IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *X. v. Y.*,
2011 BCSC 944

Date: 20110718
Docket: M99443
Registry: New Westminster

Between:

X.

Plaintiff

And

Y. and Z. Ltd.

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

NOTICE: Court file sealed

Counsel for the Plaintiff:	T. Spraggs A. Sovani
Counsel for the Defendants:	J. Lindsay, Q.C. P. Tung
Place and Date of Trial:	New Westminster, B.C. February 22-26; March 1-5, 8-12, 17-21; September 7-9; and November 15-16, 2010
Place and Date of Judgment:	New Westminster, B.C. July 18, 2011

INTRODUCTION

[1] On July 19, 2005, the plaintiff, Mr. X., an RCMP officer, was responding to an emergency call on the Lougheed Highway in Coquitlam. His life changed permanently and materially when his motorcycle collided with a truck driven by one of the defendants, Mr. Y. The truck was owned by Z. Ltd., the other defendant. I will refer to the defendant, Mr. Y., as "the defendant" for the balance of these reasons. As a result of the accident, the plaintiff was seriously injured; he sustained a burst-fracture of his T12 vertebra and underwent fusion surgery. The plaintiff returned to his employment with the RCMP in April 2006. However, he has not returned to front-line police work.

[2] He claims general damages for pain and suffering, past wage loss, loss of capacity to earn income in the future, loss of housekeeping capacity, future care costs, and special damages.

[3] The defendant has admitted liability but submits that the plaintiff's negligence contributed to the accident. The defendants also contend that the plaintiff's claims for compensation for his injuries are excessive.

[4] The issues for determination are:

i. Whether the plaintiff's negligence contributed to the collision; and

ii. The quantum of damages the plaintiff should be awarded.

I will address these issues separately under the headings of "Liability" and "Damages."

LIABILITY

[5] The plaintiff contends that the accident was caused solely because of the negligence of the defendant, and denies any contributory negligence. The defendants submit that the apportionment of fault under the *Negligence Act*, R.S.B.C. 1996, c. 333, should be in the range of 50% to 60% to the plaintiff.

[6] For the reasons discussed below, I find the plaintiff was not contributorily negligent.

Legal Framework

[7] Before turning to the analysis, it is necessary to refer to the relevant provisions of the *Motor Vehicle Act*, R.S.B.C. 1996 c. 318 [*MVA*], and the judicial consideration of those provisions.

[8] Section 122 of the *MVA* states as follows:

> 122 (1) Despite anything in this Part, but subject to subsections (2) and (4), a driver of an emergency vehicle may do the following:
>
> (a) exceed the speed limit;
>
> (b) proceed past a red traffic control signal or stop sign without stopping;
>
> (c) disregard rules and traffic control devices governing direction of movement or turning in specified directions;
>
> (d) stop or stand.
>
> (2) The driver of an emergency vehicle must not exercise the privileges granted by subsection (1) except in accordance with the regulations.
>
> (3) [Repealed 1997-30-2.]
>
> (4) The driver of an emergency vehicle exercising a privilege granted by subsection (1) must drive with due regard for safety, having regard to all the circumstances of the case, including the following:
>
> (a) the nature, condition and use of the highway;
>
> (b) the amount of traffic that is on, or might reasonably be expected to be on, the highway;
>
> (c) the nature of the use being made of the emergency vehicle at the time.

[9] The sections of the *Emergency Vehicle Driving Regulation*, B.C. Reg. 133/98, which are relevant to the application of s. 122 of the *MVA* read as follows:

> 1 In this regulation:
>
> ...
>
> “emergency light” means a flashing red or blue light;
>
> “emergency siren” means an audible siren, signal bell or exhaust whistle;

> ...
>
> 4 (1) A peace officer operating an emergency vehicle for purposes other than pursuit may exercise the privileges granted by section 122 (1) of the *Motor Vehicle Act* if
>
> > (a) the peace officer has reasonable grounds to believe that the risk of harm to members of the public from the exercise of those privileges is less than the risk of harm to members of the public should those privileges not be exercised, and
> >
> > (b) the peace officer operates the following emergency equipment, as applicable:
> >
> > > (i) in the exercise of privileges described in section 122 (1) (a) to (c) of the *Motor Vehicle Act*, an emergency light and siren;
> > >
> > > (ii) in the exercise of privileges described in section 122 (1) (d) of the *Motor Vehicle Act*, an emergency light or an emergency light and siren.

[10] Section 163 of the *MVA* deals with divided highways and states as follows:

> 163 If a highway has been divided into 2 roadways by a physical barrier or clearly indicated dividing section constructed so that it impedes vehicular traffic, a driver must not
>
> > (a) drive a vehicle over, across or within a barrier or dividing section, except at a crossover or intersection, or
> >
> > (b) drive a vehicle on the left hand roadway unless directed or permitted to do so by a peace officer or a traffic control device.

[11] Section 177 of the *MVA* which deals with the approach of an emergency vehicle states as follows:

> 177 On the immediate approach of an emergency vehicle giving an audible signal by a bell, siren or exhaust whistle, and showing a visible flashing red light, except when otherwise directed by a peace officer, a driver must yield the right of way, and immediately drive to a position parallel to and as close as possible to the nearest edge or curb of the roadway, clear of an intersection, and stop and remain in that position until the emergency vehicle has passed.

[12] It emerges from the authorities that the determination of whether a police officer was negligent to any degree turns on whether the conduct of that police officer, viewed objectively from the viewpoint of a reasonable police officer, was reasonable in the particular circumstances of the case: *Radke v. M.S. (Litigation*

guardian of), 2007 BCCA 216 at para. 7; *Doern v. Phillips Estate* (1997), 43 B.C.L.R. (3d) 53 at para. 13, 100 B.C.A.C. 5 (C.A.).

[13] The Court of Appeal in *Doern* affirmed this governing principle as follows at para. 13:

> There is no dispute in this case concerning the legal standard of care to which the police are to be held. After a thorough review of the relevant authorities the learned trial judge said:
>
> > Based on the authorities provided, there is little doubt that the standard of care to which a police officer will be held is that of a reasonable police officer, acting reasonably and within the statutory powers imposed upon him or her, according to the circumstances of the case ....

[14] This Court must analyze whether there was any negligence on the part of the plaintiff within the context of s. 122 of the *MVA*, the relevant sections of the *Emergency Vehicle Driving Regulation*, and any relevant police policy. The critical inquiry which informs the analysis is whether the emergency to which the plaintiff was responding was sufficiently serious to justify the exercise of his privileges under s. 122 of the *MVA* and the attendant risk to public safety. This mandates an assessment of whether he properly balanced the utility of his conduct with the risk to public safety: *Radke* at para. 13.

[15] I have considered all of the case authorities provided by the parties. The decisions, while affirming the general propositions outlined above, are largely fact specific and accordingly are of limited assistance.

[16] The defendant admitted that his negligence caused the accident. Therefore, the essential issue for determination in this proceeding is whether there was any contributory negligence on the part of the plaintiff.

Facts

Evidence of the Plaintiff

[17] The plaintiff, who had owned and operated a variety of motorcycles, was a very experienced motorcycle rider. He had been a motorcycle rider with the

Canadian Armed Forces and had successfully completed the Canada Safety Council motorcycle program. He completed his training as an advanced motorcycle operator with the RCMP on April 18, 2005.

[18] Prior to operating his motorcycle on the day of the collision, the plaintiff, as was his routine, conducted a safety inspection of his motorcycle. I accept his evidence that he only operated his motorcycle on the days he considered himself in optimal physical and mental form. The motorcycle was a heavy Harley Davidson model.

[19] In the minutes preceding the collision, the plaintiff was responding to an emergency call in relation to a collapsed overpass on the Lougheed Highway. The Lougheed Highway runs in a north-south direction. It has two lanes in each direction and is divided by a painted median which is approximately a half-lane wide and is flush with the road surface. The posted speed limit on the Lougheed Highway is 70 kilometres per hour. It was a clear and sunny summer day. Northbound traffic on the Lougheed Highway was stalled due to the collapse of the overpass.

[20] The plaintiff, in responding to the Code 3 call, knew the pedestrian bridge had collapsed over the highway and it was “unknown for injuries”. Code 3 calls mandate a priority one response and police officers are expected to activate their emergency equipment, including lights and sirens, and to attend the scene at a safe and reasonable speed. Although there were emergency vehicles with activated emergency lights and sirens present in the vicinity of the collapsed overpass, the Code 3 had not been cancelled prior to the collision.

[21] It is a critical and uncontroverted fact that the plaintiff, in responding to the Code 3 call, immediately and continually employed his automatic flashing emergency lights and sirens and repeatedly sounded his air horn, which he described as a “loud, irritating blast of noise”. He accelerated towards the overpass accident scene at a speed he determined was safe and reasonable. He initially “split the traffic” and travelled between the two northbound lanes before eventually coming to a police roadblock at the Chilko Dr. intersection which was preventing civilian

vehicles from proceeding north. After passing around the raised median at Chilko Dr., he began travelling in the southbound lane in a northerly direction towards the overpass. However, while driving, he observed some traffic moving in the opposite direction from him in those southbound lanes; some vehicles in the northbound lanes closer to the collapsed overpass were executing U-turns into the southbound lanes. He also assumed that some vehicles were still passing underneath the intact portion of the overpass. He determined that travelling on the flat median area would be the most prudent and most efficient path of travel in the circumstances. He proceeded cautiously, with his lights and sirens activated, repeatedly blowing his air horn so that the drivers on the highway could hear him and see him. He reduced his speed after passing the roadblock.

[22] The defendant, who was driving a large pick-up truck, suddenly and without warning pulled out of the northbound lane and turned directly into the path in front of him. The plaintiff instantly determined that he would be unable to swerve to avoid the vehicle, and realizing a collision was inevitable, he took, in the circumstances, what he deemed to be the most reasonable course of action. Prior to impact, he laid down his motorcycle on its left side and tried to dismount the motorcycle so that his body would not directly impact the truck. He made a conscious effort to tuck himself into a ball by bringing in his legs and arms before landing on the pavement. He was able to execute this manoeuvre, at least in part, because of his training as a member of the emergency response team in the Armed Forces. His motorcycle collided with the driver’s side of the truck.

[23] Emergency personnel attended the scene immediately after the collision.

[24] I accept the plaintiff’s evidence as outlined above. His description of the accident was largely supported by the evidence of the independent witnesses who, prior to the collision, had been travelling on the Lougheed Highway in the northbound lane closest to the median. I turn now to their evidence.

Evidence of the Independent Witnesses

(i) Ms. O.

[25] Ms. O.'s vehicle was immediately in front of the defendants' truck, in the lane closest to the median. Through her rear-view mirror she observed the plaintiff's motorcycle travelling down the median with its lights flashing. She noticed his motorcycle just after it passed the Chilko Dr. intersection. She estimated that the plaintiff was travelling at a speed of 50-60 kilometres per hour. She then observed that the truck behind her had begun to veer to the left; it had turned approximately 45 degrees west when she heard the loud slam of the collision. She immediately turned to look over her shoulder and saw the motorcycle driver fly through the air and then hit the ground. Ms. O. conveyed to the Court her shock at the time that any driver would attempt to complete a U-turn while an emergency motorcycle was approaching.

[26] She confirmed that sometime prior to her observing the plaintiff's motorcycle, she had observed four or five vehicles in front of her making U-turns into the southbound lanes.

(ii) Mr. K.

[27] Mr. K. was travelling in a convertible with its top down directly behind the defendants' truck. He noticed other cars were backed up in front of him and waiting in line, but he was unable to identify the emergency or what was causing the stalled, "stop and go" traffic. Mr. K. had just started to contemplate executing a U-turn when he heard the plaintiff's motorcycle siren approaching from behind him. He estimated that he first observed the plaintiff's motorcycle about 20 seconds prior to the collision. He turned his head around and had a clear view of a police officer on a motorcycle with flashing lights travelling up the median. He estimated its speed as 50-60 kilometres per hour. He concluded it was best to remain in his current position.

[28] Mr. K. then observed that the defendants' pick-up truck, which was stopped one-half to one car length immediately in front of him, was beginning to pull out to

the left. He observed that the driver turned without turning his head to check for traffic and without turning on his signal lights. Mr. K. stated that he thought to himself "what the heck is he [the driver of the truck] doing?" when he first noticed the truck's movement to the left. According to Mr. K., the police motorcycle was approximately two or three car lengths behind the defendants' truck when the defendant began his U-turn.

[29] Mr. K. saw the motorcycle driver "dump" the motorcycle, the motorcycle collide with the truck and the motorcycle driver ricochet off the truck and fly through the air "like a rag doll". According to Mr. K., the defendants' truck was well into the median when the collision occurred.

(iii) Mr. KR.

[30] Mr. KR. was also travelling north in the same northbound lane. He was approximately 50 feet in front of the defendants' truck. Within what he estimated to be five seconds of completing his U-turn, he heard the motorcycle sirens and observed the plaintiff's motorcycle travelling down the median with its lights activated. He described the motorcycle as travelling "pretty fast". He then saw the defendant, who was a "quarter way" through his U-turn, collide with the motorcycle.

(iv) Summary

[31] There are some inconsistencies in the evidence of these witnesses; for instance, they gave different accounts of the length of time they had been stopped prior to the collision. However, I note that these witnesses were attempting to give detailed descriptions of a sequence of events which happened suddenly, over the course of seconds or split-seconds. It is not surprising that their recollections were not identical.

[32] The evidence establishes that both Ms. O. and Mr. K., in the vehicles directly in front of and behind the defendant, saw the plaintiff prior to the collision travelling down the centre of the median with his emergency lights activated. Mr. K. heard the plaintiff's motorcycle siren; Ms. O. heard the sirens of emergency vehicles behind

her. They both remained in their respective positions as they were required to do pursuant to s. 177 of the *MVA*. With respect to their observations of the defendant and the sequence of events immediately preceding the collision, I found the evidence of both Ms. O. and Mr. K. credible and reliable.

[33] While Mr. KR. testified that he did not hear the siren or see the motorcycle until just after he had completed his U-turn, he was at least 50 feet ahead of the defendant. Moreover, the evidence does not support a finding that Mr. KR. checked his mirrors prior to executing his U-turn. Although he testified that he had been directed by a police officer to execute a U-turn, the totality of the evidence does not support such a finding. Neither the plaintiff, the defendant, Ms. O., nor Mr. K. saw a police officer directing U-turns.

Evidence of the Defendant's Father

[34] The defendant's father was following his son in the northbound lane closest to the median. He confirmed that traffic was stalled due to the collapsed overpass. Both he and the defendant testified that his vehicle was immediately behind the defendants' truck. This is inconsistent with the evidence of Mr. K., who testified that it was his vehicle that was directly behind the defendants' truck. I prefer the evidence of Mr. K. on this point, as I find it more consistent with the reasonable probabilities of the situation.

Evidence of the Defendant

[35] The defendant was proceeding in a northerly direction on the Lougheed Highway in his canopied 3/4 ton pick-up truck. The driver's side window of his truck was open. Prior to the collision, he had been stopped in bumper-to-bumper traffic, during which time he saw lights from emergency vehicles and heard the ambient sound of sirens. He also observed that there were cars left abandoned along the shoulder and an out-of-province motorcycle travelling on the right-hand shoulder. The defendant made his U-turn without being directed to by any emergency personnel. Although the defendant did hear a loud grinding or screeching noise a few seconds before the impact, he only saw the motorcycle when it slid by his

window and hit his truck. He slammed on his brakes in the split seconds prior to the collision. After the collision, he immediately put his truck in park and jumped out of the vehicle. The defendant was not injured in the collision.

[36] The defendant pled guilty to charges of driving without due care and attention. He asserts that he did so because he could not afford the legal fees to defend himself and because he wanted to avoid the risk of a suspension of his license.

[37] The defendant's evidence on material points contradicted both his own testimony at trial and the evidence of the independent witnesses without any satisfactory explanation. The following examples are illustrative:

- He stated he was travelling in the lane closest to the median, and maintained that it was "his turn" to make a U-turn. He recalls that although there were a few staggered vehicles ahead of him there were no drivers in those vehicles. However, the evidence clearly establishes that Ms. O.'s vehicle was directly in front of him in the lane.

- He testified at his examination for discovery that his truck remained in the northbound lane closest to the median, and maintained that he had not turned into the median prior to impact. At trial, he testified that at the time of the collision, he was "on or right around the centre median line" and that his tire was "very close to the median". He conceded in cross-examination that the front of his vehicle may have been in the median. The three collision experts and the independent witnesses all place his truck well through the median at the time of impact.

- He testified that he checked his mirror seconds before he started executing his U-turn. He stated that he could see back to the Chilko Dr. intersection and he saw a "clear road on the other

> side and traffic backed up" behind him. Given the other evidence which I prefer, the only rational conclusion is that the defendant did not check his mirrors before making his U-turn or execute a proper shoulder check (which would have finished with a turn to the blind spot on his left); had he done so, he would have seen the plaintiff approaching. Both the defendant's own expert, Mr. I., as well as Mr. SE., the plaintiff's expert, were of the opinion that if he had checked his mirrors, the plaintiff would have been in his view.
>
> - He testified that prior to executing his U-turn, he turned on his turn signal. This evidence was directly contradicted by Mr. K.

[38] An assessment of the defendant's evidence as a whole demonstrates that it is not reliable. I consider it unsafe to give any weight to his evidence that tends to implicate the plaintiff for being at fault for the accident.

[39] The preponderance of the evidence shows that the left front tire of the defendants' truck was well between the two yellow median line markers at the time of impact. The defendant had clearly initiated his U-turn prior to the collision. He violated s. 163 of the *MVA* by making a U-turn on a divided highway and in breaching the law, he was under a heightened duty of care: *Bradley v. Bath,* 2010 BCCA 10 at para. 27. Contrary to the submissions of his counsel, the defendant did not exercise caution in executing his U-turn. The defendant admits that he was not directed to do the U-turn by any emergency personnel. Moreover, it was "not his turn" to make a U-turn; Ms. O.'s vehicle was in front of him. Even if he could not locate the source of the sirens, given the presence of emergency vehicles, the defendant should have looked carefully before executing any turn. If he had done so, he would have seen the plaintiff—the plaintiff was there to be seen and heard by the defendant.

[40] While recognizing that a breach of the *MVA* alone is not determinative of negligence, I find that the defendant clearly failed to keep a proper lookout and to

take appropriate care in the circumstances: *Dhah v. Harris*, 2010 BCSC 172; *Dickie Estate v. Dickie and Desousa* (1991), 5 B.C.A.C. 37 (C.A.). The location and nature of his unlawful manoeuvre in an area where he knew there were emergency vehicles required him to pay particular attention. Had he looked in his mirrors and conducted a proper shoulder check, he would not have initiated his turn in such patently unsafe circumstances.

Expert Evidence

[41] Each party led expert opinion evidence from an engineer experienced in accident reconstruction. Mr. I. gave expert evidence for the defendants; Mr. SE. provided evidence for the plaintiff. Both experts opined on the initial speed of the motorcycle prior to the pre-impact application of the brakes. Both experts relied on the contents of the motor vehicle traffic accident RCMP investigation report as well as RCMP incident scene photographs. Mr. SE. personally attended and examined the accident scene. Mr. I. did not attend the accident scene. Neither engineer examined the truck or the motorcycle.

[42] The plaintiff also tendered the traffic collision reconstruction report of Sgt. D., the National Coordinator for Collision Investigation Training at the RCMP Pacific Region Training Centre. Sergeant D., who is not an engineer, gave opinion evidence as a traffic collision analyst. He opined that the speed of the motorcycle was a minimum of 33 kilometres per hour. His analysis is incomplete because it calculates the speed of the motorcycle using only the skid marks; therefore, it is of limited assistance.

[43] The evidence as to the resting position of the two vehicles and the damage sustained by each of the vehicles was uncontroversial. After the collision, the final resting position of the upright truck was at an angle straddling the northbound lane (closest to the median) and the median lane. The truck was facing northwest. The motorcycle came to rest in the southbound lane, on its left side, facing southeast.

[44] The defendants' truck sustained some damage: the left running board under the cabin on the left side was torn off; there was denting on the driver's door and

along the rocker panel below and behind the driver's door; the left front wheel rim was fractured; and the left side steering components of the left front wheel sustained damage. Sergeant D. was of the view that the impact moved the truck on its rotational axis approximately one metre.

[45] The RCMP Traffic Collision Reconstruction Report describes the damage to the motorcycle. The primary damage to the motorcycle, which slid to rest on its left side, consisted of "abrasion to the left outboard side of the engine guard, the left saddlebag guard and the lid to the left saddlebag." The report also states as follows:

> Secondary contact damage consisted of a shattering of the underside of the right side mounted saddlebag. The right side saddlebag guard rails were bent upward. The right rear, arm mounted signal lamp was broken and bent upward.
>
> There was denting to the underside of the right side mounted exhaust muffler, which was pushed upward and inward toward the right side of the rear tire. ... The right side lower tubular frame rail, under the engine, was flattened and bent upward.

(i) Mr. I.'s Opinion

[46] Mr. I. opines that the plaintiff's motorcycle lost speed as a result of the braking, the impact with the defendants' truck, and the eventual sliding to a rest position. He considered the skid marks on the roadway identified by the investigating officers and the final resting position of the plaintiff's motorcycle. He analyzed each of these factors to provide an opinion as to the motorcycle's initial speed prior to the application of the brakes. In essence, he analyzed the initial speed of the motorcycle by working backwards from its resting position.

[47] In his analysis, he observes that only one skid mark was visible at the incident scene, likely from the motorcycle's rear tire. The police measured a 17.3 metre tire mark prior to impact.

[48] From his review of the police photographs and scale diagram, Mr. I. opines that the motorcycle slid approximately five metres from impact to rest. Mr. I., in applying the published works of Lambourn (1991), quantified the co-efficient of sliding friction of a motorcycle sliding on its side on asphalt to be in the range of 0.25

to 0.53. In his opinion, the motorcycle exited from the side of the truck at approximately 18 to 26 kilometres per hour. Through the application of a computer accident simulation and reconstruction program, he concluded that this required an impact speed of 37 to 54 kilometres per hour. He notes that because he used a conservative coefficient of restitution for the collision, the motorcycle's speed was "possibly higher". He also notes that both brakes could have been applied, with only the rear applied hard enough to lock the wheel; this is significant because the friction coefficient used in the crash analysis varies with whether there was rear braking only or whether there was front and rear braking.

[49] Considering the 17.3 metre tire mark prior to impact and a speed of 37 to 54 kilometres per hour at the end of the skid, he opines that the initial speed of the plaintiff's motorcycle was between 52 and 86 kilometres per hour. If only rear braking was applied, he opines that the motorcycle's initial speed was between 52 and 72 kilometres per hour.

[50] He was of the opinion that at the time of impact, the left front tire of the defendants' truck was in the western half of the median.

(ii) Mr. SE.'s Opinion

[51] Mr. SE.'s analysis of the range of the post-impact speed of the motorcycle and therefore its initial speed differed from that of Mr. I. He described two factors which resulted in Mr. I.'s overestimated calculations—the coefficient of friction on the roadway and not taking into account that the motorcycle had slid on its side prior to the collision.

[52] In his opinion, Mr. I.'s use of 0.25 to 0.53 for the coefficient of friction resulted in an overestimation of the post-impact speed of the motorcycle. Mr. SE. noted that the Lambourn test involved motorcycles varying in size, from a Honda 90 to a Honda CB 750G. In his report, Mr. SE. states as follows:

> The ... Harley Davidson was fitted with crash bars at the front and had metal guards around the saddlebags. Only one motorcycle in the Lambourn test was fitted with crash bars; the Honda CB 750G had crash bars over the crank

> case ends. The range for the coefficient of sliding friction for this motorcycle was 0.25 to 0.35.

Applying this coefficient of friction, Mr. SE. calculated a range of 18 to 21 kilometres per hour for the post-impact speed of the plaintiff's motorcycle.

[53] Mr. SE. also observed that Mr. I. stated that only one skid mark was visible at the accident site, and that the length of the mark was 17.3 metres. However, he points out that Sgt. D. in his traffic collision reconstruction report describes a metal scar on the road surface seen in the police photograph. According to Mr. SE., this is a significant component in the analysis; the scar was most likely from the crash bar on the left side of the motorcycle, and indicates that it was sliding on its left side as it approached the truck. Therefore, he opines that the 17.3 metres used by Mr. I. as the skid distance was too long and ultimately inaccurate. Mr. SE. also states that based on the measurements he took from the scene, the length of the mark made by the crash bar before it changed direction abruptly was about 3.6 metres. Therefore his calculations were based on the motorcycle sliding on its side for 3.6 metres and braking for 13.7 metres.

[54] Based on the above, Mr. SE. calculates that, if the front and rear brakes were applied, the pre-braking or initial speed of the motorcycle was between 51 and 76 kilometres per hour. Had only the rear brakes been applied, the pre-braking speed would have been between 51 and 63 kilometres per hour.

[55] In Mr. SE.'s opinion, at the time of impact, the front wheel of the defendants' truck was approximately 20 inches from the western side of the median.

[56] Finally, he states that:

> Therefore, if Mr. [Y.] had scanned his mirrors while trying to localize the source of the approaching siren, he would have had an unobstructed view of the motorcycle for at least the final 98 metres of its travel. ...

(iii) Summary of Expert Evidence

[57] Mr. I. conceded that Mr. SE. had offered some valid criticisms of his report. He acknowledged that Mr. SE.'s analysis was correct and that the crash bars would lower the coefficient of friction. While he did not concede that the range was as low as that asserted by Mr. SE., he did acknowledge in cross-examination that he would "split the difference" in the range of the coefficient of friction. This calculation in turn impacts the calculation of the initial speed of the motorcycle. He also conceded that Mr. SE. had a valid point that the coefficient of friction should be reduced because there was a concurrent scrape parallel to the skid mark which he had not factored into his calculations. He admitted in cross-examination that this was a "very difficult problem" that had not been fully explored in his report.

[58] Significantly, he testified that both of their respective estimates were within the realm of reasonable professional opinion.

[59] Mr. I. also conceded in cross-examination that if the defendant had checked his rear-view mirror prior to turning, he would have seen the plaintiff.

[60] In my view, on cross-examination, Mr. SE.'s opinion was not shown to be faulty in any substantive way. Mr. SE. acknowledged in cross-examination the possibility that both his and Mr. I.'s calculations on speed may be conservative because neither analysis factored in the extent to which the truck was moved by the impact. However, Mr. SE. testified and I accept that the increase in the speed estimates would be marginal.

[61] To the extent of any disagreement, I prefer Mr. SE.'s opinion to that of Mr. I.

Discussion

[62] The crucial question is whether the plaintiff failed to take reasonable care for his own safety and the safety of the public, and if so, whether his failure to do so was one of the causes of the collision. For the reasons set out below, I find that he did not fail to take reasonable care and that he was not at fault for the collision.

[63] The defendants' overarching submission is that the plaintiff should have reassessed the circumstances of the Code 3 call once it became apparent at the Chilko Dr. intersection that he would not be the first officer on the scene of the collapsed overpass. They say he made an error in judgment in putting too much emphasis on timing.

[64] I find that the plaintiff did conduct a proper risk assessment in responding to the emergency call. From the limited information the plaintiff had, he knew the situation was very serious; he knew that it was unknown for injuries and that time was of the essence. The Code 3 call had not been cancelled prior to the collision. I accept his evidence that officers are to continue as dispatched until a Code 3 call is cancelled. Moreover, it is an uncontroverted fact that he reduced his speed after passing the police blockade at the Chilko Dr. intersection.

[65] The defendants assert that the plaintiff was negligent as he approached the accident scene. They argue that:

i. he was negligent in his choice of lane;

ii. he should have proceeded more cautiously and he lacked an appreciation for U-turning vehicles in a chaotic emergency situation;

iii. he was travelling too fast in all the circumstances; and

iv. he should not have laid down his motorcycle.

[66] I will deal with each of these allegations in turn.

(i) Choice of Lane

[67] The defendants forcefully argue that the plaintiff was negligent in choosing to travel down the median. They submit that he acted unreasonably because he was travelling through the blind-spots of the drivers in the inside northbound lane.

[68] I reject that submission. It is not reasonable to require the plaintiff in responding to an emergency call to travel in a lane that would have entirely avoided the blind-spots of those drivers executing turns or lane changes. Rather, the analysis of whether his choice of lane was reasonable requires consideration of what reasonable options were available to the plaintiff at the time.

[69] With respect to the defendants' contention that the plaintiff should have travelled on the shoulder of the northbound lane, I note that the evidence from the defendant himself was that there were vehicles, including a motorcycle, moving through that lane, and that there were abandoned parked cars on the shoulder. In those circumstances, I am not persuaded that it would have been prudent for the plaintiff to travel in the shoulder of the northbound lane.

[70] Moreover, it is significant that the traffic was stalled in the northbound lane. If the plaintiff had chosen, instead of driving down the median, to continue to split the traffic by travelling north between the two northbound lanes of stopped traffic, he likely would not have had an unimpeded route of travel. The defendant himself testified that some of the drivers of the vehicles stopped in the northbound lanes were exiting their vehicles. If any occupant of a vehicle, either on the passenger side of the left lane or the driver side of the right lane, opened their door without checking their blind-spot, the door would have opened directly in front of the plaintiff's vehicle. Moreover, he would have been passing through the blind-spots of the drivers in the shoulder lane.

[71] Lastly, proceeding northbound in the southbound lane would have presented its own set of hazards, because despite the downed overpass, there were vehicles travelling in a southerly direction in those lanes.

[72] In summary, I am not persuaded that in the circumstances the plaintiff's choice of lane breached the standard of care of a reasonable police officer.

(ii) Failure to Appreciate U-turning Vehicles

[73] I next address whether the plaintiff nonetheless should have taken more care for his own safety by recognizing the potential risks of vehicles in the northbound lane negotiating U-turns. I find that the plaintiff did appreciate that there were vehicles doing U-turns from the northbound lane through the median to travel south in the southbound lanes.

[74] In all the circumstances, I am unable to conclude that he failed to take reasonable care. He did what was reasonable in terms of activating all of his emergency equipment: the evidence shows that his sirens and his flashing lights were on, and that he was repeatedly blowing his air-horn. He did so to be seen and heard. Significantly, both Mr. K. and Ms. O., who were in the vehicles directly in front of and behind the defendants' truck, observed the approach of the plaintiff and remained stopped in their respective positions.

(iii) Travelling at an Excessive Speed

[75] The plaintiff, in responding to a high-priority emergency call with his lights and sirens activated, was travelling in a path where traffic should not lawfully be travelling. I turn to the defendants' submission that in these circumstances, the plaintiff was travelling too fast.

[76] Mr. SE. opined that the initial speed of the motorcycle was between 51 and 76 kilometres per hour if the front and rear brakes had been applied. Had only the rear brakes been applied, the pre-braking speed would have been between 51 and 63 kilometres per hour. I accept the plaintiff's evidence that he applied both the front and rear brakes.

[77] In opining on the speed of the motorcycle, neither expert had complete data or considered all of the factors necessary to provide a thorough scientific analysis. This is reflected in the range of estimates they provided. The conjecture elicited in cross-examination as to the possible variables that might impact the calculations

was of little assistance to the Court. In the circumstances, while I have considered the expert evidence, I have not relied on it exclusively in making my findings of fact.

[78] Both Ms. O. and Mr. K. estimated the plaintiff's speed at 50 to 60 kilometres per hour. I have approached this evidence cautiously as each of them made this estimate based on a very brief observation. However, there is no evidence suggesting that either of them were aware of the other's testimony in this regard. The plaintiff estimated his speed as 40 to 50 kilometres per hour. The plaintiff's unchallenged evidence is that prior to reaching the Chilko Dr. intersection, he was proceeding at 80 to 90 kilometres per hour. He then slowed down appreciably to pass the roadblock at the Chilko Dr. intersection. By virtue of his training and experience, I find the plaintiff would have been particularly attuned to his speed. Although he candidly admitted that he did not check his speedometer after passing through the intersection, as I referred to earlier, I accept his evidence that thereafter he proceeded at a reduced speed.

[79] Based on the totality of the evidence, I am unable to make a finding as to the precise speed of the motorcycle prior to the application of the brakes. I am satisfied that the evidence supports a finding that it is more likely than not that the plaintiff was travelling in the range of 55 to 70 kilometres per hour. In all the circumstances, I conclude that the speed at which the plaintiff was travelling was justified in the context of the duty to which he was responding. Even if the plaintiff was travelling at 80 kilometres per hour, I would not be persuaded this constituted a breach of the plaintiff's statutory duty.

(iv) "Laying Down" the Motorcycle

[80] Counsel for the defendants also suggested that the plaintiff, when suddenly confronted with a very dangerous situation in which he had to react in a split-second timeframe, should have kept his motorcycle upright. In *Dhah v. Harris*, 2010 BCSC 172, the plaintiff motorcyclist was struck by a pick-up truck driven by the defendant who had made a U-turn across a double yellow line. The observations of the court at para. 34 are apt in this case:

> Similarly, the plaintiff may, in hindsight, have had alternate courses of action open to him, although there is no evidence that they would have made a difference. However, he did not have the luxury of carefully considering all his options. He reacted to the sudden appearance of a dangerous situation in front of him.

[81] I conclude that at the speed the plaintiff was travelling, he could not have reasonably taken any evasive action that would have avoided the accident. The evidence establishes that the plaintiff had no escape route, and his only option to mitigate the severity of the collision was to lay down the motorcycle. The motorcycle went down on its left side, which shows that the plaintiff applied counter-steering and steered the motorcycle in the direction he intended. He could not have swerved to the right because he would have collided with the vehicles behind the defendants' truck. If he had swerved to the left, it would have likely only changed the location of the impact with the truck.

Conclusion

[82] The plaintiff was exercising his privileges as a police officer pursuant to s. 122 of the *MVA*, travelling on the roadway where he would not otherwise be allowed to travel. I find that he did so having due regard for his own safety and the safety of the public. He considered the relevant factors and exercised appropriate judgment in balancing the risks against the utility of his conduct.

[83] The plaintiff was aware that it was important for him to remain visible, to maintain time and space for an escape route, and to keep in mind his own safety as well as the public's safety. He proceeded with reasonable caution: he did not travel at an excessive speed, he kept a proper lookout ahead, and he activated all of his emergency equipment in an effort to make drivers aware of his presence and to arrive at the scene of the collapsed overpass as quickly and safely as possible in the circumstances. He recognized the possibility that a driver in whose blind spot he was travelling might do a U-turn and took the precaution of activating all of his emergency equipment. It was reasonable to assume that upon his approach the drivers in the northbound lanes would obey the law and stop and remain in their positions until he passed: *Mills v. Seifred,* 2010 BCCA 404 at para. 26.

[84] In short, his conduct, viewed objectively from the viewpoint of a reasonable police officer, was reasonable in all the circumstances.

[85] The onus was on the defendants to establish contributory negligence on the part of the plaintiff on a balance of probabilities. On the totality of the evidence, they have failed to discharge that onus.

[86] I conclude on a balance of probabilities that the defendant, Mr. Y., caused the accident by his negligence, and that his negligence was the sole cause of the collision. The plaintiff was not contributorily negligent. The defendants are wholly liable for the plaintiff's damages.

DAMAGES

Facts

[87] It is uncontroversial that the accident caused the plaintiff's injuries and that he is entitled to damages as a result of the injuries he sustained. Before addressing the damages analysis, I turn to the facts established on the evidence. I will first address the facts relating to the plaintiff's personal circumstances and will then address the medical evidence and the evidence of the occupational therapists.

Plaintiff's Personal Circumstances

(i) Pre-Collision

[88] Prior to the collision the plaintiff was a healthy and exceptionally physically fit 43-year-old RCMP officer.

[89] He began his career in law enforcement at a young age. After a brief period of being a member of a regional police force in Ontario, in 1984, the plaintiff became a member of the Canadian military police. He pursued career advancement and eventually achieved the rank of master corporal in the military police. He thrived on the teamwork, camaraderie, and mental and physical challenges provided by the military environment and earned a number of certificates for his achievements.

[90] In 1991, the plaintiff applied for and was accepted into the Canadian Airborne Regiment, which at that time was the paramount combat unit in Canada. The training to become a parachutist was extremely rigorous; for instance, once a year, he attended an intense week-long course on surviving capture and torture. The plaintiff spent a total of two and a half years with the Canadian Airborne Regiment and he held the rank of corporal. Throughout this period, he maintained his excellent physical condition and pursued his passion for outdoor activities, including hunting, fishing, camping and canoeing.

[91] After a posting with the Special Investigations Unit in Calgary in 1993, he was posted to Tokyo, Japan. His role as an attaché in the Canadian Embassy security guard unit was to ensure the safety of personnel at the Canadian consulate. During this time, he competed with professional and elite-level amateur athletes in three different types of triathlons and regularly participated in Kendo (Japanese sword-fighting), running, biking, and swimming. He eventually met and married his wife in Japan. They shared a common interest in hiking and camping endeavours which were very physically challenging. During his posting in Japan, the Canadian Airborne Regiment was disbanded.

[92] In 1997, the plaintiff returned with his wife to British Columbia, where he worked as a member of the military police at the Canadian Armed Forces base in Comox. He competed on the military police team in the surf and sea competition, which involved skiing, running, biking, and canoeing.

[93] In 1999, the plaintiff was assigned to work with the Joint Task Force II, Canada’s counter-terrorist unit. After being attached to a brigade with NATO in Bosnia for one and a half months, he was assigned to Kosovo for a seven-month placement. In Kosovo, he saw combat and was involved with UN investigations of war crimes. From his testimony, it is clear this was an extremely gruelling placement, from both a mental and a physical perspective.

[94] After returning from Kosovo, it became apparent to him that he inevitably would be posted to Afghanistan. For personal reasons, including wanting to start a

family, the plaintiff, after 18 years of service, decided to leave the Canadian military and to apply to the RCMP. Given his prior experience and outstanding level of fitness, he excelled at the RCMP training facility in Regina. This was despite the fact that at age 40, he was older than his fellow trainees.

[95] After completing his training, he was posted to work at the Coquitlam RCMP detachment, where he worked as an RCMP officer from September 2002 until the date of the collision. His stated career goal, given his experience and skill set, was to join the RCMP Emergency Response Team ("ERT"), which is the special tactics division of the RCMP. During his posting with the Coquitlam detachment, he worked various overtime shifts with the ERT and found the challenge satisfying.

[96] After a year of performing general duties as an RCMP officer, the plaintiff was asked to join the traffic section of the Coquitlam detachment. He was selected to participate in the advanced motorcycle operator course. I accept that he did not complete the first motorcycle operator course because of the handling and mechanical difficulties with the motorcycle assigned to him. As referred to earlier, he successfully completed the course in the spring of 2005, after being issued a Harley Davidson motorcycle. The plaintiff enjoyed being a motorcycle officer and was passionate about his work.

[97] The evidence of the plaintiff's wife, Mr. S., and Mr. L., whose evidence on this point I found reliable without exception, all support the finding that prior to the collision, the plaintiff was an extremely active individual who excelled at a wide range of athletic pursuits. The plaintiff has been passionate about the outdoors since his youth; his pre-collision activities included regular hiking, fishing, canoeing and camping. He was an avid hunter and, prior to the collision, he was able to hunt alone and carry all of his own equipment. He had participated in competitive archery; he was ranked in the World Police and Fire Games for three different types of archery.

[98] He was also an involved and active father to his three year old daughter.

(ii) Collision and Post-Collision Year

[99] The impact of the collision threw the plaintiff into the air. As referred to earlier, by virtue of his military training and in an effort to minimize his injuries, he made a conscious effort to tuck himself into a ball before landing on the pavement. After impact, he recalled lying on his back on the pavement, struggling to breathe, with intense pain radiating from his hips and lower back. He was conscious and observed that people had come to assist him. He described his pain as “pure pain” which caused him to see “white light”. The emergency personnel administered morphine on the scene and he was transported by ambulance to the hospital.

[100] The attending orthopaedic surgeon at the hospital, Dr. D., advised the plaintiff that he had sustained a spinal injury which would require surgery. The plaintiff was distraught about the prospect of potential paralysis. The plaintiff experienced a very negative reaction to the morphine and the other pain killers which were administered to him.

[101] The plaintiff underwent surgery on July 21, 2005, after which Dr. D. explained to the plaintiff that he had a burst fracture in his vertebrae in the thoracolumbar region, and that metal rods, clamps and screws had been placed in the area to fuse the spine together. The plaintiff was fitted with a clamshell brace in order to stabilize his fused spine and prevent him from moving. He was not allowed to sit or stand up unless he was wearing this brace. He used a walker to manoeuvre around the hospital. After physiotherapy treatments, he was able to walk short distances, go to the bathroom, and get in and out of his hospital bed. He was released from the hospital on July 27, 2005.

[102] Shortly after his discharge, an occupational therapist, Ms. R., on behalf of the RCMP, visited the plaintiff’s home. She evaluated his comfort and safety needs and arranged for the necessary equipment to facilitate his recovery.

[103] At home the plaintiff managed his pain with Tylenol-3s. During his initial recovery, he experienced difficulty sleeping due to his back pain and spasms; he eventually obtained sleeping pills to assist him with sleeping.

[104] The plaintiff made an extraordinary effort to build up his strength and maximize his recovery. Eventually, he improved sufficiently that he could go for short walks with his wife and daughter. By the end of September 2005, he was no longer using prescription painkillers and was able to walk for approximately 1.5 hours per day. He does not subscribe to the use of pain medication unless absolutely necessary. As of October 2005, Dr. D. permitted him to "wean himself" out of his brace. The records indicate that by November 2005, he was driving and only using a cane for support when walking uphill. The plaintiff attended physiotherapy from November 2005 until April 2006 for mobilization and strengthening of his thoracolumbar spine.

[105] Within a year of the accident, the plaintiff was walking regularly and following physiotherapy exercises at home. After completing a mock RCMP Physical Abilities Requirement Evaluation ("PARE"), the plaintiff returned to work in April 2006 in the Coquitlam detachment on a graduated schedule for a two-month period. However he never resumed his former front-line policing duties. In the spring of 2006, he eventually moved into a new position which was less physical and more administrative in nature; this is described in the next section.

[106] The plaintiff described the anxiety and fear he experienced because of his injury. I accept that the first year following his collision was very difficult for him. He was fearful that he would not be able to return to work or only to work in a limited capacity, and that he would have no way to provide for his family. I also accept his wife's evidence that during this period, he was uncharacteristically negative and short-tempered.

(iii) Plaintiff's Circumstances at Trial

[107] The plaintiff currently works for the RCMP as a firearms support investigator with the National Weapons Enforcement Support Team. His duties are much more administrative in nature than prior to the collision. He primarily works in an office and his job duties include training frontline police officers in investigating firearms offences and firearm trafficking, writing sentencing reports, and preparing court

documents. He drives to sites and attends the execution of search warrants, but does not do so in any capacity that would require the apprehension of suspects. He has not returned to a front-line general duty policing position; he cannot assume the risk of any physical altercations because of the physical limitations imposed by his fused back. He misses the opportunity for interaction with the public that his general duty position offered; he clearly derived satisfaction from those interactions.

[108] He regularly works Monday through Thursday. He requires regular breaks from sitting throughout the day. His stamina is reduced; he is physically and mentally exhausted by the end of the workweek. He has been accommodated in that he is permitted to work at home as required because of his problems with his back.

[109] His sleep pattern has largely normalized. However, when he goes to bed, it takes him some time for his back to loosen and his back pain symptoms will typically wake him in the early morning.

[110] The plaintiff has returned to some of his pre-collision recreational activities, such as hunting, fishing, and canoeing, but in a greatly modified capacity. Against the recommendation of his instructor, he competed in an archery competition in 2009, but because of his limitations, he used a lighter wooden bow which had been tuned down. The evidence was unclear as to whether he is currently participating in archery. He attends the gym but is restricted in terms of weight-lifting and he cannot do sit-ups. On medical advice he has not returned to running, cycling or swimming. He has gained weight since the collision.

[111] I accept the plaintiff's evidence, that the nature of his hunting endeavours have been modified dramatically. For the most part, he cannot do any of the heavy lifting, and his companions do what they can to accommodate him. His fishing activities have also been modified because of his limitations with heavy lifting and his difficulties remaining seated in the boat. With respect to camping, prior to the collision he typically slept on the ground, lifted and carried heavy items and hiked up steep terrain. After the collision, he is unable to sleep on the ground; on a camping trip with his wife and daughter, the family had to return home early because he could

not tolerate a third night of sleeping in the uncomfortable environment. He has now purchased a tent-trailer and has been able to continue camping with his family.

[112] Since the collision, the plaintiff, who had ridden motorcycles since the age of 16, has only been on a motorcycle on one occasion and then only for a few minutes.

[113] I will address his current symptoms later under the heading of "Conclusions Regarding Plaintiff's Condition".

Medical Evidence

[114] The plaintiff called the evidence of his orthopaedic surgeon, Dr. D., two physiatrists, Dr. H. and Dr. S., and the plaintiff's family doctor, Dr. T. The defence called the evidence of an orthopaedic surgeon, Dr. L., who conducted an independent medical examination of the plaintiff.

[115] It is common ground that as a result of the collision, the plaintiff sustained an injury to his thoracolumbar spine—a pincer burst fracture at T12. The vertebra was shattered into two large pieces and multiple smaller fragments. He also sustained some superficial contusions and abrasions.

(i) Dr. D.

[116] On July 21, 2005, Dr. D., who has been an orthopaedic surgeon for over 30 years, performed an instrumented fusion of the plaintiff's lumbar-spine from T11 to L3 with bone graphing from T12 to L2. Pedicle titanium rods and screws were used to stabilize two levels above and below the fracture site. This prevented the spine from collapsing. After his surgery, the plaintiff was stabilized and fitted with a custom-made clamshell brace with Velcro straps.

[117] During his February 28, 2006 and June 20, 2006 consultations with the plaintiff, Dr. D. noted stiffness in the plaintiff's lumbar spine which was consistent with the fusion.

[118] In December 2008, while he was swimming, the plaintiff developed severe right thoracolumbar pain extending into his right foot and numbness extending into

his right buttock. He did take anti-inflammatory medication. His family doctor referred him to Dr. D., who in May 2009 diagnosed mechanical back pain. The physical examination revealed some spasm as well as some flattening and stiffness of the plaintiff's thoracolumbar spine. Dr. D. advised the plaintiff to maintain cardiovascular, core strengthening and range of motion exercises.

[119] Dr. D. has not seen the plaintiff since May 2009. He prepared a report dated January 20, 2010, at the request of plaintiff's counsel.

[120] I accept Dr. D.'s opinion, and indeed it is not seriously disputed by the defendants, that as a result of the injuries sustained in the collision, the plaintiff is "permanently disabled insofar as repetitive heavy bending, lifting and twisting movements are concerned within his spine". Dr. D. clarified in his testimony that this included "doing arrests out in the patrol car", motorcycle-riding, heavy gardening work and performing heavy home maintenance and repairs. In his opinion, the plaintiff is not disabled from performing modified employment duties. His prognosis for the plaintiff is "fairly good". He recommends that the plaintiff maintain his own active, independent exercise program in order to preserve the flexibility of his thoracolumbar spine as much as possible and to maintain his trunk, core and abdominal muscle strength.

[121] Dr. D. opined that in order to relieve the plaintiff's pain there is a possibility of a future surgery to remove the pedicle screws and rods from his spine. Dr. D. affirmed that the hardware in the spine can cause pain, which Dr. D. described as a "dull roar in the background" and that daily activities can make the pain worse. He explained that removal of hardware usually will reduce the pain but does not eliminate it. His opinion with respect to the removal of the hardware from the plaintiff's back is as follows:

> In my opinion, it is possible that consideration might be given to removal of the pedicle screws and rods from his thoracolumbar spine. The risks of such a surgery include the general anaesthetic and also include the small possibility of a postoperative infection. It is unlikely that there would be any nerve compromise or injury as a result of this possible hardware removal procedure.

> I anticipate that this removal of the hardware may be helpful in the relief of some localized pain within the thoracolumbar area thereby improving his overall activity and tolerance. I do not anticipate that this surgery would affect his ability to perform his usual employment duties and activities of daily living once convalescence has been completed after such a surgical procedure.

Dr. D. was of the opinion that based on the plaintiff's reported pain levels as of May, 2009, further surgery was a possibility; however, if the plaintiff's pain increases, surgery would be more likely.

(ii) Dr. H.

[122] Dr. H. is a medical doctor with a specialty in physical medicine and rehabilitation. He has practiced as a specialist since 1985. He assessed the plaintiff on September 5, 2007.

[123] Dr. H. diagnosed increased tightness or stiffness and loss of range of motion in the plaintiff's lower back, which increases with heavy physical activities. His prognosis was a permanent abnormal tightness in the plaintiff's lower back which results in difficulty getting up from immobile positions, running or lifting. He explained that a severe and permanent injury to the spine such as that sustained by the plaintiff results in the body developing reflexes to tighten the surrounding muscles to protect the injured area. In the result, the tissues surrounding the plaintiff's spinal fusion have become tighter. The plaintiff is at increased risk of injury and reinjury to his spine. He also opined that the plaintiff's injuries increase the risk of him developing arthritis in his spine because of the increased loading on the two ends of the fusion; however, he also acknowledged that the development of arthritis does not inevitably result in increased pain or disability.

[124] Dr. H. recommended that in order to protect his spine, the plaintiff should limit his work tasks and sports activities to those that do not involve repetitive heavy lifting or movements that send impulsive forces through the spine, such as running and jumping. He also opined that the plaintiff is more likely to experience pain, fatigue, and tightness if he engages in repetitive tasks. The plaintiff does not have the same

flexibility, endurance, or the capability of exerting force on his spine that he did prior to the collision.

[125] Dr. H. disagrees with Dr. L.'s opinion that the plaintiff's lower back pain "will not appreciably increase with time". I found Dr. H.'s explanation persuasive and prefer his opinion. I accept that there is a likelihood that the natural aging process will impact the plaintiff's symptoms because as he ages he likely will not be able to maintain conditioning and the strength of the supporting anatomical structures of his spine.

(iii) Dr. S.

[126] Dr. S., a specialist in physical medicine and rehabilitation since 1981, assessed the plaintiff on February 7, 2006.

[127] The plaintiff reported to her that he had stiffness, discomfort, numbness and a tingling sensation in his buttocks and lower back. At the time of her report, she opined that the plaintiff would make a full recovery and would be able to resume his normal home and leisure activities. She based her opinion on his own positive presentation and the steady progress he had made in his recovery up to October 2006. She subsequently changed her opinion and testified that her initial prognosis was overly optimistic. She stated that the hardware in his back can cause pain and increased symptoms in the winter months when it is cold. She opined that his back pain and discomfort will persist indefinitely.

[128] Consistent with Dr. D. and Dr. H.'s recommendation, she recommends that the plaintiff permanently avoid work with heavy physical demands, and avoid repetitive lifting and impact activities such as running and jumping. She stated that given his restrictions, the plaintiff had been unable to maintain his former level of physical and cardiovascular fitness and noted that his weight gain since the collision was a reflection of the challenges he faced in this regard.

[129] She also opined that the plaintiff's back is permanently more vulnerable to injury, and even if he is careful, he is at an increased risk of developing degenerative

disc disease. Although this may or may not become symptomatic, it usually results in increased pain and decreased ability to participate in physical activities.

(iv) Dr. T.

[130] Dr. T. is the plaintiff's family doctor. He has extensive sport medicine experience and a Master's Degree in Sports Medicine. His evidence was adduced at trial through a video deposition. Dr. T. prepared three reports dated November 22, 2006, September 2, 2008, and December 18, 2009.

[131] The plaintiff first consulted Dr. T. about the injury on August 11, 2005, and thereafter consulted him on a regular basis until December 7, 2009. The plaintiff reported stabbing pain in his lower back on March 9, 2007. In December 2008, the plaintiff reported severe thoracolumbar pain, with intense pain into his right leg and buttock, which was aggravated by certain movements such as using stairs. Dr. T. ordered x-rays and referred the plaintiff back to Dr. D. This flare-up persisted for some months. In December 2009, the plaintiff again reported shooting pain in his lower back.

[132] It is Dr. T.'s opinion that the plaintiff will be permanently disabled from his previous job as an active-duty police officer because of his functional limitations. It is his medical opinion that the plaintiff should not run or swim. He will also be permanently limited in terms of heavier household cleaning, maintenance repairs, renovating, and gardening. In his final report Dr. T. states that he foresees the possibility of future surgery to remove the hardware from the plaintiff's spine because the plaintiff is experiencing increased symptoms during the winter time.

(v) Dr. L.

[133] Dr. L., an orthopaedic surgeon, conducted an independent medical examination of the plaintiff on behalf of the defendants on July 17, 2008, and he prepared a report dated July 25, 2008. Dr. L. has been an orthopaedic surgeon since 1997, but does not perform any type of spinal surgery.

[134] According to Dr. L., the plaintiff reported complaints of intermittent low back discomfort and an increase in pain with activities such as cycling, repetitive bending and heavier lifting. In his report, Dr. L. opined as follows:

> The examinee's current functional level and minimal low back pain complaints, the past history of extreme fitness, this physical examination and the submitted functional capacity evaluation all support the probability that the spine injury *has not significantly diminished Mr. [X.]'s ability to perform the full duties as an RCMP officer including performing up to standard for a [46] year old police officer in any physical encounter (fighting, retraining*).
>
> It would be assumed that prolonged driving a car or motorcycle would trigger low back pain. Also low back pain is likely to be experienced in the rare instance of physical combat.
>
> [Emphasis added.]

[135] It is his opinion that "there will be an increased stress at least at the L2-L3 intervertebral level with the probability of a moderate acceleration of the normal intervertebral disc degenerative process at this level" (emphasis added). He also opines as follows:

> Despite this change at the spinal level below the fusion, it is probable that Mr. [X.]'s low back pain, that he will experience indefinitely due to the spinal fracture, will not appreciably increase with time and not interfere with his performing the essential duties as an RCMP officer for his remaining eligible working years. This latter conclusion is supported by his minimal back pain complaints at this time and his history of maintaining top physical conditioning. This physical conditioning will combat the risk of deconditioning (a well known contributing factor for low back pain)
>
> Mr. [X.] should be able to take part in the vast majority of physical activities he was engaged in prior to the accident but at a reduced level as a pain reduction measure. His lack of maintaining exceptional fitness since the accident will most probably result in the examinee not reaching the same peak as prior to the injury.
>
> It is most probable that further surgical intervention, such as hardware removal, will not be necessary as a result of the spinal fracture of July 19, 2005.
>
> [Emphasis added.]

[136] Dr. L. acknowledged in cross-examination that the primary assumption underlying his opinion was his assessment that the plaintiff communicated intermittent minimal lower back pain during their short consultation. Notably, at the time he prepared his report, he had no information about the aggravation of the

plaintiff's symptoms in December 2008 and December 2009, as those were reported to Dr. T. He also conceded that Dr. D., the plaintiff's surgeon, was in a better position to provide an opinion about the plaintiff's condition and future.

[137] I reject Dr. L.'s opinion that the plaintiff can perform as a full-duty RCMP officer. His view is contrary to the weight of the evidence of the other healthcare professionals, including the opinion of Ms. T., an occupational therapist who was called by the defendants.

[138] Overall, I found Dr. L.'s assessment cursory and lacking the sufficient degree of objectivity to render it of any assistance to the court. In the end, I place no weight on his opinion. To the extent of any disagreement, I prefer the evidence of Dr. D., Dr. S., Dr. H., and Dr. T.

Occupational Therapists

[139] Both sides provided reports from occupational therapists: Ms. Q. for the plaintiff and Ms. T. for the defendants. Some aspects of those reports are addressed below under the heading of "Cost of Future Care."

[140] The plaintiff also called Ms. R., the occupational therapist retained by the RCMP who assessed the plaintiff at his home after his discharge from the hospital. She continued to communicate with the plaintiff and coordinated his care until his return to work in April 2006.

(i) Ms. T.

[141] Ms. T. is an occupational therapist who has practised since 1991. She was retained by the defendants to prepare a work capacity evaluation and cost of future care recommendations for the plaintiff. She assessed the plaintiff on June 17, 2008. He reported to her that he experienced ongoing low back pain, tightness, and generalized fatigue.

[142] In making her future care recommendations after testing the plaintiff, she assumed, and I find on the evidence, that his limitations in functioning are

permanent and that he will experience episodes of symptom aggravation because of the altered biomechanics of his trunk. She concluded that the plaintiff is not considered durable for full policing duties.

[143] In her report she states her opinion as follows:

> With regard to Mr. [X.]'s pre-accident job as a police officer according to the National Occupational Classification (NOC) this job (#6261) requires: sitting, standing, walking, multiple limb co-ordination and Heavy strength. Additionally, Mr. [X.] described the requirement for running, jumping and restraining, as well as riding a motor cycle for work in Traffic Service.
>
> Based on the results of this assessment, Mr. [X.] is considered borderline for meeting the demands of this work. He demonstrates basic tolerances for sitting, standing, walking, multiple limb co-ordination and into the heavy strength range, but is likely not durable for extended periods of standing and for heavy strength application outside of neutral trunk positioning. He is also likely not durable for impact activity. Given the nature of his work and need to respond at full capacity these limitations are likely significant for full policing duties. Additionally, medical recommendations for heavy strength application and impact should be clarified.
>
> Mr. [X.] has returned to work with the RCMP in an investigative capacity in the National Weapons Enforcement Project. He described this work to include periods of office work where demands are largely sedentary, as well as periods of site work which can involve greater mobility and body dexterity, as well as strength demands in the light to medium range. Based on the results of this assessment he meets the described physical demands for this work. In some situation he may experience symptom aggravation or have to pace/alter his positioning but this appears to be manageable in the current work situation as described by Mr. [X.].
>
> Mr. [X.] identifies concern regarding finding himself called into more physical policing demands in the course of his weapons investigation duties and/or his employer transferring him to other duties that exceed his tolerances. The likelihood of this would need clarification. As stated above he is not considered durable for full policing duties.
>
> [Emphasis added.]

(ii) Ms. Q.

[144] Ms. Q. is a very experienced occupational therapy consultant. She obtained her qualifications as a physical and occupational therapist in 1956. At the request of the plaintiff, she prepared three reports dated April 10, 2006, November 30, 2007, and July 24, 2008.

[145] She performed a functional capacity evaluation of the plaintiff on September 25, 2007. During this assessment and the follow-up on July 24, 2008, the plaintiff reported he was continuing to experience muscle spasms, stiffness, tightness in his para-vertebral muscles, tingling in his buttocks and reduced stamina. Based on her experience, she opined that he will experience an increase in pain as he ages.

[146] It is her opinion that the plaintiff does not meet the physical demands of an active-duty RCMP officer; he is restricted to working in occupations in the limited and light categories. Moreover, he requires the flexibility to be able to take regular breaks from sitting or standing.

Conclusion Regarding Plaintiff's Condition

[147] It is uncontroversial that the plaintiff suffered a serious injury in the accident: a fractured spine which required surgical fusion with metal instrumentation. The medical evidence clearly establishes that he is permanently disabled insofar as repetitive heavy bending, lifting and high-impact activities. He has an increased risk for the development or acceleration of degenerative disc disease and is at an increased susceptibility for reinjuring his back.

[148] However, the assessment of the consequences of that injury on the plaintiff and, in particular, the symptoms he continues to experience now and in the future are very much in dispute. It therefore falls to this Court to assess the severity of his persisting symptoms and the likelihood that he will experience an increase in the severity of his symptoms in the future.

[149] As was affirmed by the medical witnesses in this trial, the interpretation, reporting and assessment of the level of pain of any given individual is, at its core, a very subjective exercise. The medical opinions as to prognosis have been largely based on the back pain symptoms reported by the plaintiff himself. The observations of the court in *Fan v. Chana*, 2009 BCSC 1127 at para. 73, are apt in this case:

> ... As courts have observed on any number of occasions, the approach taken by medical professionals is not forensic: they assume that the patient is

> accurately reporting to them and then set about a diagnosis that plausibly fits the pattern of the complaint.

[150] In the end, the assessment of the plaintiff's back pain ultimately turns on the Court's assessment of the plaintiff's credibility and the consistency of his evidence at trial with the information he previously communicated to the various healthcare professionals who treated and assessed him: *Edmondson v. Payer,* 2011 BCSC 118 at para. 21. At this juncture, it is therefore appropriate to comment on the plaintiff's credibility.

[151] The defendants, although conceding that the plaintiff was largely a credible witness, submitted that on the fundamental issues, he embellished and coloured his injuries, and that he was attempting to colour his function and injuries in a way that was not accurate. In assessing credibility, the defendants urge the Court to consider the level of the plaintiff's return to function after the injury. Furthermore, the defendants say that after his initial recovery from surgery, the plaintiff did not report any pain other than episodic flare-ups to various healthcare professionals. They point out that after 2006, Dr. T. has not referred the plaintiff for either physiotherapy or massage therapy, nor has the plaintiff been prescribed pain medications since the fall of 2005.

[152] The evidence shows that since the collision, the plaintiff has consistently reported symptoms of stiffness, tightness and discomfort to the various healthcare professionals. The common theme that emerges from the evidence is that the plaintiff, particularly in the first few years after the accident, minimized his symptoms in the course of his self-reporting. Ms. Q. described the plaintiff as being "very much an RCMP officer" in that he avoided complaining to her about pain or limitations, and was hesitant to admit activities that he was unable to complete. Ms. R., whom I found to be professional and objective in her assessment, was of the view that the plaintiff minimized reporting his symptoms and difficulties and pushed himself to get as far as he could in his recovery. Ms. T. confirmed that he demonstrated higher levels of effort and exhibited competitive behaviour in the functional capacity assessment.

[153] There was much made at the trial of the numeric pain scale of 1-10, with 10 being the worst pain. I have considered that the plaintiff's military experiences may have impacted his interpretation of the pain rating scale and his characterization and communication of the degree of pain he has experienced. In his functional capacity assessment with Ms. Q. in 2007, the plaintiff described his pain as 1-2; but this must be assessed in the context of his description in 2008 to Ms. T. of stabbing pain as 2-4 on the pain scale. At the trial, the plaintiff described his "normal" pain as level 4, which he compared to the sensation of someone putting a foot on his back. He sometimes experiences tingling in his right buttock which he compared to a "fork being jammed" into him. This sometimes causes an increase in pain to a 5-6 out of 10. During the course of the testimony which was given over some seven days, the plaintiff required frequent breaks. He frequently switched between standing and sitting positions. He described feeling "beat down" and tired from sitting too long.

[154] I have concluded that the plaintiff was highly motivated after the collision, and made a genuine and extraordinary attempt to overcome his injuries and to minimize their impact on his lifestyle. Given his training and background, he is a man whose temperament is to "grin and bear it". In particular, in the first few years following the accident, he was reluctant to complain about his pain; his tendency was to minimize the suffering he had endured. The plaintiff says that he has experienced the worst pain, being a 10, and that he had previously described his less severe symptoms as discomfort. I accept his explanation that the 1-2 ratings he reported to Ms. Q. in 2007 are equivalent to what he subsequently described at trial as level-4 pain. His expression of his discomfort and pain has gradually evolved over time to a more realistic presentation. I find no significant discrepancy between his evidence at trial and the information he had previously communicated to others. I have made these findings notwithstanding his self-reporting of "no pain" at various times to some of the healthcare professionals he saw.

[155] Overall, I found the plaintiff to be a credible witness. In the face of a very thorough cross-examination, I found his evidence as a whole forthright and consistent. The plaintiff struck me as a proud and honourable man who has served

his country and his community with distinction. He presented as a stoic individual with a brave demeanour who has struggled with accepting the reality of his limitations. I have considered all of the defendants' examples of what they assert are inconsistencies in the plaintiff's evidence, including as those allegations relate to him shooting an elk on an October 2006 hunting trip, and his mandatory RCMP periodic health assessments. I do not regard all of the examples as constituting inconsistencies. Moreover, I am not persuaded that the inconsistencies that can be found are particularly significant in the context of all of the evidence. I do not agree that these inconsistencies demonstrate that the plaintiff attempted to mislead the Court or exaggerate the extent and nature of his injuries.

[156] I am fortified in my conclusions by the witnesses called by the plaintiff, whose evidence I found reliable regarding their observations about the changes in the plaintiff after the accident.

[157] Mr. S., the plaintiff's neighbour and friend, testified that after the accident he has observed the plaintiff as being obviously in pain and observed that he can no longer stand or sit for any extended periods of time. He has also observed that the plaintiff's fitness level has deteriorated since the accident.

[158] Corporal L., a colleague of the plaintiff, described the plaintiff prior to the collision to be "in phenomenal physical shape". After the collision, he observed that the plaintiff was "not the same person". He walked more slowly and appeared stiff. He also described his temperament as being "short and not as friendly" as before the accident.

[159] Mr. L., the plaintiff's former archery coach, who I found to be an exceptionally sincere witness, described the plaintiff prior to the accident as "standing tall and walking proud" and with "a very positive mental outlook". After the accident, he described the plaintiff's walk as being "hunched forward with stooped shoulders". Mr. L. has also observed a change in the plaintiff's demeanour; he is more withdrawn and "short" and he tires more easily.

[160] Sergeant P., the plaintiff's former supervisor, described the plaintiff prior to the accident as a go-getter, very mature, competent and extremely committed to police work. Since the accident, he has observed on occasion that the plaintiff's back was obviously bothering him and that he had to sit down more frequently. The plaintiff also complained to him about his back problems.

[161] According to the plaintiff's wife, if he stays in certain positions for any length of time, he complains of spasm and discomfort. He has lower levels of energy and tires easily.

[162] A careful review of the videotape surveillance submitted by the defendants does not demonstrate any inconsistencies with my findings.

[163] In summary on this issue, I find that the plaintiff's symptoms are genuine. He regularly experiences varying degrees of pain and significant stiffness, tightness, and spasms in his back. The cold exacerbates his symptoms. He will continue to experience episodic aggravation of his symptoms. He is at an increased risk of developing degenerative arthritis and he has an increased susceptibility for further injury to his back. He also faces the possibility of another surgery to remove the hardware in his back. He has reduced stamina and tires much more easily than prior to the collision. I also conclude that as the plaintiff ages, there is a substantial likelihood that his pain and discomfort will increase because he will not be able to maintain the same level of conditioning in the muscles supporting the fused area of his back.

[164] In terms of his career, the preponderance of the evidence clearly supports a finding that the plaintiff is not fit to perform the full range of policing duties. He must avoid impact activities and any risk of physical altercations with suspects, which restricts him from participation in front-line policing duties. He can no longer perform the duties of a motorcycle officer, nor is he able to pursue his ambition to join the ERT as an operational member.

Discussion

[165] I next address the plaintiff's claim for damages under the following headings:

(A) Non-Pecuniary Damages

(B) Loss of Past Income Earning Capacity and Loss of Future Earning Capacity

(C) Loss of Housekeeping Capacity

(D) Cost of Future Care

(E) Special Damages

A) Non-Pecuniary Damages

[166] The plaintiff seeks an award of $250,000 for non-pecuniary damages. Counsel for the defendants concedes that the plaintiff sustained a serious injury, but forcefully asserts that he has had an excellent recovery. The defendants submit that non-pecuniary damages should be assessed at approximately $100,000.

[167] The objective of non-pecuniary damages is to compensate a plaintiff's pain, suffering, and loss of enjoyment of life. The award is to compensate a plaintiff for those damages he has suffered up to the date of the trial and for those he will suffer in the future. The essential principle derived from the authorities is that an award for non-pecuniary damages must be fair and reasonable to both parties and should be measured by the adverse impact of the particular injuries on the individual plaintiff.

[168] The B.C. Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, enumerated the factors to be considered in awarding non-pecuniary damages. The non-exhaustive list includes: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; the impairment of family, marital, and social relationships; and loss of lifestyle. While fairness is assessed by reference to awards made in comparable cases, it is impossible to develop a "tariff"; each case is decided on its own unique facts: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637.

[169] It cannot be overstated that the assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[170] I have concluded that as a result of the accident, the plaintiff has suffered pain and a loss of enjoyment of life. The consequences of his injury are permanent.

[171] In terms of his enjoyment of athletics, his lifelong outdoor pursuits have been significantly curtailed. His injuries have restricted his participation in many recreational activities and competitive athletic endeavours that he pursued so passionately prior to the collision. He is a former triathlete with a considerable competitive drive who is no longer able to run, cycle or swim. He derived considerable pleasure from his excellence at athletic pursuits and that was a vital component of his identity. He prided himself on his ability to protect others and to embrace any type of challenge.

[172] I have also considered as a factor in my assessment the adverse emotional impact of the plaintiff's inability to pursue the type of active police work from which he so clearly derived satisfaction.

[173] His injuries have also impacted his family life; the plaintiff's limitations have inevitably created a strain on his marriage. He can no longer perform heavier household tasks such as heavy gardening, cleaning, maintenance, and repairs. He is unable to do many physical and recreational activities such as skiing and the more strenuous hiking and camping that he and his wife had previously enjoyed doing together.

[174] Significantly, the plaintiff has been unable to lift up his young daughter since the collision, which has created a genuine emotional strain on him. He also clearly finds it distressing that he is and will continue to be unable to participate with his daughter in the more adventurous physical and recreational activities that, but for his injury, he would have pursued.

[175] The totality of the evidence supports a finding that prior to the collision, he was a very stable individual with an outgoing personality and a very positive outlook. He now faces uncertainty about the potential for deterioration and is burdened with anxiety regarding his future. He struggles with episodic bouts of frustration and irritability. He is more withdrawn in his social interactions. Prior to the collision, he was a very energetic and enthusiastic individual; Corporal B. described him as a "go-getter". As a consequence of coping with his condition, he now suffers from markedly reduced stamina and increased fatigue.

[176] The plaintiff, similar to the plaintiff in *Easton v. Chrunka*, 2006 BCSC 1396 at para. 21, is "neither a complainer nor a malingerer"; rather, when faced with a challenge, his character demanded that he "tough it out". Although he has endured significant pain and discomfort, he exhibited considerable perseverance and fortitude in his efforts to resume his pre-collision lifestyle and to engage in as many of his pre-collision activities as he could. It would be unjust if the Court did not recognize the reality of the adverse impact of his injuries and loss of enjoyment of life that he has and will continue to endure. As Kirkpatrick J. observes in *Stapley* at para. 46, a plaintiff should not, generally speaking, be penalized for their stoicism.

[177] I have considered the following cases cited by plaintiff's counsel on the issue of the quantum of non-pecuniary damages: *Dilello v. Montgomery*, 2005 BCCA 56; *Crackel v. Miller*, 2003 ABQB 781; *Payne v. Lore*, 2008 BCSC 1744; *Easton v. Chrunka*, 2006 BCSC 1396; *Park v. Heimbeckner*, 2007 ABQB 386; *Cook v. Cahoose*, 2001 BCSC 254; *Kahl v. Jakobsson*, 2006 BCSC 1163; *Erickson v. Webber*, 2005 BCSC 1048; *Bjornson v. Field*, 2007 BCSC 1860; *Caldwell v. Ignas*, 2007 BCSC 1816; and *Court v. Schwartz*, 1994 CarswellBC 2520, [1994] B.C.J. No. 2164 (S.C.).

[178] I have also considered the additional case cited by the defence: *Yu v. Yu* (1999), 48 M.V.R. (3d) 285, 93 A.C.W.S. (3d) 585 (B.C.S.C.).

[179] While the authorities are instructive, I do not propose to review them in detail, as each case turns on its own unique facts. Having reviewed all of the authorities

provided by both counsel, and in considering the plaintiff's particular circumstances, I conclude a fair and reasonable award for non-pecuniary damages is $140,000.

B) Loss of Earning Capacity: Past and Future

Position of the Parties

[180] The plaintiff submits that he should receive an award of $100,000 for lost income and opportunities up to the date of trial, and an award in the range of $550,000 to $750,000 for future loss of income and diminished earning capacity.

[181] The position of the defendants is that:

(1) the plaintiff should not be awarded any damages for loss of future earning capacity because the evidence does not establish that there is any real and substantial possibility of a financial loss in the future;

(2) the plaintiff should not be awarded any damages for past wage loss because he received full wages from the RCMP when he was off work; and

(3) the plaintiff should be awarded $10,000 for loss of opportunity up to the date of trial.

This head of damages represents the most significant and complex aspect of the plaintiff's claim.

Legal Framework

[182] An award for future loss of earning capacity represents compensation for a pecuniary loss: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32. The legal principle that governs this assessment for loss of earning capacity is that, insofar as is possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185. Compensation must

be made for the loss of earning capacity and not for the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[183] 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 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 at para. 19.

[184] As recently enumerated by the court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, 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 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 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 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (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 at 636 (C.A.).

(3) The court must assess damages for loss of earning capacity and not calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The overall

> fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11. The assessment is based on the evidence, taking into account all positive and negative contingencies.

[185] 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 a claim for the loss of value of the work that an injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Bradley* at paras. 31-32.

[186] 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, 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."

[187] With respect to the loss of earning capacity from the accident to date of trial, the defendants are only liable for the net income loss, as defined in s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. In *Lines* at para. 184, the Court of Appeal held that "it was the intention of the Legislature to give a discretion to the judge to determine what period or periods are appropriate for the determination of net income loss in all of the circumstances".

Loss of Future Earning Capacity

[188] The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working

life after the accident: *Gregory* at para. 32; *Rosvold* at para. 11. The Court must first assess whether the plaintiff's accident-related injuries impaired his earning capacity and then must assess what is fair and reasonable compensation to the plaintiff for any pecuniary loss accruing because of that impairment.

[189] The plaintiff was 49 years old as of the date of trial. His entire career has been devoted to military service and law enforcement pursuits.

[190] Earlier in these reasons for judgment, I concluded that the plaintiff, because of his physical limitations, can no longer discharge the full range of duties of an RCMP officer. On medical advice, he is restricted from being a motorcycle officer and from those postings which require heavy lifting, impact activity, or static or full-time standing. Moreover, he has been advised that he should not assume the risk of any physical altercation because his own safety and the safety of the public may be compromised. The plaintiff has therefore been rendered less capable overall from earning income from all types of law enforcement employment. The physical limitations caused by the injuries in the accident have reduced his career options, and have rendered him a less marketable and attractive employee.

[191] As referred to earlier, the plaintiff's stated career goal was to join the ERT as an active operational member. Given the plaintiff's experience and skill set, I am satisfied that prior to the accident, there was a real possibility that he would have successfully applied to the ERT. I accept Sgt. P.'s evidence as to the rigorous physical requirements associated with an ERT posting and I am satisfied that this opportunity has been foreclosed to him due to his accident-related injuries. Notably, Dr. B., the physician who assessed the plaintiff in June 2007 for his periodic health assessment, deemed the plaintiff not fit for participation in the PARE required for the ERT.

[192] In short, the plaintiff has proven that the injuries he sustained in the collision have impaired his earning capacity. He clearly has lost the ability to take advantage of all the employment opportunities in law enforcement that might have otherwise been open to him. However, that is only the first step in the analysis—the critical and

controversial issue is whether the evidence in this case establishes a real and substantial possibility that this impairment to the plaintiff's earning capacity will result in a future pecuniary loss. The defendants submit that given that after his recovery, the plaintiff continued to be employed by the RCMP with full compensation, there is no basis on the evidence to find that the plaintiff's loss of opportunity for joining the ERT would in itself translate into a pecuniary loss.

[193] I therefore turn to analyze the issue of a potential pecuniary loss under the following headings:

(i) Likelihood of discharge from the RCMP;

(ii) Whether his accident-related injuries will affect the age to which he will likely work;

(iii) Loss of promotability; and

(iv) Loss of overtime.

(i) Likelihood of discharge from the RCMP

[194] Inspector D., the RCMP officer in charge of the Employee and Management Relations office in B.C., was called by the defendants. He gave important evidence about the scope of the RCMP's policy for accommodation. He confirmed that there was nothing in the plaintiff's personnel file to indicate that he was at any risk for discharge, and confirmed that the plaintiff's personnel file does not indicate that he is currently being accommodated.

[195] While I accept Inspector D.'s evidence as to the contents of the plaintiff's personnel file, I cannot accept the defendants' suggestion that the plaintiff is currently working without limitations and is not being accommodated. These assertions are overtaken by the reality of the plaintiff's circumstances. As I referred to earlier, his 2007 health assessment itself recognizes some limitations with his functioning. The plaintiff, since his return to work in 2006, has been working in a position that does not require strenuous physical activity and does not pose any

significant risk of confrontation with suspects. The demands are largely sedentary with some site attendances involving mobility and strength demands in the light to medium range.

[196] The plaintiff testified that he is concerned about his future with the RCMP. Regular job rotations occur within each RCMP detachment based on demand and the work ethic and job performance of each officer. The usual rotation for a member is three years within each detachment, and he points out that he has been working in his current position since 2006. Therefore, he asks the Court to conclude that he may be rotated at any time to a position involving duties which he cannot perform. Moreover, he says, there are few options for him aside from his current position as a weapons support investigator; the purely administrative function of a reader is not appealing to him, and there are only limited desk jobs available within the RCMP.

[197] According to Inspector D., even if the plaintiff suffers future deterioration in function from his accident-related injuries, he will be accommodated by the RCMP. He will have unlimited access to disability and sick benefits. He stated that accommodation within the RCMP does not impact a member's access to pay increases and promotion.

[198] In summary, in face of the evidence of the RCMP's policy of accommodation, I cannot accept that it is a tenable proposition that there is a real and substantial possibility that the plaintiff is or will be at risk of being discharged because of his accident-related injuries.

(ii) Whether his accident-related injuries will affect the age to which he will likely work

[199] It is common ground that the RCMP's former policy for mandatory retirement at age 60 has now been abolished. According to Sgt. P. and Corp. L., once an RCMP member has attained maximum pensionable service, it is not uncommon for those RCMP members to return to the RCMP on a contract basis or to pursue law enforcement work with other agencies. While the evidence was conflicting on this

point, the weight of the evidence supports a finding that members of the RCMP are now permitted to work until at least age 65.

[200] The defendants forcefully argue that the medical evidence does not support a finding that the plaintiff's condition will deteriorate as he ages and that his injuries will affect the age to which he will likely work.

[201] Prior to the accident, the plaintiff was a very fit and ambitious police officer who was driven by a strong work ethic and genuine passion about law enforcement. He intended to return to do contract work with the RCMP or to pursue other law enforcement work after retiring from the RCMP. I find on the evidence that there is a substantial likelihood that he would have worked with the RCMP or at other law-enforcement related employment until at least age 65 and that due to his accident-related injuries, he will cease employment earlier than he otherwise would have. I find this for the following reasons.

[202] As referred to earlier, I have concluded that there is a substantial likelihood that as the plaintiff ages, he will not be able to maintain the same level of conditioning and strength in his spine. While Ms. T.'s opinion is that he could tolerate full-time sitting demands as long as he has ergonomic seating and regular breaks, I find that the plaintiff now experiences episodic symptom aggravation in his largely sedentary job. This was acknowledged by Ms. T. The plaintiff is at an increased risk of developing arthritis which may become symptomatic, and is at increased risk of re-injury. Further, a significant factor that must not be overlooked is the plaintiff's increased levels of fatigue and reduced stamina. There is a real chance that his capacity and general endurance will decrease as he ages.

[203] My best assessment of the evidence is that due to his accident-related injuries, there is a real and substantial possibility that the plaintiff will cease working for the RCMP somewhere between the ages of 57-60. It is not possible to pinpoint with any precision where in the range his tolerance may lie. I have considered the fact that he continues to work overtime, but in my view, this is a reflection of his work ethic and professionalism and does not impact my findings as to the age that he will

likely cease working. I also conclude that due to his accident-related injuries, there is a substantial possibility he will not pursue any other employment opportunities after he leaves the RCMP. Opportunities which were otherwise realistic options for him, such as contract work with the RCMP, or investigative work, will be foreclosed to him.

(iii) Loss of promotability

[204] Generally, promotion within the RCMP requires at least seven years' service.

[205] The evidence of Corp. B., Corp. L. and Sgt. P. supports a finding that the plaintiff was regarded by his RCMP colleagues as an ambitious, motivated, and competent officer with the potential for being a leader.

[206] The plaintiff passed the RCMP corporal exam and several correspondence courses towards a degree in police leadership prior to the collision. He has received very positive performance reviews and at least three commendations for his performance as a firearms enforcement support investigator. In considering his potential for advancement in the RCMP, I have considered the fact that he attained the rank of master corporal during his military service.

[207] I accept the plaintiff's evidence that many promotional opportunities within the RCMP require first becoming an operational supervisor at a detachment. On account of his accident-related injuries and limitations, those opportunities which require performance of the full range of duties will be foreclosed to him.

[208] I find a real and substantial possibility that by the end of 2011, the plaintiff would have been promoted within the RCMP, but that due to his accident-related injuries and significantly reduced stamina, he is now less likely to seek opportunities for advancement and is less likely to be promoted.

(iv) Loss of overtime

[209] I now turn to the question of whether the plaintiff should be compensated for a pecuniary loss occasioned by a loss of overtime opportunities. Although there was

much evidence at trial with respect to overtime available to other officers, the question for this Court is how much overtime the plaintiff would be able to work if he had remained in the traffic division or moved to the ERT section or another front-line policing position, in comparison to what overtime opportunities will now be available to him. I also note parenthetically that there was no reliable evidence adduced as to what call-out pay or standby pay ERT members earn.

[210] The defendants' summary of overtime was based on the plaintiff's payroll records from 2003 to January 2010. The records were produced by Mr. T., a district manager in the compensation section of the RCMP. Mr. T.'s summary is more complete than the records produced by Corp. L. and I prefer it to the summary prepared by Corp. L. This summary, however, must be approached cautiously because it fails to take into account the plaintiff's testimony that prior to the accident, he on occasion took time off in lieu of the overtime he worked. Mr. T. confirmed that time off in lieu of pay would not be recorded on the plaintiff's payroll information. The difficulty this Court now faces is that there is no evidence of how many hours the plaintiff may have worked on this basis before or after the accident. In the result, I have not considered this as a factor in my assessment.

[211] The evidence at trial shows that in 2009, the plaintiff was paid for 211 hours of overtime. In 2004, the year immediately preceding the accident, he was paid 182.5 hours of overtime. There was little in the way of reliable evidence tendered as to the plaintiff's prospects for overtime decreasing if he remains in his current position or obtains another assignment with the RCMP. Accordingly, I am unable to conclude that the loss of potential overtime opportunities is a factor in assessing the future pecuniary loss accruing to the plaintiff as a result of the accident.

(v) Summary

[212] In summary on this issue, the plaintiff has proven that the injuries he sustained in the accident have impaired his future earning capacity and that this impairment will harm his earning ability into the future. I conclude that on account of his accident-related injuries, there is a real and substantial likelihood that the plaintiff

will suffer a pecuniary loss because of his reduced prospects for advancement within the RCMP and because he will cease working earlier than he otherwise would have.

[213] Having found that the plaintiff's future earning capacity is diminished, and that there is a real and substantial possibility that the impairment of his capacity will generate a pecuniary loss, I must now decide the companion issue of what, in light of all the circumstances, he should be awarded as compensation.

[214] The plaintiff earns a base salary of approximately $74,000 per year. Also, in 2009, he earned $14,147.34 in overtime. I have considered the evidence of Corp. L. that his own promotion resulted in an increase in his annual salary of approximately $5,000 in the first year and $10,000 thereafter.

[215] Mr. B., an economist, prepared a report on behalf of the plaintiff, estimating his past income loss and providing multipliers for calculating future losses. He factored in the survival rates and various negative contingencies, including non-participation in the labour force, applicable to males of the plaintiff's age and occupation. In essence, he presented a number of calculations of what the plaintiff would earn if he works with the RCMP until age 60 and what he can expect to earn if he ceases employment prior to age 60. Plaintiff's counsel properly acknowledged that these comparative illustrations are not intended to be conclusive. In any case, it must be noted that Mr. B. estimated the loss of overtime earnings based on an assumption of overtime being 20% of the plaintiff's base salary rather than looking at his actual records of earnings. In addition, the most current information in the analysis was the plaintiff's 2006 employment income. Mr. B. also provided no calculations from ages 60-65. Overall, his report on future income loss is of limited assistance to the Court. This is not intended to reflect adversely on Mr. B.'s professionalism; it appears that he was given a narrowly prescribed mandate and provided with limited information.

[216] It is well-recognized that unknown contingencies and uncertain factors make it impossible to calculate future earning capacity with any precision. The process of quantification is not a mathematical calculation but rather one of assessment based

on the evidence: *Gray v. Fraser Health Authority*, 2009 BCSC 269 at para. 35. The evidence in this case mandates that in my assessment, I take into account the following contingencies:

i. the plaintiff would not have been promoted, even if the accident had not occurred, or he would have been promoted in another geographical location that he would not have accepted given his personal circumstances;

ii. the plaintiff will be promoted within the RCMP notwithstanding his injury;

iii. the plaintiff would have withdrawn from employment because of unrelated illness, injury, or disability;

iv. the plaintiff will obtain secure employment after his retirement from the RCMP at a job that he can tolerate in an area of law enforcement that does not require strenuous physical activity and/or he will earn more than he would have if he had continued with the RCMP; and

v. the plaintiff's tolerance for work will improve because he undergoes surgery to remove the hardware in his back.

[217] I have not considered the impact on his pension, as there were no submissions nor any cogent evidence adduced in this regard.

[218] In considering all of the evidence, the degree of likelihood of the future loss occurring and all of the relevant positive and negative contingencies, I assess the plaintiff's diminishment of future earning capacity from the date of trial at $180,000.

Loss of Earning Capacity to the Date of Trial

[219] The defendants properly concede and I find that the injuries the plaintiff sustained as a result of the accident prevented him from returning to any

employment until April 2006. The defendants nonetheless submit that the plaintiff is not entitled to recover his past wage loss because he was reimbursed for those wages by the RCMP.

[220] The question of whether benefits or wages received by an injured plaintiff should be deducted from the plaintiff's claim for lost wages has been considered by the Supreme Court of Canada: *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; see also *Dionne v. Romanick*, 2007 BCSC 436. The primary concern, as articulated by Madam Justice McLachlin in *Ratych* at 981, is avoiding double recovery:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account.

[221] Madam Justice McLachlin in *Ratych* at 982-983, affirmed the general rule for the deduction of wage benefits paid while a plaintiff is unable to work, while recognizing an exception in those circumstances where employers retain a right to be reimbursed:

> These considerations suggest the following rule. As a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. An exception to this rule may lie where the court is satisfied that the employer or fund which paid the wage benefits is entitled to be reimbursed for them on the principle of subrogation. This is the case where statutes, such as the *Workers' Compensation Act*, expressly provide for payment to the benefactor of any wage benefits recovered. It will also be the case where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded. ...
>
> [Emphasis added.]

[222] Later, in *Cunningham* at 415, the Supreme Court of Canada concluded that where benefits which are not in the nature of insurance are paid, the issue of the

right by the payor to be reimbursed on the principle of subrogation is determinative, regardless of whether or not that right has been exercised:

> Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits if they are found to be in the nature of insurance. However, if the benefits are not "insurance" then the issue of subrogation will be determinative. If the benefits are not shown to fall within the insurance exception, then they must be deducted from the wage claim that is recovered. However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right.
>
> [Emphasis added.]

[223] The Court in *Cunningham*, without expressly deciding the issue, left open the possibility that if the employer formally releases its right for reimbursement, other considerations may apply and the compensation may be deductible.

[224] In applying the relevant legal principles, it follows that there should not be any deduction from the amount for lost wages that the defendants are liable to pay to the plaintiff if the RCMP has not formally released its right to reimbursement and may claim back the wages it paid to the plaintiff when he was off work. Accordingly, the pivotal question is whether the evidence supports a finding that the RCMP has formally waived its right, based on the principle of subrogation, to reclaim the compensation for the wages and benefits paid to the plaintiff from the date of the accident to the date he returned to work.

[225] Waiver constitutes an intentional and unequivocal relinquishment of a known right: *Crump v. McNeill*, [1919] 1 W.W.R. 52.

[226] Inspector D. stated that he "underst[ood] and [could] speak to the RCMP policy with respect to subrogated claims" and with respect to the policy on seeking the return of the plaintiff's wages. His evidence supports a finding that the RCMP has the right to reclaim the wages and benefits paid to the plaintiff when he was away from work. Inspector D. testified as follows:

Q: So, more specifically, is the RCMP seeking reimbursement from Mr. [X.] for any of the wages that he was paid while he was off following this accident?

A: No.

Q: Is the RCMP seeking repayment from Mr. [X.] for any of the rehabilitation benefits that he received while he was off?

A: No.

...

Q: And you are authorized to speak for the RCMP with respect to the policy on -- seeking return of his pay?

A: Yes.

[227] Inspector D., after confirming that the RCMP has the right to subrogate with respect to monies paid to a member, further testified as follows:

Q: Okay, sir. You said that the -- you've heard the question, what's the answer. Are you pursuing the right in this case?

A: No, we're not.

[228] Inspector D. stated that he was not aware of the RCMP seeking reimbursement for the wages or benefits paid to the plaintiff during his time off; however, he did not state that the RCMP would not seek reimbursement in the future or had relinquished its right to do so. He did not explicitly state that he was authorized to bind the RCMP. He merely commented on the current policy. The plaintiff has not received any notification, written or otherwise, that the RCMP has waived its right to reclaim the wages and benefits it paid him as a result of the accident.

[229] I am not persuaded that the evidence establishes that Inspector D., with full authority, clearly and unequivocally made an informed decision to waive the RCMP's right with full knowledge of the effect of that waiver. In short, the Inspector's testimony regarding the RCMP's current policy position does not constitute a formal release or waiver of the RCMP's right to reclaim the money it paid to the plaintiff for wages and benefits.

[230] Therefore, I conclude that the plaintiff is entitled to an award for past loss of earning capacity. The loss of earning capacity is quantified up until April 2006, when the plaintiff returned to work, by the amount of wages he would have earned if his capacity had not been impaired by the injuries sustained in the accident: *Bradley* at para. 33. The gross wage loss from the date of accident to the date of his return to work is 42 weeks, which equates to $53,855.52 based upon the calculations provided to me. Counsel have leave to apply if they cannot agree on this calculation.

[231] This assessment excludes any consideration of the overtime the plaintiff would have worked. The defendants concede that the plaintiff did lose access to some overtime in his period of recovery and for some time after he returned to work in April 2006, and that he should therefore be awarded some compensation for this loss of opportunity.

[232] In 2003, the plaintiff was paid for 147 hours of overtime. In 2004, he was paid for 182.5 hours of overtime. In 2005, he was paid for 95.5 hours in the first 6.5 months of the year. In 2006, he was paid for 33 hours of overtime; in 2007, he was paid for 114.5 hours; and in 2008, he was paid for 129 hours. By 2009, he was working more overtime than before the accident; he was paid for 211 hours of overtime. The defendants suggest that using 182.5 hours as a benchmark, he lost access to about 350 hours of overtime. They submit that applying an hourly rate of $35 produces a loss of overtime income in the range of $12,250. The defendants contend that an after-tax award of $10,000 would amply compensate the plaintiff, particularly since for some brief period of time he was ineligible to work overtime.

[233] Given the various contingencies that may have arisen, I exercise my discretion, based on the principles articulated in *Lines*, as follows. I am satisfied that if the plaintiff had not been injured, he likely would have continued to work at least 182.5 hours of overtime per year. For the period from July 2005 to the end of 2006, the plaintiff lost the opportunity to work overtime while he was recovering from his injury. I have assessed his loss of overtime as approximately 240 hours from July 2005 until the end of 2006, keeping in mind his overtime hours in 2004, and the

fact that he was on a gradual return to work program in 2006. I assess a loss in the range of 125 hours from the start of 2007 to the end of 2008.

[234] Prior to the accident, the plaintiff had been selected to train for the VIP motorcycle escort team at the Vancouver 2010 Olympics. On account of his accident-related injuries, he was unable to do so. Both Corp. L. and Sgt. P. testified as to the opportunities for overtime at the Olympics, and although the evidence on this point was not well developed, Corp. L. testified that members working at the Olympics were guaranteed a minimum of 16 hours per week of overtime. I assess a loss of 35 hours with respect to the loss of the opportunity to work overtime at the Olympics.

[235] In summary, from the date of the accident to the date of the trial, I assess the plaintiff's total loss of overtime in the range of 400 hours (125 + 240 + 35). This overtime would have been primarily paid at either double-time or time and one-half. Using my judgment as best as I can on the evidence, I assess the loss at $26,000.

[236] I am not persuaded that there was a real and substantial possibility that in the post-accident pre-trial period the plaintiff would have been promoted.

[237] In the result, the total award for the monetary value of the impairment to the plaintiff's past earning capacity is $79,855.52 gross ($53,855.52 + $26,000). I leave it to counsel to calculate the net amount; they have liberty to apply in the event they are unable to agree.

C) Claim for Loss of Housekeeping Capacity and In-Trust Award

[238] The plaintiff seeks an in-trust award for his wife and compensation for both the pre-trial and future impairment of his housekeeping capacity. I will address the in-trust claim and compensation claims separately.

In-Trust Award

[239] The plaintiff claims an in-trust award for his wife. He seeks compensation for the additional services she rendered as a result of his impaired capacity to perform

household chores. The plaintiff's wife, who works as an in-flight service director for an airline, took a one-month unpaid leave from work in August 2005 to care for the plaintiff after the accident. Her mother and sister, who were visiting from Japan, assisted her with housekeeping chores and child care until September 2005.

[240] The defendants argue that the in-trust claim was not properly pleaded, and in the alternative, they submit there is insufficient evidence to justify anything other than a nominal award.

[241] Such an award is made to a plaintiff in trust for a non-party family member as compensation for the additional work performed by that family member on account of the impaired capacity of the plaintiff to perform housekeeping chores or to care for themselves: *Bradley* at para. 43.

[242] In *Bradley*, the Court of Appeal addressed the issue of the extent to which a claim for past in-trust services ought to be pleaded. Without deciding the appeal on the pleadings point, the Court of Appeal, at para. 47, cited with approval the observation of the court in *Star v. Ellis*, 2008 BCCA 164 at para. 21, that such a claim should be specifically pleaded under the heading of special damages.

[243] In this case, although the statement of claim requested special damages, those damages are not particularized and there was no reference to an in-trust claim. The claim was raised for the first time during the plaintiff's closing submissions at trial. I conclude that to allow the claim when it was introduced at such a late stage of the trial would result in prejudice to the defendants; they were not afforded an opportunity to test the claim on cross-examination. In the result, I decline to make any in-trust award.

Claim for Impaired Homemaking Capacity

[244] I turn now to address whether the plaintiff is entitled to compensation for pre-trial and future impaired housekeeping capacity. The plaintiff seeks an award of $25,000-$45,000. Notably, under his claim for future care loss, the plaintiff also seeks compensation for gardening services, home maintenance and repair, and

janitorial assistance. The assessment of these overlapping claims must be approached cautiously to avoid the potential for double recovery.

[245] The defendants assert that the evidence does not support an award for any pre-trial loss and that any future impairment is more appropriately compensated under future care costs.

(i) Legal Framework

[246] In *Dykeman v. Porohowski,* 2010 BCCA 36, Newbury J.A. at para. 28 summarized the governing principles with respect to awarding damages for the loss or impairment of housekeeping capacity. She affirmed that damages for the loss of housekeeping capacity may be awarded even though the plaintiff has not incurred any expense because housekeeping services were gratuitously replaced by a family member. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29.

[247] In *McTavish v. MacGillivray*, 2000 BCCA 164, the Court of Appeal endorsed the replacement cost approach to the valuation of lost housekeeping capacity. Madam Justice Huddart's comments at paras. 67-68 are instructive:

> [67] ... The loss of the ability to perform household tasks requires compensation by an award measured by the value of replacement services where evidence of that value is available.
>
> [68] In my view, when housekeeping capacity is lost, it is to be remunerated. When family members by their gratuitous labour replace costs that would otherwise be incurred or themselves incur costs, their work can be valued by a replacement cost or opportunity cost approach as the case may be. That value provides a measure of the plaintiff's loss.

[248] In assessing the damages on the replacement cost approach, the court must carefully scrutinize the gratuitous services done by the family member. A relatively minor adjustment of duties within a family will not justify a discrete assessment of damages: *Campbell v. Banman*, 2009 BCCA 484 at para. 19. In *Dykeman* at para. 29, Madam Justice Newbury cautioned that:

> Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services – were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? – and with respect to causation – were the services necessitated by the plaintiff's injuries or would they have been provided in any event?

[249] Having reviewed the basis for the assessment, I now turn to a consideration of the evidence.

(ii) Discussion

[250] Prior to the accident, it is uncontroversial that the plaintiff equally shared household duties with his wife. Immediately after the accident and spinal fusion surgery, the plaintiff was confined to bed; he was unable to do any cooking, cleaning, laundry, or other household chores. During the approximate nine-month period when he was recuperating, I accept the evidence that his wife's contribution exceeded her usual share of the household duties. I accept that the work she did went above and beyond the normal level of work done by a loving spouse. The plaintiff also paid an external housekeeping service $511.30 for work done during that time.

[251] As his condition improved, the plaintiff, through his perseverance, resumed many of his household chores. He now performs some of his pre-accident household tasks, such as cleaning the tub, with some difficulty and discomfort. This does not properly form the basis for an award for impairment of housekeeping capacity, but I have considered it as a factor in my award for non-pecuniary damages.

[252] Significantly however, as of the date of trial, the plaintiff had not resumed the entirety of his pre-accident responsibilities; he has been unable to resume the heavier household tasks and gardening work he performed prior to the accident. It is uncontroversial that his doctors have recommended restrictions on the more strenuous household cleaning, maintenance and repairs, and the heavier gardening activities.

[253] In my assessment for the loss to date of trial, I have considered the initial period of recovery when the plaintiff could not perform any household tasks. I have also considered the period to date of trial in which the plaintiff resumed some of his pre-accident household tasks but was unable to resume the more strenuous tasks. I conclude that the plaintiff is entitled to an award for his pre-trial loss of housekeeping capacity that will not be compensated for in his claim for special damages of $511.30. In quantifying his pre-trial loss, I have considered Ms. L.'s and Ms. Q.'s itemization of the estimate of replacement costs for gardening services, home maintenance, and janitorial services.

[254] On the totality of the evidence, I assess the plaintiff's pre-trial loss for impaired housekeeping capacity as $12,000.

[255] Based on the medical evidence, I am satisfied that there is a real and substantial probability that in the future, the plaintiff will continue to be unable to perform heavier household cleaning, maintenance and repairs, and gardening. I have assessed, as best I can, the household services the plaintiff would have provided but for the accident and what services would be required to permit the plaintiff and his family to live and function in their usual manner.

[256] In their submissions on future care costs, the defendants conceded that the plaintiff, until at least age 70 when he likely would have required assistance in any event or would have moved from his home, is reasonably entitled to an annual allowance for gardening services in the range of $500-$700, home maintenance in the range of $1,000-$1,500, and janitorial services of $300. Doctrinally, I am of the view that compensation for these services properly should be addressed under loss of future housekeeping capacity. The underpinning for an award is a recognition of the impairment to homemaking capacity. In contrast to an award for future care, the issue of whether the plaintiff used any of these services in the past and the likelihood of whether or not the plaintiff would hire replacement help in the future does not inform the analysis: *McTavish* at para. 43.

[257] The plaintiff did most of the gardening prior to the accident. He has resumed mowing the lawn. However, he will have some limitations in the future relating to periodic weeding and seasonal and heavier yard tasks, including when he experiences episodic aggravation of his symptoms. For the purposes of my assessment, I have estimated an annual allowance of $900 per year as a reasonable replacement cost for his services.

[258] The plaintiff also performed all his own home maintenance, including painting and home repairs, prior to the accident. He has resumed some participation in those activities. However, Ms. T. in her evaluation acknowledged his limitations for some tasks that would be “too onerous in terms of overall symptom aggravation and overall endurance”. I have assessed an annual replacement cost in the range of $1,500 per year for those tasks.

[259] Although the evidence does not support a finding that a regular home-cleaning service is required, it would be reasonable to award an annual allowance of $500 for the replacement cost of hiring assistance for seasonal tasks and those tasks requiring heavy lifting, and to replace services when the plaintiff experiences periodic flare-ups.

[260] For the purposes of my assessment, I have considered the multipliers in the cost of future services in Mr. B.’s report, and I have taken into account that by the age of 70, the plaintiff would have moved from his home or would have required assistance even if he had not been injured.

[261] Keeping in mind that an award for loss of housekeeping capacity is intended to compensate the plaintiff for a diminished loss of capacity and is not a mathematical calculation, I assess a fair award to be $40,000 for the future loss of housekeeping capacity.

D) Cost of Future Care

[262] Counsel for the plaintiff has submitted entitlement to compensation for the costs of future care in excess of $240,000, calculated as follows:

Mr. X. Cost Of Future Care					
Treatment	**Cost per Visit**	**Frequency**	**Value**		
			5 years	**10 years**	**15 years**
Medication	$500 per year	-	$2,500.00	$5,000.00	$7,500.00
Massage Therapy	$60.00	2 sessions per month	$7,200.00	$14,400.00	$21,600.00
Physiotherapy	$45.00	12 sessions annually	$2,700.00	$5,400.00	$8,100.00
Podiatrist	$40.00	1 visit per month	$2,400.00	$4,800.00	$7,200.00
Gym Membership	$10.00/per month (for RCMP officers)	-	$600.00	$1,200.00	$1,800.00
Aquatic Centre Membership	$50.00/per month	-	$3,000.00	$6,000.00	$9,000.00
Kinesiology	$60.00 per session	12 sessions	$3,600.00	$7,200.00	$10,800.00
Gardening Service	$50.00 per week	1 visit per week for 30 week growing season	$7,500.00	$15,000.00	$22,500.00
Home Maintenance/Repairs	$30.00 per hour	182.5 hours per year	$27,375.00	$54,750.00	$82,125.00
Janitorial Assistance	$25.00 per hour	2 hours per week	$13,000.00	$26,000.00	$39,000.00
Camper, 5th Wheel Camper Replacement	$400.00 per year	Annual Replacement Cost	$2,000.00	$4,000.00	$6,000.00
Ergonomic Chair Replacement	$170.00 per year	Annual Replacement Cost	$850.00	$1,700.00	$2,550.00
In Home Exercise Equipment Replacement	$176.00 per year	Annual Replacement Cost	$880.00	$1,760.00	$2,640.00
Roho Pressure Mattress Replacement	$250.00 per year	Annual Replacement Cost	$1,250.00	$2,500.00	$3,750.00
Pulse Signal Therapy	Initial Fee		$2,000.00 (9 sessions)		
Renovation Repayment	One time Cost		$3,000.00		
Bosu and Swiss Balls	One time Cost		$265.00		
Cane	One time Cost		$50.00		
Ergonomic Worksite & Home office Assessment	One time Cost		$1,200.00		
Ergonomic Chair	One time Cost		$1,700.00		
Small Ergonomic Equipment	One time Cost		$400.00		
In-Home exercise Equipment	One time Cost		$1,765.00		
Roho Pressure Mattress	One time Cost		$2,500.00		
Elliptical Trainer	One time Cost		$2,200.00		
Hot Water Tank	One time Cost		$1,116.00		
Hot Tub	One time Cost		$7,500.00		
TOTAL:			**$98,551.00**	**$173,406.00**	**$248,261.00**

[263] The defendants have acknowledged, based on Ms. T.'s report, that the plaintiff is entitled to some compensation for his future care costs. They submit that he is entitled to compensation for:

- an allowance for physiotherapy and massage therapy, which they contend should be $500 every three years;
- an allowance for 10 sessions ($600) with a kinesiologist and a further 20 sessions over his lifetime ($1,200);
- a one-time ergonomic assessment in the range of $600-$800;
- a home-office ergonomic chair at a cost of $500-$700 and an allowance of $300 every five years for small equipment repair; and
- home exercise cardio equipment of $2,000 every ten years, and an annual allowance of $100 for associated repairs.

(i) Legal Framework

[264] There is no dispute regarding the legal principles governing the assessment of this award. After articulating that the basis for an award for future care is providing for "what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff" (at 78), the court in *Milina v. Bartsch* (1985), 49 B.C.L.R (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.), summarized the pertinent principles at 84:

> The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
>
> These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

[265] In assessing what is reasonably necessary to preserve the plaintiff's health, the court should examine whether on the evidence the plaintiff has used the items or services in the past and whether the plaintiff will likely use the items or services in

the future: *Izony v. Weidlich,* 2006 BCSC 1315 at para. 74; *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at paras. 12-14.

[266] The B.C. Court of Appeal has recently clarified, in *Gregory v. ICBC*, 2011 BCCA 144, that determining whether an item or service is medically justified is not limited to what medical doctors recommend; rather, it can include recommendations from a variety of healthcare professionals such as a rehabilitation expert. However, the authorities mandate that the court find an evidentiary link between the injuries found by medical doctors and the care or services recommended by qualified healthcare professionals: *Gregory* at para. 39. The Court of Appeal in *Penner* observed that "a little common sense should inform claims under this head, however much they may be recommended by experts in the field": para. 13.

[267] The assessment of damages for cost of future care necessarily entails the prediction of future events and an assessment of the care that would be in each individual plaintiff's best interests: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21.

(ii) Discussion

[268] In my view, the evidence falls short of establishing either medical justification for, or the reasonableness of, many of the items claimed for future care advanced by the plaintiff.

[269] With respect to Ms. Q.'s recommendations for future care costs, I agree with counsel for the defendants that given that Ms. Q. never obtained, nor reviewed, any medical information pertaining to the plaintiff after August 8, 2005, her recommendations are somewhat flawed. Moreover, on cross-examination, it was apparent that her assessment was deficient because she had based many of her recommendations on incomplete or inaccurate information and had not taken

reasonable steps to obtain pertinent information. I found her approach to the assessment of future care items somewhat lacking in objectivity.

[270] I turn now to a consideration of each of the items claimed.

[271] I conclude that an annual allowance of $600 for physiotherapy and massage therapy would be beneficial in providing the plaintiff with some relief, particularly when he experiences aggravation of his symptoms. Dr. T. recommended this on an “as necessary” basis. It can reasonably be inferred on the evidence that with the elimination of any obvious financial impediment, the plaintiff would access these treatments from time to time.

[272] The evidence does not support a claim for either regular podiatry services or the costs of pain medication. The plaintiff acknowledged that, for the most part since his initial recovery from the accident, he has not used pain medication.

[273] Dr. H. recommended Pulse Signal therapy for the plaintiff. This technology consists of sending a series of low intensity magnetic pulses through the injured region of the body. Dr. H. contends that in 70%-75% of cases, this treatment improves function and decreases pain and stiffness. Dr. H. is the principal provider of this therapy in British Columbia. In the absence of peer-reviewed literature stating that this is an effective treatment, I am not persuaded that the cost of treatment in the amount of $2,000 is medically justified.

[274] I conclude, based on the medical evidence and the evidence of both the occupational therapists, that the plaintiff would benefit from some sessions with a kinesiologist to develop an optimal exercise program. In order to preserve his health, I also expect the plaintiff would reasonably require some future sessions over his lifetime. In my view, 15 initial sessions and a further 30 sessions over his lifetime are reasonable and necessary.

[275] An ergonomic work and home office assessment by an occupational therapist, the purchase of an ergonomic chair for the plaintiff’s home office, and an

allowance for the purchase of small ergonomic items to support his function and comfort at home and at work are all reasonably justified expenses.

[276] The plaintiff's doctors have all recommended that the plaintiff follow a regular exercise regime as it is important for maintaining his conditioning. I find it would be beneficial for the plaintiff to be able to exercise within his home. The purchase of in-home exercise equipment would facilitate a regular at-home exercise program. An allowance for replacement costs for this equipment every ten years and some allowance for repair costs is also reasonable.

[277] I turn next to the balance of the items recommended by Ms. Q. and claimed by the plaintiff:

- The claim for the gym membership should not properly be awarded as the plaintiff had a gym membership prior to the accident;

- It is uncontentious that the plaintiff does not use a cane (nor does the evidence support a finding that he will require a cane in the future) and cannot swim because of his injuries. The claims for an aquatic centre membership and cane are therefore not allowed;

- The plaintiff seeks a payment of $3,000 for home renovations under both his future care claim and his claim for special damages. I will address it below under special damages;

- In my view, the proposed expenditures of a hot-water tank and hot tub and the replacement costs of the tent-trailer are not recoverable as they are properly characterized as amenities which may render the plaintiff's life more bearable or enjoyable: *Milina* at 84. The evidence falls short of establishing that these expenses are reasonably necessary to promote or preserve the mental and physical health of the plaintiff in the future; and

- Ms. Q. recommends the purchase of a Roho pressure mattress when the plaintiff turns 55. The evidence falls short of demonstrating that such a purchase is medically justified.

[278] Having considered the costs as set out in Ms. Q. and Ms. T.'s respective reports, and the costs of future care multipliers in Mr. B.'s report, I assess an award for the cost of future care in the amount of $25,000. This is based on an assessment of the present value of the cost to be incurred in the future.

[279] The plaintiff has leave to apply to address any issues related to tax gross-up.

E) Special Damages

[280] The plaintiff submits that he is entitled to special damages as follows:

(i) Physiotherapy (45 visits)	$1,900.00
(ii) Tent-Trailer	$10,000.00
(iii) Renovations to Basement	$3,000.00
(iv) Housekeeping (December 2005 to January 16, 2006)	$511.30
(v) Psychological Treatments	$280.00
Total:	$15,691.30

[281] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses they incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *Milina* at 78.

[282] However, this compensatory principle mandates that expense claims be limited to those which are restorative as distinct from those which would put the plaintiff in a better position than before the accident: Cooper-Stephenson, *Personal Injury Damages In Canada*, 2d ed (Toronto: Thomson Canada, 1996) at 134. Moreover, remoteness may limit the recovery of damages: Cooper-Stephenson at 134. Based on these principles, I am not persuaded that the defendants should be

liable for the purchase of a tent-trailer that the plaintiff never owned before the accident or for the renovations to his home after the accident that were not occasioned for any rehabilitative purpose.

[283] The defendants agree to the payment of housekeeping ($511.30) and psychological treatment ($280.00) for a total of $791.30. Based on my earlier findings regarding the RCMP's right to reclaim the funds it paid as a result of the accident, the plaintiff is entitled to reimbursement for physiotherapy in the amount of $1,900.

[284] The plaintiff has proved special damages in the amount of $2,691.30.

CONCLUSION AND SUMMARY

[285] The plaintiff's damages are assessed at $479,546.82, consisting of the following:

Non-Pecuniary:	$140,000.00
Gross Past Wage Loss:	$79,855.52
Loss of Future Earning Capacity:	$180,000.00
Loss of Housekeeping Capacity:	$52,000.00
Future Care Costs:	$25,000.00
Special Damages:	$2,691.30
Total:	$479,546.82

COSTS

[286] If the parties are unable to agree on costs, plaintiff's counsel is at liberty to file a written submission within 60 days from the date of this judgment. Counsel for the defendants are to file written submissions in response within 45 days of receipt of the plaintiff's submissions. Any reply submissions must be filed within 15 days.

"Dardi J."