new hospital contracts:

We're going to lose opportunities that are 10-year contracts. So we're going to lose 10-year revenues, and then they're gone for 10 years. We're not going to be able to have an opportunity again after this, and this is part of our business model. This is what we want. We can't really forego this, so at that point in time we said, you know what? We've got to-we've got to go and get something; we've got to go and get a Kannegiesser.

And we had to be cautious with taking on, like, poundage and new customers all at one time. We had to stagger it out. Because, you know, when you start putting new volume into the plant, you can't just look at, okay, there's going to be capacity/reliability issues with the Milnors. You have to look at the whole plant and say, okay, what's the impact now; right? We've got to make sure we still meet our 24-hour turnaround. We've got to make sure that we're meeting our quality control. And if we're getting staining out of it and linen mixing, we've got to be able to keep up with troubleshooting. And we had to keep the troubleshooting at a manageable level.

**150**  Although a number of Keefer witnesses referred to customer complaints about rust, Keefer did not tender any evidence from customers or former customers.

**151**  I therefore conclude that Keefer's decision to replace the Milnor equipment was motivated by the inability of the system to meet promised production levels, an issue that I have already said was covered by the release. I have no doubt the replacement decision would have been the same with or without the additional problem of rust and there is no evidence from which I can conclude that, in the absence of production problems, Keefer would have replaced the equipment solely because of rust. I therefore can not conclude that the rust problem was of sufficient severity to constitute a breach of the implied condition in s. 18 of the ***Sale of Goods Act***.

**Negligent Design, Manufacture and Repair**

**152**  Keefer claims, as an alternative ground of liability, that Milnor was negligent in the design, manufacture and repair of the system. The alleged ***negligence*** relates in part to matters that Keefer was aware of and complained of prior to its execution of the release and in part to the rust problem that developed after the release.

**153**  Keefer has introduced some evidence in relation to welding techniques on which it would be possible to find ***negligence***. There is, however, no evidence on standard industry practices relating to design or basic manufacture and therefore no evidence of a breach of those standards. Keefer is essentially asking the Court to infer negligent design and manufacture from the problems that subsequently developed.

**154**  Even if I were to find ***negligence***, Keefer would have to overcome the fact that its claim is one for purely economic loss-costs of repair and replacement, lost business opportunities and increased operating costs. Such damages are recoverable in tort in only limited circumstances.

**155**  In ***Winnipeg Condominium Corp. No. 36 v. Bird Construction,*** [*[1995] 1 S.C.R. 85*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3GT-00000-00&context=), 121 D.L.R. (4d) 193, the Supreme Court of Canada considered alleged negligent construction of a building. La Forest J. said at 97:

The negligently supplied structure in this case was not merely shoddy; it was dangerous. In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort.

In finding that contractors can be held liable for dangerous defects, the Court left open the question of whether there could be liability to subsequent purchasers for the cost of repairing non-dangerous defects.

**156**  However, in ***Hasegawa v. Pepsi Bottling Group***, [*2002 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2FC-00000-00&context=), 213 D.L.R. (4d) 663, the Court of Appeal rejected a claim in tort for pure economic loss arising out of defective, but not dangerous, products. Finch C.J.B.C. said at paragraphs 57 and 58:

A legal rule which imposed liability for the manufacture or supply of defective, but non-dangerous, goods would create an implied warranty of product quality for the sale of commercial products, in the absence of contract. Such a rule would be an enormous change in the law, and would indeed create "liability in an indeterminate amount for an indeterminate time to an indeterminate class": per Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y.C.A. 1931) at p. 444.

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

**157**  Although Keefer's claim in this case does not directly raise the concern, referred to in ***Ultramares***, about liability to an indeterminate class, it does raise concerns about liability in an indeterminate amount for an indeterminate time, or at least liability in an amount far beyond what Milnor contemplated and expressly agreed to assume. Keefer asked for and received specific warranties as a matter of contract and, also as a matter of contract, agreed to a release of most of its claims. There is no reason for tort law to impose a different risk allocation on these commercial parties.

**Summary and Conclusion**

**158**  In summary, I find that the equipment supplied by Milnor failed to meet Keefer's production requirements and Milnor was in breach both of the express warranty it provided to Keefer and of the implied condition of fitness for purposes in s. 18 of the ***Sale of Goods Act***. However, I also find that Milnor is entitled to rely on the document agreed to by Keefer in December 2000 as an effective release of Keefer's claim.

**159**  If find further that rust and corrosion problems, which developed after the release was executed, did not constitute a breach of the structural guarantee that Milnor provided and did not, in and of themselves, amount to a breach of the implied statutory condition.

**160**  These conclusions are based upon the law of contract and the law relating to sale of goods and Keefer cannot obtain a different or contrary result by resorting to the law of torts.

**161**  Accordingly, this action must be dismissed.

N.H. SMITH J.

\* \* \* \* \*

Corrigendum

Released: September 26, 2008

***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that on page one of my Reasons for Judgment of August 22, 2008, [2008 BCSC 1119] some of the trial dates were listed incorrectly. The correct trial dates are listed.

\* \* \* \* \*

Corrigendum

Released: January 22, 2009

***Revised Judgment***

Corrigendum to the Reasons for Judgment issued advising that on page one of my Reasons for Judgment of August 22, 2008, [2008 BCSC 1119] and on page one of my Corrigendum of September 26, 2008 [2008 BCSC 1119] the name of the defendant Tessler G.W. Fabricare Inc. is incorrect and should read Tessler G.W. Fabcare Inc.

**End of Document**

[***Kope v. Tse, [2019] B.C.J. No. 1360***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5WND-DFH1-FJM6-60W5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E. McDonald J.

Heard: June 17-21, 2019.

Judgment: July 22, 2019.

Docket: M173824

Registry: Vancouver

**[2019] B.C.J. No. 1360** | 2019 BCSC 1197

Between Dustin Kope, Plaintiff, and Candy Tse and John Tse, Defendant

(57 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Motor vehicles — Rules of the road — Action for personal injuries suffered in a motor vehicle accident dismissed — Plaintiff alleged he had fully reversed out of his parking stall and was about to move forward when his vehicle was hit from behind by the defendant's vehicle — Defendant alleged plaintiff was still partially in parking stall as he hit her vehicle — Plaintiff was solely liable for collision — Plaintiff reversed his vehicle in an unsafe manner by failing to ensure that there was no vehicle behind him.**

|  |
| --- |
| Action for personal injuries suffered in a motor vehicle accident. The accident occurred in a parking lot. The plaintiff alleged that he had fully reversed out of his parking stall and was about to move forward when his vehicle was hit from behind by the defendant's vehicle as she turned around a corner. He claimed that he did not see the plaintiff's vehicle prior to the collision. The defendant alleged the plaintiff was still partially in the parking stall when the collision occurred and that it was the plaintiff who hit the defendant's car.  HELD: Action dismissed.  The plaintiff was solely liable for the collision. The court accepted that the defendant drove her vehicle behind the plaintiff as far as her front wheel well before he backed into the side of her car. Based on a careful assessment of the evidence, it was the plaintiff who reversed his vehicle in an unsafe manner by failing to ensure that there was no vehicle behind him. The plaintiff had not established that the defendant admitted liability after the collision or that she was distracted. It was reasonably foreseeable that a vehicle would turn the corner near where the plaintiff was parked and enter the aisle behind him. His failure to continue checking the aisle behind him as he reversed was negligent. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 86*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-60KK-00000-00&context=), s. 193

**Counsel**

Counsel for Plaintiff: B.A. Yuen.

Counsel for Defendants: S. Grewal.

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**Reasons for Judgment**

|  |
| --- |
| **E. McDONALD J.** |

**I. INTRODUCTION**

**1**  The plaintiff, Mr. Kope, claims damages for personal injuries sustained in a collision that took place in a parking lot. In particular, he claims that one of the defendants, Ms. Tse, was negligent when she collided with his vehicle after he had reversed out of a parking stall. The plaintiff claims for injuries to his neck, back, shoulders, hips and glutes and claims these injuries are causing him anxiety, headaches, fogginess, sleeping difficulties and leg tension. The plaintiff's specific claims are for: general and special damages; costs; loss of income earning capacity; loss of domestic capacity, past and prospective; an "in trust" amount for relatives and others who provided care and assistance; and interest.

**II. ISSUES**

**2**  The issues are: (1) whether the defendants, Mr. and Mrs. Tse, are liable to the plaintiff in ***negligence***; (2) whether the plaintiff suffered the losses and injuries alleged; and, (3) the amount of damages and costs payable to the plaintiff in the event I find the defendants liable.

**III. FACTS**

**The Plaintiff's Background**

**3**  The plaintiff has worked for approximately 10 years as a bartender. At the time of the accident he was working as a bar manager before eventually returning to bartending. He testified that his work duties involved lots of bending, reaching, mixing and pouring movements, as well as some heavy lifting for items such as kegs. The plaintiff said he was in the best physical shape of his life prior to the accident. He testified that fitness and sporting activities were important to him. He belonged to an indoor climbing gym. He cycled, hiked, skim boarded, played Frisbee, danced, and engaged in numerous other physical activities. He said he enjoyed physical challenges and pushing himself to the limits of his abilities.

**The Collision**

**4**  In the early afternoon of October 31, 2016, Mr. Kope and Ms. Tse had parked their respective vehicles on the rooftop parking lot of the Canadian Tire store located at 2290 Cambie Street in Vancouver. Mr. Kope was parked one aisle over from where Mr. Tse was parked. The aisle where Mr. Kope was parked was directly in front of the store entrance and led to the parking lot exit (the "Exit Aisle").

**5**  According to a professionally prepared and scaled plan of the parking lot, the Exit Aisle is 22 feet wide and it runs one way, going west to east. I have attached the plan at Appendix A of these reasons for ease of reference. There are 15-foot-long parking stalls that extend out along the north and south sides of the Exit Aisle. Both Mr. Kope and Ms. Tse testified that the width of the Exit Aisle was insufficient for two cars to travel side by side. In other words, cars traveling along the Exit Aisle would have to proceed single file.

**6**  On the day of the collision, Mr. Kope was parked on the north side of the Exit Aisle in the third parking stall from the west corner. He was driving a four-door Subaru Legacy vehicle that appears sedan-like. Ms. Tse was driving her husband's four-door Range Rover SUV. Ms. Tse was parked in the middle aisle, which was located to the north of the Exit Aisle.

**7**  According to photographs of the vehicles taken at the scene of the collision, the Subaru had dark tinting on the side and rear windows, including on the front driver's side window. The Range Rover, which was generally larger and higher than the Subaru, had dark tinting on the rear passenger and back windows, but not on the front driver's side window.

**8**  Ms. Tse testified that at approximately 1:00 p.m., she returned to her vehicle after shopping, used keyless entry to access the vehicle and placed her handbag in the passenger's seat. She put on her seatbelt and exited her parking stall in the middle aisle of the parking lot. She testified that she drove slowly in a westerly direction along the middle aisle and then she made two left-hand turns in short succession. The second and final left-hand turn she made before the collision took her by the store entrance and then onto the Exit Aisle heading east.

**9**  According to Ms. Tse, as she approached the corner by the store entrance to make the left turn onto the Exit Aisle, she was travelling under five kilometres per hour. She said she had an unobstructed view down the Exit Aisle and towards Mr. Kope's parking stall. She said there were no cars parked on the left side (i.e. west) of the spot where Mr. Kope was parked. In his direct examination, Mr. Kope testified that he was parked in the third stall from the corner next to two unoccupied parking stalls for people with disabilities to the left (i.e. west) of his vehicle.

**10**  Each party testified about how the collision occurred. In his direct evidence, Mr. Kope gave a detailed account of his movements immediately prior to the collision. When asked to describe what happened step by step, he proceeded to testify that he exited the store and got inside his car. He put his seatbelt on. He started his ignition. He checked his mirrors and blind spots at the rear. He pressed down on the clutch and shifted into reverse. He pressed on his brakes and turned to look out the rear of the vehicle, looking left and right. He said he slowly exited the spot - going as slow as one could possibly go - constantly looking left and right. He turned his vehicle towards the entrance of the Canadian Tire store. He said once he had exited the spot far enough to complete the second half of the two-point turn, he stopped his vehicle. Then, seeing nothing behind him, he turned his head towards the front of the vehicle. He put on the brakes, pressed the clutch again, and shifted into first gear. Before he had a chance to release the clutch, he was hit from behind.

**11**  After providing this step-by-step description of his movements, Mr. Kope was asked whether he saw the other vehicle before it hit him. He stated that he had not seen the other vehicle.

**12**  In his cross-examination, Mr. Kope testified that he had completely exited out of the parking stall and came to a full stop, with his vehicle "partially aligned" with the one-way aisle, when he was struck from behind by Ms. Tse's vehicle. He described the force of the impact as a "heavy hit". He agreed that he used words such as "snapped" and "lurched" to describe the impact of the collision on his body to his doctors. He offered to defence counsel that he was prone to "verbosity" when speaking.

**13**  In her direct evidence, Ms. Tse recounted her memory of the collision. She stated that after turning into the Exit Aisle she could see straight down it and as the roadway was clear, she proceeded forward. She said she was driving at less than five kilometres per hour and she saw nothing in front of her as she proceeded down the middle of the roadway. Halfway down the aisle, at about the fourth parking stall, she said she heard a metal crunching noise off to her left and she stated: "I figured somebody hit me on the side." When questioned in cross-examination about the force of the impact, she stated: "it was just a bump" and "my car shifted left to right".

**14**  She estimated that Mr. Kope must have come out about half his car length into the aisle; she said that he was still partially in the parking stall when the collision occurred. She said she stopped at that point and rolled down her driver's window to speak to Mr. Kope. However, she was unable to open her driver's door because his vehicle was "attached" to hers.

**After the Collision**

**15**  After the collision, Ms. Tse testified that because her car was "in front of his car", Mr. Kope had to pull his vehicle back into the same stall he came from so that she could reverse her vehicle and park to the left of Mr. Kope's vehicle. In cross-examination, when counsel for Mr. Kope suggested that Mr. Kope's vehicle was already occupying the aisle when she hit him, she stated: "no, I don't agree that the other vehicle was already into the aisle." She also denied that his vehicle was stopped in the aisle before she hit him and that she apologized to him for the accident.

**16**  Ms. Tse testified that she took photos of their vehicles while they were exchanging information. Right after that, she went into the Canadian Tire looking for witnesses. She asked the cashier located near the store entrance if she had witnessed the accident and she inquired at customer service about video footage of the parking lot. Inside the store, Ms. Tse eventually located a female witness, Ms. Konstantina Tsalamandris, whom she had seen in the parking lot at the time of the collision.

**17**  According to the photographs of the vehicles entered into evidence, Mr. Kope's vehicle sustained damage to the corner of his back bumper. Specifically, the driver's side corner of the Subaru's back bumper was dented and there were a few vertical scratches close to the corner dent on the bumper. Ms. Tse's vehicle sustained damage to the bottom of the front driver's side wheel well and to the front driver's side door. Specifically, there was a dent near the bottom of the Range Rover's front wheel well and scratches that ran vertically from the dent to approximately half the width of the driver's door.

**18**  No ambulance or police attended the scene and the parties were able to drive their vehicles out of the parking lot and home after the collision. Both Mr. Kope and Ms. Tse saw a doctor on the day of the collision. Mr. Kope stated that after the collision, he started to feel unwell so he went to the medical clinic and saw Dr. Bhatt. Ms. Tse went to see a doctor after the collision "to be safe." The doctor told her she might feel symptoms later, but no symptoms developed and she stated that she was fine.

**19**  Unlike Ms. Tse, Mr. Kope suffered a variety of negative symptoms. He testified that within hours of the collision, he developed pain in his neck, shoulders, back and hips that he had never experienced before in his life. He also began experiencing anxiety while driving, especially when he would see white SUVs, and he started having trouble sleeping after the collision. These symptoms have been ongoing, with varying degrees of severity, despite the fact that Mr. Kope has attended physiotherapy, massage, dry needling, physical rehabilitation sessions and has regularly performed stretches and exercises prescribed to him. According to the medical evidence, Mr. Kope's physical injuries were soft-tissue injuries.

**Other Witness' Reliability**

**20**  The plaintiff called Ms. Tsalamandris to testify at the trial. Ms. Tsalamandris was a reluctant witness. Prior to testifying, she advised the court that since witnessing the collision, she had suffered a concussion that she had not recovered from, that she was under medical supervision, and that she was easily fatigued. She further advised that she attended due to the plaintiff's subpoena and she indicated that she was willing to testify.

**21**  Again, Ms. Tsalamandris was the eyewitness that Ms. Tse located in the Canadian Tire after the collision. On August 7, 2017, approximately 10 months after the collision, ICBC interviewed Ms. Tsalamandris by telephone, and prepared and sent her a written statement (the "Written Statement"). Ms. Tsalamandris never signed the Written Statement. She testified that a lawyer for ICBC prepared it for her. According to an email dated May 1, 2019, Ms. Tsalamandris confirmed that she had read the Written Statement and she remembered the incident as recorded.

**22**  The Written Statement refers only to the gender of the drivers, not the makes or models of the vehicles. The relevant part of the Written Statement reads as follows:

... I was just entering the parking lot and was facing west when I saw a car driven by a woman backing out slowly from a parking stall on the north side of the aisle. The front of her car was facing north and the back of the car was facing south. The car was far enough into the aisle that no other car could get through from behind it. She was about three parking stalls west of where I was and I stopped. At about the same time, I saw a car turn left from an aisle just west of the woman's car onto the aisle that the woman's car had already occupied. In other words, the parking stall that the woman had pulled out of was at the corner of where the two aisles intersect. The car was turning from south to east and hit the driver side of the woman's car. Although the left-turning car was not travelling at a particularly fast speed, the impact was hard enough to push the woman's car a bit. I think the woman's car was stopped at the time of the collision, as I could see that she was looking to her left and she probably saw the car turning left. The male driver of the other car got out and I head [sic] him apologize to the woman. I thought the man had admitted fault so I proceeded to shop at Canadian Tire. ...

**23**  The problem with the Written Statement, which is unsigned, is that it gets the genders of the drivers wrong. It indicates that a man was driving the vehicle that turned the corner into the aisle and a woman was driving the vehicle that reversed out of a parking spot into the aisle, rather than the other way around as described by the parties.

**24**  Certain additional details in the Written Statement do not line up with the testimony of the parties, such as the parked location of the reversing car. These problems, including that it is unknown whether Ms. Tsalamandris ever read or confirmed the contents of the Written Statement prior to May 1, 2019, cast doubt on its reliability and lead me to conclude that I should place little weight on it. I place greater weight on Ms. Tsalamandris' *viva voce* evidence at trial.

**25**  In her direct evidence at trial, Ms. Tsalamandris correctly identified the genders of the drivers. For example, Ms. Tsalamandris was asked about the turning car and she stated that the woman in the Range Rover was in front of her and that driver was also the person who came into the store. Ms. Tsalamandris also testified that: "... her vehicle was hit. The other driver did something silly, it stopped and hit her."

**26**  When asked in direct-examination whether she remembered where each vehicle was located in the Exit Aisle she stated: "no". However, she also stated that she remembered a vehicle in front of her that was straight, without turned wheels, and that it was out of the spot, occupying the small aisle. That fact that she referred to a vehicle being out of its parking stall in the Exit Aisle leads me to conclude that she is referring to Mr. Kope's Subaru. However, a few moments later when she was asked whether one of the vehicles was a Range Rover, Ms. Tsalamandris stated that she remembered the vehicle in front of her, "she" was in it, the other vehicle "did the hit," and there was no reason for the accident. She said "he stopped and then started again." Finally, in her direct evidence, Ms. Tsalamandris was directed to look at photographs of the Subaru and the Range Rover vehicles. She indicated that she recognized the vehicles and stated, "the Subaru hit the Range Rover."

**27**  She explained in her testimony that she regarded the collision as a very strange event. She described it as "an odd accident" since both vehicles had stopped and then the other vehicle "just hit her anyway." She stated it was the "oddest thing she had ever seen" and that while "the woman in the bigger car" was completely stopped and the man in the other car had stopped too, he "hit her anyway."

**28**  When asked in her direct-examination about overhearing an apology, she said she could not remember, but she alluded to the Written Statement and surmised that hearing an apology might be the reason that she did not "stick around" after seeing the collision. Again, on this point, the Written Statement provides: "...I head [sic] him apologize to the woman."

**IV. CREDIBILITY AND RELIABILITY OF EVIDENCE**

**29**  In assessing the credibility of the witnesses, the court takes a number of factors into consideration. Justice Dillon summarized the factors in *Bradshaw v. Stenner*, [*2010 BCSC 1398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2V4-00000-00&context=) at para. 186, aff'd [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=), as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [*(1926), 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont.H.C.); *Faryna v. Chorny*, [*[1952] 2 D.L.R. 354*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X40C-00000-00&context=) (B.C.C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [*[1997] 3 S.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WX-00000-00&context=) at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

**Ms. Tse's Credibility and the Reliability of Her Evidence**

**30**  Ms. Tse appeared to be a sincere and honest witness. While counsel for the plaintiff identified some minor inconsistencies in her evidence, I do not find that these inconsistencies seriously diminish her overall credibility or the reliability of her evidence about the material facts. These inconsistences include whether she was shopping for Halloween decorations or lightbulbs on the day of the collision, or whether she travelled as few as three or as many as six parking stalls into the Exit Aisle before the collision occurred. The location of the collision, or where Mr. Kope was parked, is not seriously in dispute between the parties.

**31**  I find that Ms. Tse's evidence is trustworthy after an examination of the factors set out in *Bradshaw*, including that her testimony is consistent with the probabilities affecting the entirety of the case and shown to be in existence at the time of the collision.

**Ms. Tsalamandris' Credibility and the Reliability of Her Evidence**

**32**  Ms. Tsalamandris' direct evidence was not always clear and she failed to remember some of the details she provided in her telephone interview as set out in the Written Statement. However, I have concluded that she tried to answer questions truthfully and to the best of her ability. I have also concluded after carefully observing her that she had no specific interest in the outcome of the claim, nor any bias towards either party.

**33**  Mr. Yuen, counsel for the plaintiff, argued that faced with such differing versions of the collision, the assistance of an independent witness is critical. Mr. Yuen also submitted that Ms. Tsalamandris' *viva voce* evidence is largely congruent with the Written Statement. It is clear that the plaintiff regards the Written Statement as helpful for his claim. Ms. Tsalamandris was not asked, nor did she testify, to confirm that the entire content of the Written Statement was truthful and accurate. Rather, she was asked whether the Written Statement had been sent to her and her response was: "they phoned me and I gave this statement by phone." She was also asked if she had stated that no other car could get around the car that had reversed into the Exit Aisle and she responded as follows: "I think I said that. That probably is accurate."

**34**  Despite not remembering certain details from the Written Statement and providing some answers that were unclear, I still found Ms. Tsalamandris' direct evidence helpful. For example, after she testified that a female driver operated the Range Rover (making it clear that she correctly identified the gender of the driver), she testified that "she" was hit and the other vehicle "did the hit." She described this order of events more than once in her testimony. I found her evidence on this point to be sufficiently clear and reliable. I have taken it into account.

**35**  I find that Ms. Tsalamandris' evidence supports, and is most consistent with, Ms. Tse's evidence on the salient points.

**Mr. Kope's Credibility and the Reliability of His Evidence**

**36**  After carefully observing Mr. Kope as he gave evidence, and after considering whether his evidence is consistent with the probabilities affecting the case and shown to be in existence at the time of the collision, I have concluded that Mr. Kope's evidence is not as credible or reliable as the evidence of Ms. Tse and Ms. Tsalamandris.

**37**  Mr. Kope's manner of testifying while giving direct evidence about his movements immediately before and during the collision was noticeably different from the way he gave other parts of his testimony. It also appeared out of step with his description of himself as verbose. For example, he testified about the key moments leading up to the collision as if repeating a memorized list of concise, point-form notes. This was unlike other parts of his testimony, where he appeared to be genuinely searching his memory to recall details of an event that had taken place over two years ago. While it is appropriate for a witness to prepare for and to be prepared to give evidence at trial, Mr. Kope's demeanor while testifying specifically about the collision was at odds with how he gave the rest of his evidence. I have taken this into account as part of my assessment of his credibility.

**38**  If Mr. Kope's version of the accident is to be believed, he fully reversed out of the stall and came to a full stop with his vehicle partially aligned with the Exit Aisle. Ms. Tse's vehicle was not visible to him at any point while he completed these maneuvers, despite the numerous, continuous mirror and shoulder checks that he said he made. He says that as he was about to shift gears, Ms. Tse's vehicle turned the corner and collided into the driver's side corner of his rear bumper.

**39**  I have concluded that Mr. Kope's evidence regarding the steps before reversing is unlikely and not consistent with the probabilities shown to be in existence at the time of the collision. The photographs establish that the damage to Ms. Tse's vehicle starts at her driver's side front wheel well rather than her front bumper and that she had to travel past two empty parking stalls before reaching Mr. Kope's stall. There is no dispute that the Exit Aisle could only accommodate one vehicle at a time and that there is no evidence of damage to Ms. Tse's front bumper.

**40**  Further, Ms. Tsalamandris testified that she saw Ms. Tse driving the Range Rover and stopping in front of her; Mr. Kope driving and stopping the Subaru; and Mr. Kope start driving again until he hit the Range Rover.

**V. FACTUAL FINDINGS**

**41**  I have concluded that Ms. Tse drove her vehicle behind Mr. Kope as far as her front wheel well before he backed into the side of her car. This is more probable than the alternative, that Mr. Kope fully reversed out of the parking stall and came to a full stop before Ms. Tse somehow managed to strike him from behind with her front driver's side wheel well and not her front bumper. There is no evidence to support the plaintiff's submission that Ms. Tse's vehicle might have been damaged where it was because she may have swerved to avoid Mr. Kope's vehicle. Based on a careful assessment of the evidence, I have concluded that Mr. Kope reversed his vehicle in an unsafe manner by failing to ensure that there was no vehicle behind him.

**42**  Mr. Kope also testified that Ms. Tse apologized to him after the accident and stated: "I must have been distracted." However, Mr. Kope's evidence about their post-collision interaction does not include details testified to by Ms. Tse, details which I accept. Namely, he did not testify that Ms. Tse had to roll down her window to initially speak with Mr. Kope; that he exited his vehicle to speak with her before they parked to exchange information; or that she could not open her driver's side front door or reverse her vehicle towards an empty parking stall as she was attached to his corner bumper.

**43**  Ms. Tse denies having apologized to him. I find it improbable that she apologized and admitted liability to Mr. Kope, only to immediately search for witnesses who likely overheard their conversation and attempt to secure video footage.

**44**  I do not find the Written Statement helpful on this point for the reasons discussed above. I find that Ms. Tse did not admit liability to Mr. Kope.

**VI. LIABILITY**

**45**  Mr. Kope claims that Ms. Tse operated her vehicle in a negligent manner by colliding with his vehicle after he had reversed out of the parking stall to occupy the Exit Aisle. Mr. Kope also claims that Mr. Tse, as the owner of the Range Rover driven by Ms. Tse, is vicariously liable to him pursuant to s. 86 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*.

**46**  In her defence, Ms. Tse claims that she was operating her husband's vehicle in a manner that was safe and she denies she was negligent. She claims Mr. Kope caused the collision and any injury or damage sustained was the result of his ***negligence***.

**47**  Section 193 of the *Motor Vehicle Act* effectively prohibits a driver from causing a vehicle to move backwards unless it can be done safely. Section 193 places the onus to ensure safety and a high standard of care upon the reversing driver. Courts have described this standard as including a duty to be aware, as reasonably possible, of objects behind and in the driver's path while reversing. Justice Hyslop noted that importantly, this is expected "... not just when the driver starts to reverse, but throughout the entire reversing procedure and to its completion": *Carson v. Henyecz*, [*2012 BCSC 314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6258-00000-00&context=) at para. 99.

**48**  While s. 193 imposes a high standard of care, it is not does not impose absolute liability, nor does it require perfection. This Court has interpreted the standard to mean a driver who is backing up must guard against "such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience", but the driver "...is not bound to guard against every conceivable eventuality": *Araujo v. Vincent*, [*2012 BCSC 1836*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2X1-00000-00&context=) at paras. 30-31 citing *Dechev v. Judas*, [*2004 BCSC 1564*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0K1-00000-00&context=) at para. 22.

**49**  The plaintiff submits that a driver, such as Mr. Kope, who reverses his car into a lane to do a two-point turn to become fully established in the lane, and thereby establishing prior entry to the lane, should succeed. He relies, amongst other authorities, on *Brown v. Granger*, [*2012 BCPC 521*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-2073-00000-00&context=), which involved a collision in a parking lot. In *Brown*, Pothecary J. found ***negligence*** against a driver who collided with another driver reversing out of a parking stall. I agree with Pothecary J.'s comments that parking lots are inherently dangerous and therefore drivers should treat each other as they would like to be treated. Drivers should watch out for one another and give each other space: para. 5.

**50**  At para. 13, Pothecary J. describes that the plaintiff who was reversing out of the parking stall sustained damage to the "...right, rear side panel of her car, denting it from about the rear of the rear passenger side wheel well back and, essentially, wedging off the bumper." Judge Pothecary describes the damage to the non-reversing driver's vehicle as follows at para. 15:

[15] The vehicle driven by the defendant continued to drive after first striking the car and, in fact, drove such that her car was dented and scraped all the way down the passenger's side. The initial scrapes and marks start at about the mid-point of the front of the car and then out to the passenger's side of the passenger's side headlight and then all the way down the passenger's side of the car from the photographs...

**51**  In *Brown*, there was evidence from the plaintiff that the defendant offered her an apology after the collision. The plaintiff testified she did not see the defendant's vehicle before it hit her and the defendant testified that she was travelling at a maximum of 20 kilometres per hour in the parking lot. The defendant relied on s. 193 of the *Motor Vehicle Act* to argue that the reversing driver (i.e. the plaintiff) had the dominant responsibility.

**52**  In *Brown*, Pothecary J. concludes that the defendant was liable for the collision after finding as follows at para. 65:

[65] In these circumstances, notwithstanding that the duty of care on the driver backing up is high, I am satisfied Ms. Brown, in these circumstances, met that duty and it was then for Ms. Granger to yield to her at that point. Ms. Granger simply was not paying attention. That, frankly, falls within the driving without due care and attention provisions if there is to be found a fault under the *Motor Vehicle Act*, or not keeping a proper lookout, which can be part of that.

**53**  Some key factual distinctions between the present case and *Brown* lead me to reach a different conclusion regarding liability for the accident.

**54**  Setting aside the fact that Ms. Tse was travelling in an easterly, not westerly, direction (as was the case in *Brown*), the damage sustained by the vehicles in the present case is somewhat different. Mr. Kope's vehicle, as the one reversing, sustained damage on the rear corner of the back bumper, while Ms. Tse's vehicle sustained damage starting at the front side wheel well and extending part way down the front door. There is no evidence to establish that Ms. Tse was traveling at greater than the speed she testified to, five kilometres per hour. Mr. Kope has not established that she admitted liability after the collision or that she was distracted.

**55**  Section 193 of the *Motor Vehicle Act* effectively prohibits a driver from driving a vehicle backwards unless it can be done safely. Defence counsel submitted that it was reasonably foreseeable that a vehicle would turn the corner near where Mr. Kope was parked and enter the aisle behind him: *Saidy v. Louzado*, [*2019 BCSC 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VMD-0961-FGRY-B160-00000-00&context=). I agree that in the particular circumstances of this case, this was reasonably foreseeable and his failure to continue checking the aisle behind him as he reversed was negligent.

**56**  The onus rests with Mr. Kope to establish that he acted prudently and reasonably in the circumstances of this case and I find that he has not discharged the onus. After carefully considering the evidence presented by the parties, I have concluded that Mr. Kope is 100% liable for the collision. It is therefore unnecessary to address Mr. Kope's claims for damage.

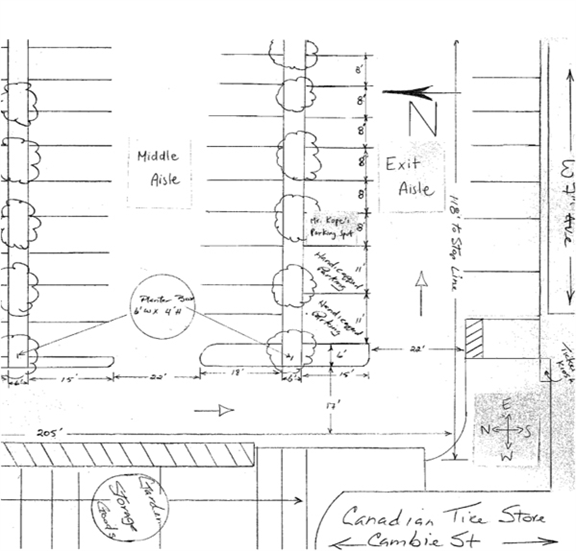
**VII. COSTS**

**57**  Ms. Tse is entitled to her costs at Appendix B, Scale B, of the *Supreme Court Civil Rules*.

E. McDONALD J.

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**Appendix "A": Parking Lot Map**



**End of Document**

[***Laboucane v. Brooks, [2003] B.C.J. No. 2752***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Burnyeat J. (In Chambers)

Heard: November 10, 2003.

Judgment: December 4, 2003.

Vancouver Registry No. C992756

**[2003] B.C.J. No. 2752** | 2003 BCSC 1807 | 22 B.C.L.R. (4th) 159 | 127 A.C.W.S. (3d) 845

Between Darcy Laboucane, plaintiff, and Donald Brooks, John Doe #1, John Doe #2, John Doe #3, John Doe #4 and John Doe #5, defendants, and Thomas Burns doing business as Zapco Welding and Fabricating, third party

(32 paras.)

**Case Summary**

**Practice — Costs — Party and party costs — Special orders — Increase in scale of costs, novel or important issues — Increase in scale of costs, difficulty and complexity of proceedings — Liability for party and party costs — Liability of successful defendant for costs of third party.**

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| --- |
| Application by Brooks for costs on a Scale 5 basis and an order that the plaintiff, Laboucane, pay the costs of the third party, Zapco Welding. The action arose out of an explosion that occurred on a fishing vessel owned by Brooks. Laboucane was injured in the explosion. At the time of the explosion Laboucane was working for Zapco. Brooks added Zapco as a third party and then moved successfully to have the claims dismissed as barred by the provisions of the Workers' Compensation Act. During the course of that application, Laboucane contended that the Act was constitutionally ultra vires of the province because it barred a claim by a worker involved in navigation and shipping, a matter within exclusive federal jurisdiction. Brooks argued that he was entitled to costs on Scale 5 throughout the proceedings because the conduct of the proceedings was characterized by uncommon, exceptional or remarkable events, was of unusual difficulty, and involved matters of unusual importance. He also argued that he should not be liable for the third party's costs because his addition of Zapco as a third party was a natural and inevitable consequence of the action. Laboucane argued that the addition of Zapco was unnecessary because Laboucane admitted he was acting in the course of his employment when the explosion occurred and the Workers' Compensation Act provided for a set-off even if the employer was not a party to the action.  HELD: Application dismissed.  The matter was not of unusual difficulty. The application for summary judgment was legally complex but not factually complex, nor were the issues of unusual importance. Scale 4 costs were appropriate for the application because it was of more than ordinary difficulty, and Scale 3 costs were appropriate for the balance of the action. Laboucane was under no obligation to join Zapco as a third party due to the admissions and the available statutory set-off. Brooks was to bear Zapco's costs. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 18, 18A, 26(11), 28, 57(13.1), 57(15); Appendix B, s. 2(1), 2(2), 2(3).

Constitution Act, 1867, ss. 91(10), 92(13).

Federal Court Act, ss. 5(6), 7(1).

Workers' Compensation Act, R.S.B.C. 1996, c. 492, ss. 10, 10(1), 10(7), 11.

**Counsel**

D.G.A. Jones, for plaintiff, Darcy Laboucane. D.F. McEwen, for defendant, Donald Brooks.

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| --- |
| **BURNYEAT J.** |

**1**   The Defendant seeks costs on a Scale 5 basis and submits that the costs of the Third Party should also be paid by the Plaintiff. The Plaintiff submits that the costs of the Third Party should not be paid by the Plaintiff and that, if other than Scale 3 costs are to be awarded, that only Scale 4 costs should only be available for the application which was heard on August 13, 2003 and that Scale 3 costs are appropriate for the balance of what was undertaken in the action.

BACKGROUND

**2**  This action arose out of an explosion that occurred on a fishing vessel on June 13, 1997. The Plaintiff who was working on the vessel at the time of the explosion was injured and commenced this action on May 31, 1999. Mr. Brooks is a fisherman and owns the vessel and subsequently filed a Third Party Notice against Thomas Burns doing business as Zapco Welding and Fabricating ("Zapco") who was the employer of Mr. Laboucane. Mr. Brooks claimed contribution to and indemnity for the alleged loss of the Plaintiff from Zapco.

**3**  On August 13, 2003, I dismissed the claim of the Plaintiff and the Third Party Notice of the Defendant on the grounds that the two proceedings were barred by the provisions of s. 10 of the Workers' Compensation Act, *R.S.B.C. 1996, c. 492* ("Act"). The central issue on the application of Mr. Brooks pursuant to Rule 18A of the Rules of Court was whether the Act was constitutionally ultra vires of the Province insofar as it might bar the claim of a worker for damages for personal injuries arising in the course of employment where those injuries occurred aboard a marine vessel. In Reasons for Judgment, [*[2003] B.C.J. No. 1886*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20GJ-00000-00&context=), [*2003 BCSC 1247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JCJ5-20GJ-00000-00&context=), I concluded that the pith and substance of the Act was not a matter of "navigation and shipping" as set out in s. 92(13) of the Constitution Act, 1867. Rather, it was a matter which fell under the preview of "property and civil rights" as set out in s. 91(10) of the Constitution Act, 1867, a head of power of provincial jurisdiction.

THE APPROPRIATE SCALE OF COSTS

**4**  Sections 2(1), 2(2) and 2(3) of Appendix "B" to the Rules of Court provide in part:

1. Where a court has made an order for costs, it may fix the scale... under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
2. In fixing the scale of costs, the court shall have regard to the following principles: ...
3. Scale 3 is for matters of ordinary difficulty or importance;
4. Scale 4 is for matters of more than ordinary difficulty or importance;
5. Scale 5 is for matters of unusual difficulty or importance.
6. In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
7. whether a difficult issue of law, fact or construction is involved;
8. whether an issue of importance to a class or body or persons, or is of general interest;
9. whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

**5**  As well, Rule 57(15) of the Rules of Court provides that: "The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding." To award Scale 5 costs, the matter must be of either unusual difficulty or unusual importance. Accordingly, Scale 5 costs can be awarded if either is found.

**6**  In 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=), Bouck, J. dealt with the meaning of the words "importance" and "difficulty" as follows:

Dealing first with the meaning of the word importance as it relates to ordinary costs. Reading the rules as a whole, I believe it means the litigation must be important to the public at large or at least to other litigation of a similar nature. It does not mean important to the individual litigant since every litigant considers his or her case important. Support for this conclusion can be found in App. B, Section 2 (3) (b) above - whether an issue is of importance to a class or body of persons, or is of general interest. (at p. 317)

Scale 5 uses the word "unusual." Its dictionary meaning is "not often occurring or observed, different from what is usual; out of the common, remarkable, exceptional." Therefore, the question is whether the collection and proof of the difficult facts were uncommon, remarkable or exceptional events? (at p. 318)

**7**  Mr. Brooks submits that following factors "strongly support" a finding that the conduct of this proceedings was characterized by "uncommon, exceptional or remarkable events", and was thus of "unusual" difficulty":

1. extremely difficult and complex issues of law were involved in this proceeding, which required an inordinate amount of time and effort to properly address, as evidenced by the extensive arguments and numerous judicial, statutory and academic authorities relied upon;
2. Several unusual steps were made necessary as a result of the unique issues to be dealt with, including the collection of financial documentation and RCMP records and the lengthy process concerning the procurement of s. 11 Certificates, none of which normally occurs in a personal injury action;
3. The matter was very hard-fought by the parties with few concessions, as exemplified by the fact that despite having a significant and potentially determinative preliminary issue to deal with, the Plaintiff's counsel not only insisted that full discoveries be conducted first, but also contested in Court whether the constitutional issue should even be dealt with prior to trial;
4. As a result of all of the above factors, the time and resources eventually required to dispose of what was essentially a threshold question in the litigation were unusually great.

**8**  Mr. Brooks submits that it was an issue whether he, the Plaintiff and the Third Party were workers and/or employers as defined under s. 11 of the Workers' Compensation Act. Mr. Brooks submits that, in order to determine that issue, it was necessary to draft submissions to the Appeal Division of the Workers' Compensation Board as it was necessary to have a determination under s. 11 of the Act prior to applying to the Court for a determination that the action was barred under s. 10 of the Act.

**9**  The issue of whether the statutory bar in the Act was applicable to a workplace accident that occurred on a vessel is described by Mr. Brooks as an:

extremely complex legal issue which required extensive research into the constitution of validity and applicability of Workers' Compensation legislation. It also required consideration of the jurisprudence on the doctrine of intra-jurisdictional immunity generally and consideration specifically of the applicability of provincial legislation to actions that may involve issues of maritime law.

**10**  In Mort v. Saanich School District No. 63 [*[2001] B.C.J. No. 2151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2V2-00000-00&context=) (B.C.S.C.), R.D. Wilson, J. described the following as "relevant factors to consider" when deciding the question of the determination of the appropriate Scale of Costs: (a) the length of the trial; (b) the complexity of the issues involved; (c) the number and complexity of pre-trial applications; (d) whether or not the action was hard fought with little or nothing being conceded along the way; (e) the number and length of Examinations for Discovery; the number and complexity of Experts' Reports; and (g) the extent of the effort required in the collection and proof of facts.

**11**  I have concluded that it cannot be said that the matter throughout was of unusual difficulty. There were no pre-trial applications other than a case management conference which lasted for approximately one hour, and the discoveries consisted of the Plaintiff being examined for one day and the Defendant being examined for one-half of the day with those discoveries dealing with matters other than the constitutional issue, there were no expert reports. The action itself can only be described as an action for alleged damages for alleged ***negligence***. As well, it cannot be said that the procedure that produced a s. 11 Certificate from the Workers' Compensation Board was part of these proceedings or that it was even a necessary step in these proceedings in view of the concession by the Plaintiff in the Statement of Claim that the Plaintiff was an employee.

**12**  Dealing with the two day application which led to the August 13, 2003 decision, the Rule 18A application was not factually complex even though it was legally complex.

**13**  I have concluded that it can not be said that the Rule 18 application was of unusual difficulty. Rather, I have concluded that Scale 4 costs relating to the Rule 18 application are more appropriate as the application was of "more than ordinary difficulty". The question which then arises is whether it can be said that the Rule 18 Application or the proceeding generally was of "unusual importance".

**14**  Mr. Brookes submits that the following factors support a finding that this proceeding was of "unusual importance":

1. This case centres around an issue of critical importance to a large class or body of persons. The constitutional question at stake in this action had (and, pending appeal, continues to have) serious and far-reaching implications for not only persons employed aboard marine vessels, but also the WCB, marine industry employers and the marine industry as well;
2. If the provincial compensation scheme were found not to apply to matters of "navigation and shipping", it would represent a singular exception to an otherwise sweeping alteration of employees' rights in tort law, and would inevitably involve radical changes in the manner and terms under which such employees are hired, trained and insured;
3. The importance of this issue to the public is further underscored by the Province's intervention with respect thereto;
4. The outcome of the case is therefore of considerable importance "to the public at large, or at least to other litigation of a similar nature", as per Bradshaw, supra. Indeed, the result of this case will dictate whether other litigation of a similar nature can exist; and
5. The Plaintiff's challenge of the constitutionality of the B.C. workers' compensation scheme (which, like the Federal Court, is a creature of statute whose operation directly affects certain aspects of the general public's inherent judicial rights) parallels the "unusually important" circumstances found to exist in Carpenter Fishing, supra.

**15**  In Carpenter Fishing Corp. v. Canada [*[2002] B.C.J. No. 900*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G10C-00000-00&context=) (B.C.S.C.), Stromberg-Stein, J. dealt with the question of costs in the context of a Petition that claimed that ss. 5(6) and (7(1) of the Federal Court Act were unconstitutional and that the composition of the Federal Court of Appeal on December 23, 1997 was unconstitutional. In concluding that Scale 5 was appropriate, Stromberg-Stein, J. concluded:

The factual and legal issues raised in this petition were of more than ordinary difficulty and this was a case of "unusual importance". A challenge to the constitutionality of the Federal Court is clearly a case of more than ordinary importance. While the length of the trial was not unusual, the nature and complexity of the issues warrant characterizing the matter as unusually important, justifying an award of increased costs on Scale 5. (at para. 8)

**16**  In Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co. [*(1991) 60 B.C.L.R. (2d) 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X32N-00000-00&context=) (B.C.S.C.), Maczko, J. ordered Scale 3 costs in a maritime case involving a damaged pipe on the basis that, while the case was the first of its kind in British Columbia, it did not demand expertise greater than that found in ordinary litigation. Maczko, J. concluded:

While expert evidence was required during the trial, it does not seem that the case necessitated a degree of expertise greater than that which is utilized in most litigation. Also, although it is true that this case appears to be the first of its kind in British Columbia, it does not appear that it was a particularly difficult one to research, since much of the law was already established in England as well as in the United States, and was readily available through the various law reports. (at p. 60)

**17**  I have concluded that it can not be said that the action or the Rule 18A summary trial was one of "unusual importance". While the constitutional argument was "novel", it is important to note that Mr. Brooks as the successful party relied on case law extending over the last 80 or 90 years dealing with the constitutional validity of Worker's Compensation legislation as applied to federal undertakings and that the only real issue was whether the Plaintiff was correct in submitting that the appropriate analysis was to assume the constitutional validity of s. 10(1) of the Act and to then apply the tests for inter-jurisdictional immunity.

**18**  Unlike Carpenter, supra, this is not a case where a declaration that a portion of an act that is unconstitutional would have the far-reaching effect suggested by Mr. Brooks. It is not the case that all questions of constitutionality will attract Scale 5 costs. In reviewing decisions such as Nichols v. Koch Oil (2000) 2 C.P.C. (5th) 77 (B.C.S.C.); Carpenter, supra; Van De Perre v. Edwards, [*[2002] B.C.J. No. 1190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2JG-00000-00&context=), [*2002 BCSC 817*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2JG-00000-00&context=); Craig v. British Columbia (1997) 14 C.P.C. (4th) 369 (B.C.S.C.) and Canada Safeway Ltd. v. British Columbia [*[1997] B.C.J. No. 1490*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-61GV-00000-00&context=) (B.C.S.C.), I can not conclude that it can be said this case is of such importance to the public at large that the application pursuant to Rule 18A of the Rules of Court should attract Scale 5 costs.

**19**  While I cannot conclude that Scale 5 is appropriate, I have reached the conclusion that Scale 4 is appropriate as I am satisfied that the application which was before me was of more than ordinary difficulty or importance. I am satisfied that the constitutional question which was determined may have far-reaching implications for persons employed aboard marine vessels, the marine industry employers and the marine industry generally.

**20**  Rule 57(15) of the Rules of Court makes it clear that different scales of costs can be awarded to a "particular issue or part of the proceeding". Section 2(1) of Appendix "B" to the Rules of Court merely reiterates what is set out in Rule 57(15). That approach is to be found in Lankenau Estates v. Dutton [*(1991), 57 B.C.L.R. (2d) 327*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNR1-JKPJ-G0C7-00000-00&context=) (B.C.S.C.); A.R. Thomson Ltd. v. Stock [*[1991] B.C.J. No. 2314*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60JT-00000-00&context=) (B.C.S.C.); T.W.N.A. v. Clarke, [*[2002] B.C.J. No. 284*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D8-00000-00&context=) (B.C.S.C.); and Liedtke v. Liedtke [*(1991), 1 R.F.L. (5th) 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4H7-00000-00&context=) (B.C.C.A.).

**21**  Accordingly, I am satisfied that Mr. Brooks is entitled to Scale 4 costs for the preparation for and the two-day hearing pursuant to Rule 18A which resulted in the August 13, 2003 decision. Otherwise, the ***negligence*** action commenced by the Plaintiff was of ordinary difficulty or importance so that the remainder of the Action should attract Scale 3 costs.

THE COSTS OF THE THIRD PARTY

**22**  The "normal" rule concerning costs of the successful third party is that those costs are borne by the unsuccessful defendant who brought the third party proceedings. However, McLaughlin, J., as she then was, in Milina v. Bartsch, [*(1985) 63 B.C.L.R. 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21G3-00000-00&context=) (B.C.S.C.) concluded that there may be situations where:

... on the peculiar facts of the case, fairness requires that an unsuccessful plaintiff bear a successful third party's costs. Courts have held that such an order may be appropriate where one or more of the following situations was present:

1. Where the main issue litigated was between the plaintiff and the third party: Coast Crane Co. v. Dom. Bridge Co. [*(1961), 29 D.L.R. (2d) 383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B26J-00000-00&context=); Credit Foncier Franco-Can. v. Bennett (1964), 47 W.W.R. 369.
2. Where the third party was brought or kept in the matter by reason of the act or neglect of the plaintiff: Coast Crane Co. v. Dom. Bridge Co., supra.
3. Where the case involves a string of contracts in substantially the same terms for the sale of goods: R. D. Bristowe Ltd. v. Bennett & White Const. Co. (1958), 26 W.W.R. 477.
4. Where the third party proceedings follow naturally and inevitably upon the institution of plaintiff's action, in the sense that the defendant had no real alternative but to join the third party: Credit Foncier Franco-Can. v. Bennett, supra. (at para. 5)

**23**  Regarding the situations set out in Milina, I am satisfied that they merely represent the situations which had arisen by 1985 and I adopt in this regard the comments in Nichols v. Koch Oil Co. (c.o.b. as Koch Service Canada) [*[2000] B.C.J. No. 1942*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B178-00000-00&context=) (B.C.S.C.), where Koenigsberg, J. stated that the decision in Milina did not set out "absolute rules" and that the four examples set out in Milina were:

"... very broad, but are not exclusive. They are merely illustrations of situations in which Courts up to that time had awarded third party costs against plaintiffs." (at p. 14)

**24**  Regarding the 4th "situation" outlined in Milina, Drost, J. in Privest Properties v. Fo[u]ndation Co. of Canada Ltd. [*[1999] B.C.J. No. 2234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1MF-00000-00&context=) (B.C.S.C.) dealt with an allegation made by the plaintiff that one of the third parties had failed to draft specifications to clearly state that certain fireproofing was to be asbestos-free and that another third party acting upon instructions from the plaintiff prepared a document which became part of the contract between the plaintiff and the defendant but did not include in the document that the fireproofing was to be asbestos-free. Drost, J. concluded that the third party that did not include the requirement in the document "... ought to have been a defendant, and it was both natural and inevitable that they be joined as a third party". (at para. 68) In those circumstances, Drost, J. concluded that the plaintiff should be responsible for the payment of the costs of one of the third parties.

**25**  Similarly, in Lucky Trading Co. v. Icicle Seafood, Inc. [*[1998] B.C.J. No. 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JNS1-M1X9-00000-00&context=) (B.C.S.C.), Maczko, J. found the plaintiffs liable to pay the costs of the third party as there was evidence adduced to support a finding of ***negligence*** against that third party and, if the defendant had lost, it would have been because of the ***negligence*** of that third party. Maczko, J. stated that the presence of the third party was "... essential to the defence of the action" as the third party was able to show that it had produced cans which were identically sealed but properly stored which were rust-free in order that the defendant could show that it was not negligent in the action.

**26**  Mr. Brooks submits that the addition of Zapco to the action as a Third Party was a natural and inevitable consequence of the action of the Plaintiff for the following reasons:

1. In order to have the issue of the applicability of the s. 11 statutory bar decided, the Defendant needed to first prove that the Plaintiff was an "employee" covered within the scope of the Act;
2. In order to prove that relationship, it was necessary to directly involve Zapco in the discovery process, and to obtain Zapco's documents and oral admissions as to the facts underlying the relationship between Zapco and the Plaintiff;
3. Thus, like in Lucky Trading, supra, the Third Party's presence in this case was essential to proving the defence raised by the Defendant to the Plaintiff's constitutional issue. In other words, the Defendant was "compelled to add the third party[y] to protect [his] position", as that phrase was employed in Milina, supra;
4. The issue of the constitutional question aside, the inclusion of Zapco as a party was also made necessary on the merits of the action, by the prospect of that company's contributory ***negligence*** in bringing about the loss suffered by the Plaintiff. In order to fully and properly adjudicate the Plaintiff's claim, it was necessary that all aspects of potential fault causing or contributing to the accident be canvassed and examined upon;
5. Given Zapco's clear duties as an employer to properly train and equip its employees for the tasks those employees perform on the company's behalf, it is submitted that Zapco bore potential liability in this action, such that it ought to have been added as a defendant, as in Privest Properties, supra. In other words, the inclusion of Zapco as a third party would inevitably have been necessary in the full and final resolution of this case.

**27**  In opposing the application of Mr. Brooks, Mr. Laboucane submits that the action was brought pursuant to s. 10 of the Act and that s. 10(7) provides:

If, in an action brought by a worker or dependant of a worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the ***negligence*** of that employer or worker; but the portion of the loss or damage caused by that ***negligence*** must be determined although the employer or worker is not a party to the action

**28**  Accordingly, Mr. Laboucane submits that Mr. Brooks was entitled to a "set-off to the extent of the liability of the employer even though that employer was not a party to the action so that it was not necessary for the Defendant to join Zapco in order to enjoy the traditional benefits of a claim for contribution and indemnity".

**29**  Mr. Laboucane also submits that it was not necessary to obtain the evidence of Zapco in order to establish that Mr. Laboucane was a worker in the course of his employment. First, Mr. Laboucane had conceded that he was a worker in the course of his employment in the s. 11 certification proceedings. Second, paragraph 9 of the Statement of Claim includes an admission that Mr. Laboucane was an employee. Third, unlike the situation in Nichols, supra, there is no allegation in this Statement of Claim suggesting fault on the part of Zapco. As well, Mr. Laboucane submits that Mr. Brooks has not led any evidence to show that the evidence of Zapco would not be available unless it was joined as a party. Specifically, there is nothing to suggest that Zapco was in any way uncooperative so that it would have been necessary to resort to the provisions of Rule 28 and Rule 26(11) of the Rules of Court.

**30**  It is not enough that it be reasonably foreseeable that a defendant might join a third party. Rather, it must be inevitable in the sense that the defendant had no alternative: Privest, supra. Mr. Laboucane was under no obligation to join Zapco as a defendant so as to make it necessary for Mr. Brooks to do so. I am satisfied that s. 10(7) of the Act made that step by Mr. Laboucane unnecessary. I also find that there is nothing before me which would allow me to conclude that Zapco would not have been fully cooperative in providing the factual information upon which Mr. Brooks felt he had to rely.

**31**  I can not conclude that fairness requires that Mr. Laboucane as the unsuccessful plaintiff bear the costs of Zapco as the successful third party. Accordingly, the costs of Zapco will be borne as part of the "normal" Rule by Mr. Books.

COSTS

**32**  For this Application, Mr. Laboucane will be entitled to his costs against Mr. Brooks on a Party and Party (Scale 3) basis. In order to avoid the requirement that those costs be assessed by the Registrar, I will assess those costs pursuant to Rule 57(13.1) of the Rules of Court inclusive of fees, disbursements and government taxes at $675.00.

BURNYEAT J.

**End of Document**

[***Micka v. Oliver & District Community Economic Development Society, [2008] B.C.J. No. 2298***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B306-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Penticton, British Columbia

C.J. Ross J.

Heard: November 3, 2008.

Judgment: November 26, 2008.

Docket: 30436

Registry: Penticton

**[2008] B.C.J. No. 2298** | 2008 BCSC 1623

Between John Micka, Plaintiff, and Oliver & District Community Economic Development Society, Ron Hovanes, Allan Patton, Jim Wyse, Kenn Oldfield, Kathy Mercier, Joan Sarell, Paul Bouchard, Larry Schwarzenberger, Stephanie Salsnek, Gene Covert, Les Lawther, Defendants

(27 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Application by the defendants for an order to strike out the writ of summons and statement of claim, allowed — It was plain and obvious that the writ and statement of claim disclosed no reasonable cause of action — While they invoked several well recognized causes of action there was no pleading of material facts that would, if proved, establish all of the essential elements of the claims.**

**Constitutional law — Constitutional proceedings — Practice and procedure — Pleadings — Jurisdiction — British Columbia — Application by the defendants for an order to strike out the writ of summons and statement of claim that raised a claim of breach of the Canadian Charter of Rights and Freedoms, allowed — It was plain and obvious that the writ and statement of claim disclosed no reasonable cause of action — While they invoked several well recognized causes of action there was no pleading of material facts that would, if proved, establish all of the essential elements of the claims.**

**Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Jurisdiction — British Columbia — Application by the defendants for an order to strike out the writ of summons and statement of claim, allowed — It was plain and obvious that the writ and statement of claim disclosed no reasonable cause of action — While they invoked several well recognized causes of action there was no pleading of material facts that would, if proved, establish all of the essential elements of the claims.**

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| Application by the defendants for an order to strike the writ of summons and statement of claim. Micka was a private project developer. Defendant Oliver & District Community Economic Society was a non-profit society. Individual defendants were officers and directors of the Society, local business persons or public officials. Micka alleged in the pleadings that the defendants committed a variety of wrongs against him. Allegations related to the defendants' involvement in negotiations with respect to the sale of certain public land in Oliver, British Columbia.  HELD: Application allowed.  It was plain and obvious that the writ and statement of claim disclosed no reasonable cause of action. While they invoked several well recognized causes of action there was no pleading of material facts that would, if proved, establish all of the essential elements of the claims. Micka claimed to have suffered damages but nothing in the pleading provided any nexus between him and the impugned sale so that it could be said he suffered any damages in relation to the sale. None of the material facts that would establish the essential elements of the alleged conspiracy were pleaded. Micka sued for breach of statute but that alone was not actionable but was subsumed under the law of ***negligence***. ***Negligence*** claim was not properly pleaded as no material facts were alleged that would support any relationship of proximity and foreseeability between the defendants and Micka. No material facts were pleaded that supported the claims of deceit, misrepresentation, breach of trust, breach of fiduciary duty, fraud, defamation and breach of the Canadian Charter of Rights and Freedoms. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 19(1), Rule 19(9.1), Rule 19(11), Rule 19(24), Rule 19(24)(a), Rule 19(24)(b), Rule 19(24)(d)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 12, s. 15

Local Government Act, *RSBC 1996, CHAPTER 323*,

**Counsel**

The Plaintiff: Appeared on His Own Behalf.

Counsel for the Defendants: Reece Harding.

**Reasons for Judgment**

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| **C.J. ROSS J.** |

**Introduction**

**1**  This is an application brought by the defendants for an order striking the Writ of Summons and Statement of Claim on the grounds that they disclose no reasonable claim, are unnecessary, scandalous, frivolous, or vexatious and are otherwise an abuse of the process of the court pursuant to Rule 19(24)(a)(b) and (d) of the ***Rules of Court***. The Writ of Summons and Statement of Claim are reproduced as Appendix A to these reasons.

**2**  The plaintiff, John Micka, is a private project developer whose address for service is in Oliver, British Columbia. The defendants Oliver & District Community Economic Development Society ("ODCEDS") is a non-profit society. The defendants Ron Hovanes, Allan Patton, Jim Wyse, Kenn Oldfield, Kathy Mercier, Joan Sarell, Paul Bouchard, Larry Schwarzenberger, Stephanie Salsnek and Gene Covert are officers and directors of ODCEDS and local business persons or public officials. The defendant Les Lawther is the economic development officer for ODCEDS.

**The Pleading**

**3**  The Writ of Summons alleges that the defendants committed wrongful and unlawful conduct that violated the plaintiff's constitutional and common law rights causing the plaintiff damage and loss of reputation, opportunity, income and social relations. The plaintiff alleges in particular that his rights pursuant to ss. 7, 12 and 15 of the ***Charter*** have been infringed. The Writ alleges that the defendants have conspired to infringe the plaintiff's rights. The Writ alleges that the wrongful and unlawful conduct has been "excessive, abusive, malicious and reprehensible" and seeks an award of aggravated, exemplary and punitive damages.

**4**  The allegations in the Statement of Claim relate to the involvement of the defendants in negotiations with respect to the sale of certain public land in Oliver. The Statement of Claim alleges that the land was "unfairly undervalued, falsely appraised and illegally undersold". The plaintiff alleges in paragraph 29 of the Statement of Claim that a duly constituted quorum of the council for the Town of Oliver voted unanimously to approve the sale.

**5**  The Statement of Claim contains allegations that circumstances in relation to the approval of the sale by Council were in contravention of provisions of the ***Local Government Act***, *R.S.B.C. 1996, c. 323*. However, neither the municipality, nor the Council, nor any officials of the Town in their capacity as officials, have been named as defendants in the action. In any event, the Statement of Claim alleges that the impugned sale was never completed.

**6**  The Statement of Claim alleges conspiracy and ***negligence***. The Statement of Claim contains other allegations of very serious wrongdoing; for example, deceit (paragraphs 20, 22 and 42), misrepresentation (paragraph 20 and 42), breach of trust (paragraphs 21 and 36), breach of fiduciary duty (paragraphs 20 and 23) and fraud (paragraphs 22 and 37).

**Rule 19**

**7**  The provisions of Rule 19 that are applicable with respect to this application are as follows:

Contents

1. A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

Pleading conclusions of law

1. Conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Where particulars necessary

1. Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.

Scandalous, frivolous or vexatious matters

1. At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, 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 or the proceeding, or
5. it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

**8**  The test for establishing that a statement of claim discloses no reasonable claim is that set out by Wilson J. in ***Hunt v. T&N plc***, *[1990] 2 S.C.R. 959* (sub nom. ***Hunt v. Carey Canada Inc.***) at 980:

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

**9**  As noted in ***Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.***, [*2005 BCSC 371*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M480-00000-00&context=) at paragraph 9, per Joyce J. "[a] material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded".

**10**  The issue is not whether the plaintiff has failed to identify the specific causes of action or tort claims advanced. Rather, the Court is to examine the statement of claim to see whether the material facts set out would, if proved, complete all the constituent elements of causes of action known in law: see ***Alford v. Canada (Attorney General)*** [*(1997), 31 B.C.L.R. (3d) 228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F7VM-S34P-00000-00&context=) (S.C.) [***Alford***] per Brenner J., as he then was, at 235 and 236.

**Analysis**

**11**  I have concluded that it is plain and obvious that both the Writ and Statement of Claim disclose no reasonable cause of action. While the Writ and Statement of Claim invoke several different well recognised causes of action, there is no pleading of the material facts that would, if proved, establish all of the essential elements of these claims.

**12**  Damage is an essential element with respect to each of the claims. However, while the plaintiff claims to have suffered damages, there is nothing in the pleading that provides any nexus between the plaintiff and the impugned sale such that the plaintiff could be said to suffer damage of any sort in relation to the sale. Even more problematic is the fact that the impugned sale that is the focus of the allegations was not completed. Accordingly, assuming the facts alleged in the pleadings are true, they disclose no basis for a claim that the plaintiff has suffered loss or damage.

**13**  The necessary elements of the tort of conspiracy, together with the requirements for a pleading of conspiracy are described by Brenner J., as he then was, in ***Alford***, at paras. 37-38:

There are two types of actionable conspiracy in Canada: (1) Where the predominant purpose of the defendants' conduct is to injure the plaintiffs, whether the means used by the defendants are lawful or unlawful; and (2) where the defendants conduct is unlawful and is directed towards the plaintiffs (alone or together with others) and the defendant should have known that injury to the plaintiffs is likely to and does result. (See *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [*[1983] 1 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M27Y-00000-00&context=) at 471-472). To be complete, the tort of conspiracy requires not only a conspiratorial agreement, but also proof that overt acts have caused damage to the plaintiffs. (See *Thompson v. Coquitlam (District)* [*(1979), 15 B.C.L.R. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-K054-G0RN-00000-00&context=) (S.C.) at 63).

*Bullen, Leake and Jacobs' Precedents of Pleadings*, 12th ed. (1975) at 341 states what is to be pleaded by a plaintiff in a conspiracy action:

Pleading.

The Statement of Claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the Defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the Plaintiff thereby.

**14**  In ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*** [*(1999), 36 C.P.C. (4th) 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1HH-00000-00&context=) (BCSC), Mr Justice Romilly at paragraph 41 described what is necessary in a pleading of the tort of conspiracy:

To establish the tort of conspiracy the plaintiff must plead: (1) an agreement, in the sense of a joint plan or common intention on the part of the defendants to do the act which is the object of the alleged conspiracy; (2) an overt act or acts consequent upon the agreement; (3) resulting damage to the plaintiff. L.D. Rainaldi, ed. *Remedies in Tort* (Scarborough, Ont.: Carswell, 1987). Where the acts relied on are in themselves unlawful it is sufficient to show that the defendants' conduct was directed toward the plaintiff and that the defendants should have known that the injury to the plaintiff would result: *Hunt v. T&N* plc, *supra*. The essence of the tort of conspiracy is the concerted action. Sufficient facts must be set out in the Statement of Claim, so that, if proved, they establish an agreement or combination between the defendants.

**15**  None of the material facts that would establish these essential elements are pleaded in the Statement of Claim. In particular, there is no pleading of material facts that would establish a nexus between the alleged wrongful conduct and the plaintiff.

**16**  The Statement of Claim contains allegations of breaches of statute. However, as Mr. Justice Vickers noted at para. 17 in ***FGM Holdings Ltd. v. Workers' Compensation Board of British Columbia***, [*2000 BCSC 1188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22P8-00000-00&context=), [*79 B.C.L.R. (3d) 271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22P8-00000-00&context=) [***F.G.M.***]:

Statutory breach is not, *per se*, actionable. The civil consequences of statutory breach are subsumed in the law of ***negligence***: *The Queen 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=).

**17**  The necessary elements in an action for ***negligence*** are:

1. That there was a duty of care owed to the plaintiff by the defendant.
2. That there was a breach of that duty of care in that the defendant failed to exercise the standard of care required of a reasonable and careful person in the circumstances.
3. That the plaintiff suffered damages as a direct result of the defendant's ***negligence***.

**18**  As was noted by Vickers J. in ***F.G.M.***, a claim in ***negligence*** must be supported by pleadings of material facts to support a conclusion that the defendant was negligent, starting with pleading of facts giving rise to a duty of care.

**19**  The Supreme Court of Canada set the test for determining the existence of a private law duty of care 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=). There are two essential questions:

1. Does the relationship between the parties disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care?
2. If so, are there any residual policy considerations which ought to negate or limit that duty of care?

**20**  There are no material facts pleaded in the Statement of Claim that would support or establish any relationship of proximity and foreseeability between the defendant society and its officers and directors, and the plaintiff. The Statement of Claim does not plead the material facts necessary to support a conclusion that the defendants owed Mr. Micka a duty of care.

**21**  In addition, as noted earlier, there are no material facts in the pleadings that would establish a nexus between the conduct of the defendants and the plaintiff such as to give rise to damages suffered by the plaintiff.

**22**  In my view, the allegations of deceit, misrepresentation, breach of trust, breach of fiduciary duty and fraud contained in the Statement of Claim are not in compliance with Rules 19(1), 19(9.1) or 19(11) as in each case, neither the necessary material facts that would establish the necessary elements of the respective causes of action, nor the required particulars have been pleaded.

**23**  The defendants submitted that the Statement of Claim does not contain any of the necessary elements to support a claim for damages for defamation. I agree with that submission; however, it does not appear to me from my review of the Statement of Claim that the plaintiff intended to allege that the defendants have defamed him. If I am wrong, then it is clear that the pleadings do not contain the defamatory words, the derogatory sense of the words alleged, or the material fact that the defamatory statement was published to a third party, see ***LaPointe v. Summach***, [*[1999] B.C.J. No. 1459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4NG-00000-00&context=) (B.C. Master), ***Gaskin v. Retail Credit Co.***, [*[1965] S.C.R. 297*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JJSF-22DV-00000-00&context=).

**24**  Finally, with respect to the alleged braches of the ***Charter***, I agree with the submission of the defendants that the Statement of Claim does not plead any material facts showing the nature of the rights alleged to have been violated, how those rights were alleged to have been violated or infringed, or how the defendants, a private society and its individual officers, directors and employees, are subject to ***Charter*** scrutiny.

**25**  Mr. Micka stated in his oral submissions that this action was important because the ODCEDS is the recipient of public funds, but is otherwise not accountable to the taxpayer. He submits that he has no recourse other than the courts to seek such accountability. All individuals have access to the courts to seek redress with respect to actionable wrongs that they have suffered. However, the actionable wrongs must be set out in pleadings that comply with the Rules. The material facts necessary to establish the claim must be pleaded. The pleadings in the present case do not do so.

**Conclusion**

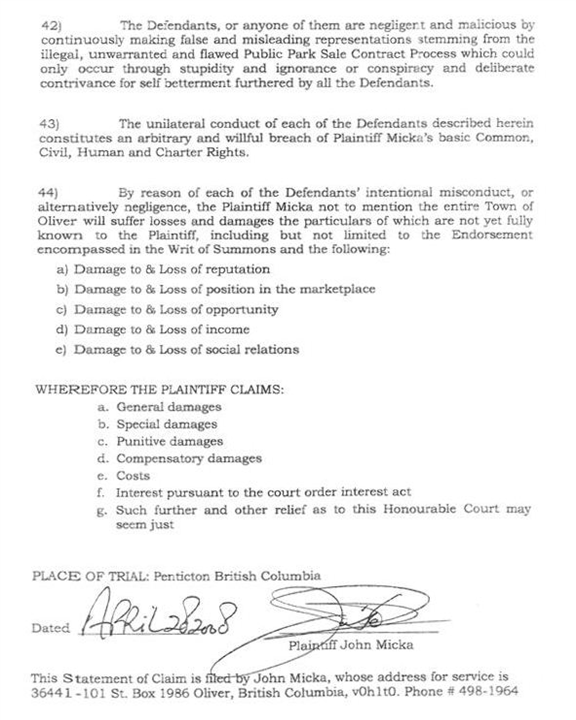
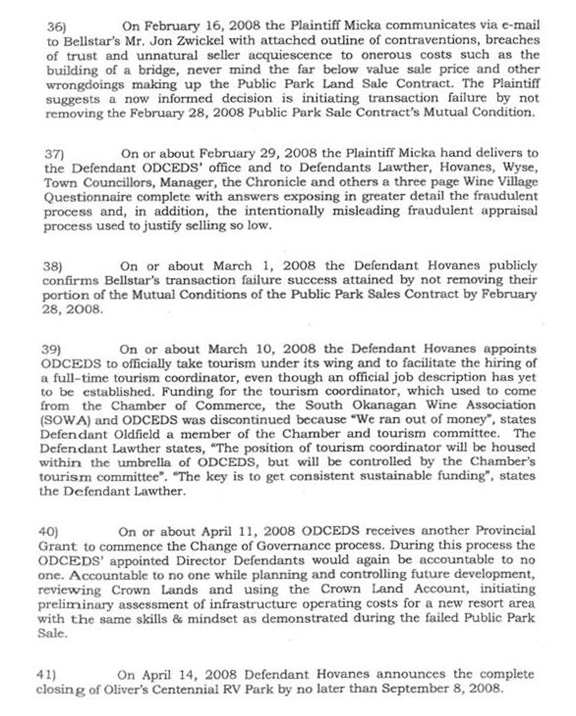
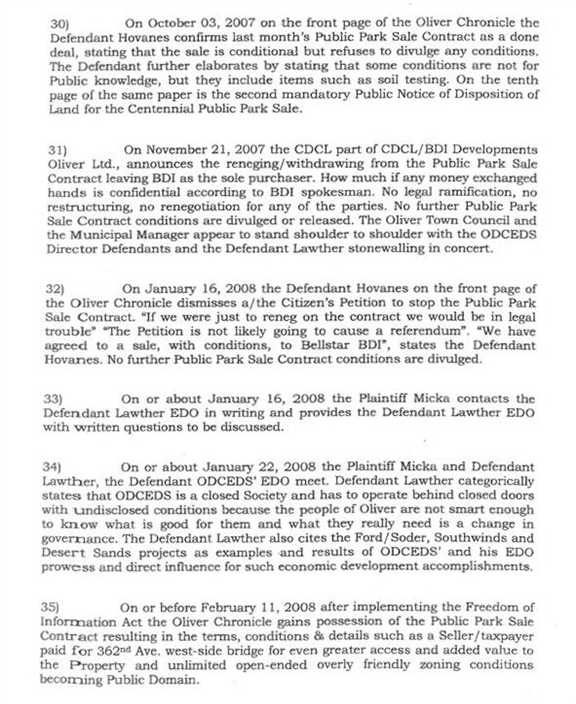
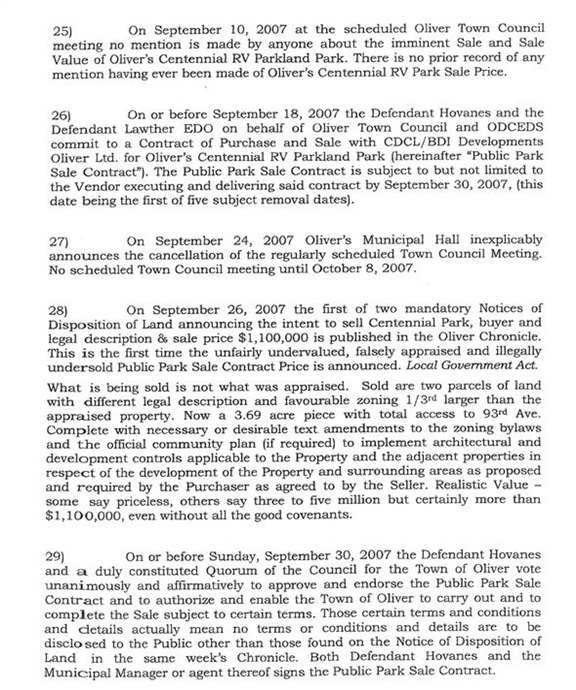
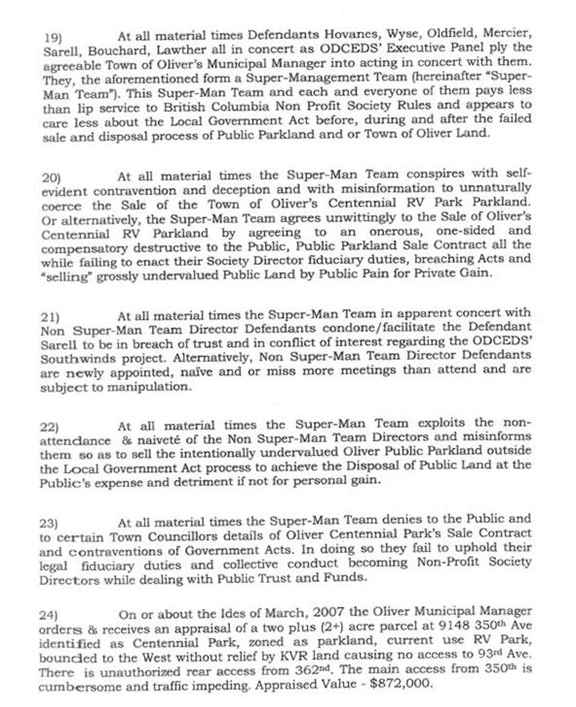
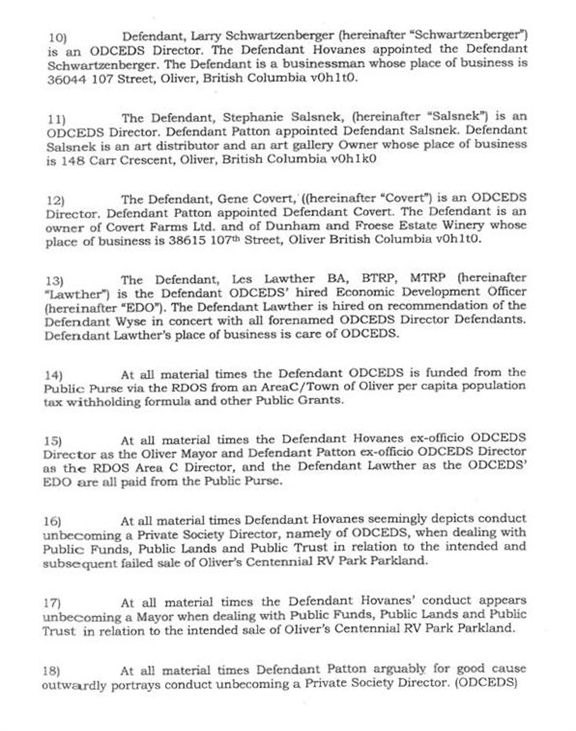
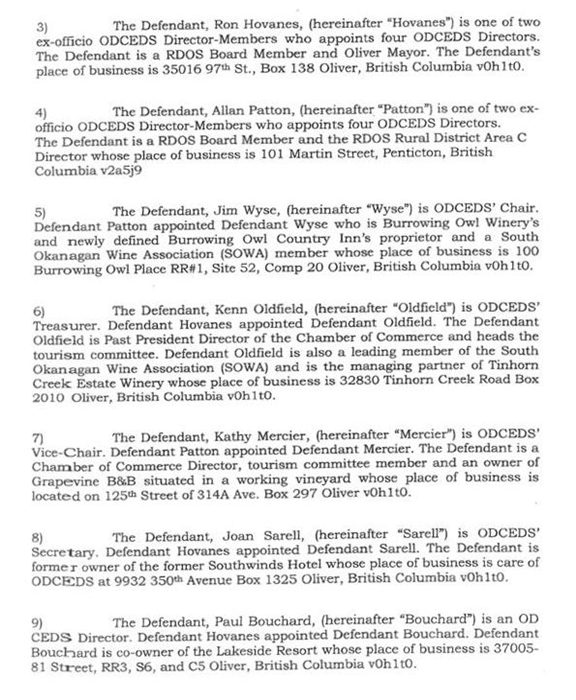
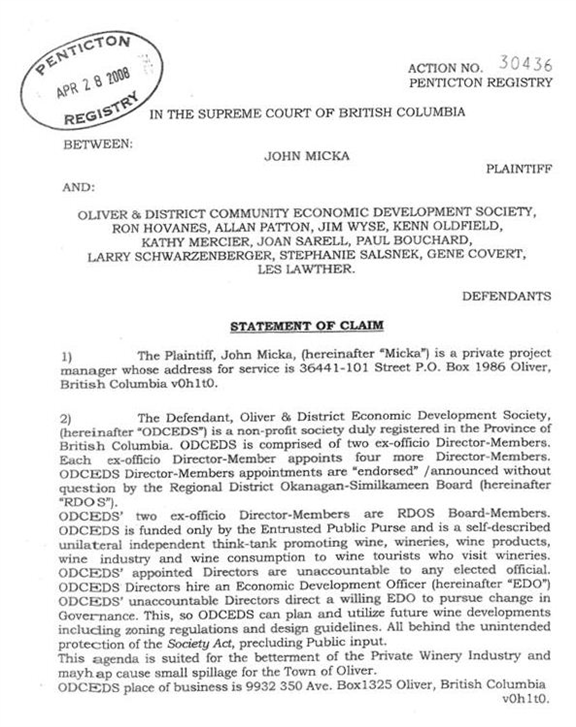
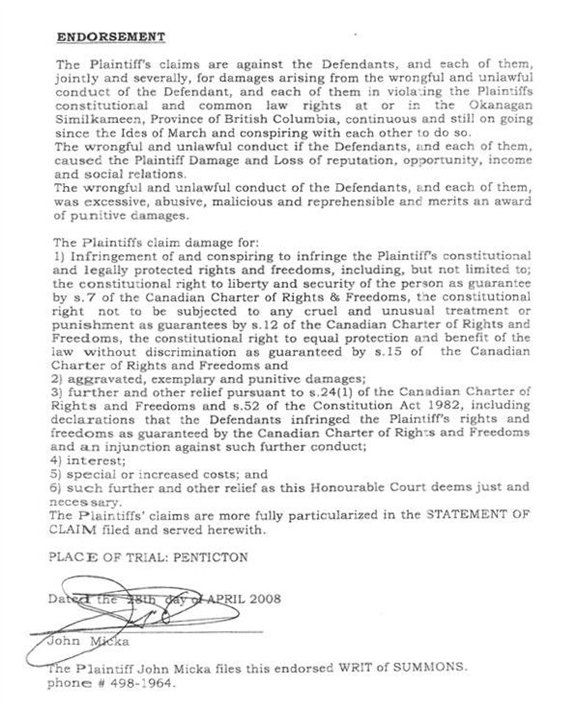
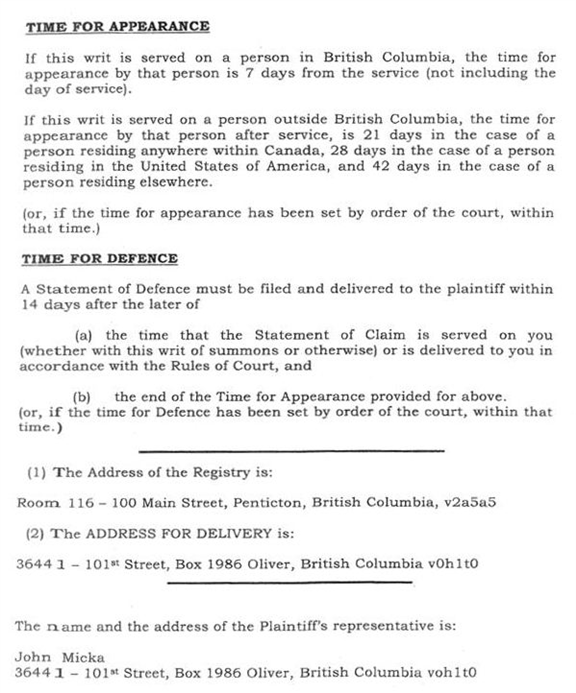
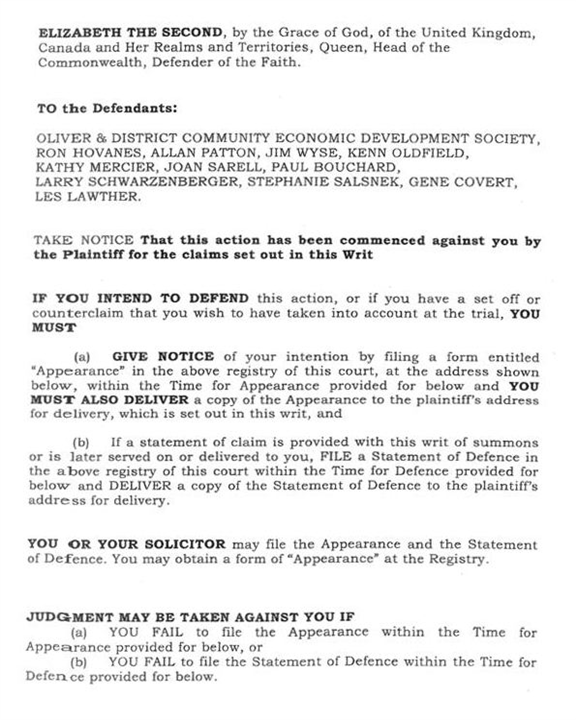
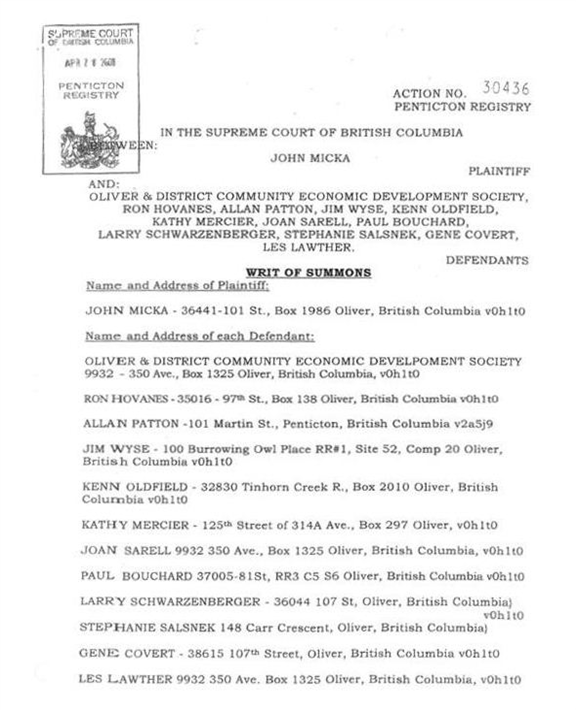
**26**  In the result, I order that the Writ and Statement of Claim are struck pursuant to Rule 19(24)(a) on the basis that they disclose no reasonable claim. Given my conclusion, I will not deal with the submissions concerning 19(24)(b) and (d).

**27**  The defendants are entitled to the costs of the application. If the defendants wish to pursue their claim for special costs, the matter can be spoken to.

C.J. ROSS J.

\* \* \* \* \*

Appendix A



**End of Document**