IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Provost v. Bolton,*
2018 BCSC 1090

Date: 20180703
Docket: M125926
Registry: Vancouver

Between:

Quinn Provost

Plaintiff

And

David James Bolton and Dueck Downtown Chevrolet Buick GMC Limited, Kyle Katerenchuk and ABC Corporations #1 - #3

Defendants

- and -

Docket: M142533
Registry: Vancouver

Between:

Attorney General of Canada

Plaintiff

And

David James Bolton and Dueck Downtown Chevrolet Buick GMC Limited and Kyle Katerenchuk

Defendants

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff, Quinn Provost:	Alexander Sayn-Wittgenstein Paul Bosco
Counsel for the Plaintiff, Attorney General of Canada:	David Kwan Lucy M.C. Bell Erica L.C. Louie

Counsel for the Defendant, David James Bolton:	Russell Robertson
Counsel for the Defendants, Dueck Downtown Chevrolet Buick GMC Limited and Kyle Katerenchuk:	Perry A. Mazzone
Place and Date of Trial:	Vancouver, B.C. November 20-24, 27 and 28, December 7 and 11, 2017
Place and Date of Judgment:	Vancouver, B.C. July 3, 2018

Background

[1] Cpl. Provost is a 40-year-old RCMP officer with the Richmond, B.C. detachment. On April 24, 2012, he was driving an unmarked Hyundai Sonata while performing surveillance for a property crime assignment in Richmond. While doing so, he learned that a male suspect, the defendant David Bolton, was driving a stolen pickup truck in close proximity to Cpl. Provost's location. He heard that the suspect had stopped and exited the stolen truck. Cpl. Provost offered to assist and drove toward the location where the truck was stopped. As he was driving, he unbuckled his seatbelt to be ready to apprehend the suspect. Unbeknownst to Cpl. Provost, Mr. Bolton had returned to the stolen truck and was driving away at high speed. Mr. Bolton turned at the intersection of Douglas and Smith Streets in Richmond. In doing so, he cut the corner and drove into the lane of oncoming traffic. Cpl. Provost was in that lane and was struck head on at high speed by the truck. He had no time to react but clearly saw the grill of the approaching truck just prior to the unavoidable collision. The airbag in the Hyundai deployed on impact and Cpl. Provost was seriously injured.

[2] This action proceeded to trial on liability only, pursuant to orders made by Justices Silverman and MacNaughton. Mr. Bolton was involved in two other accidents on April 24, 2012, while driving the stolen truck. The liability trial in this action was heard at the same time as the liability trials in the actions that arose from those accidents: Brandy Brundige is the plaintiff in Vancouver Registry action M142374 and the Attorney General of Canada ("AG Canada") is the plaintiff in Vancouver Registry action M142533. In reasons indexed as *Provost v. Bolton*, 2017 BCSC 1608, Justice Kelleher apportioned fault in this action and in action M142533 between the defendants: 85% to Mr. Bolton and 15% to Dueck Downtown Chevrolet Buick GMC Limited ("Dueck"). Justice Kelleher concluded that Cpl. Provost was not contributorily negligent for unbuckling his seatbelt just prior to the accident. In action M142374, Justice Kelleher apportioned fault 70% to Mr. Bolton, 15% to Dueck and 15% to the Minister of Justice for the Province of British Columbia.

[3] Pursuant to the previous orders, the actions proceeded before me for assessment of damages and were heard at the same time. These reasons deal with Cpl. Provost's claim and the claim of the AG Canada. I will issue separate reasons for judgment in action M142374 dealing with Ms. Brundige's claim ("*Brundige*").

[4] Cpl. Provost suffered multiple injuries in the accident including: an undisplaced fracture of his C7 vertebra; a fracture in his left hand; and a bicondylar tibial plateau fracture to his right knee. In addition, he suffered psychological injuries including post-traumatic stress disorder ("PTSD"), anxiety while driving and depression. He also suffered soft tissue injuries and has experienced migraine headaches. In the first month after the accident, he was entirely dependant on his wife, Erin O'Halloran, for most activities of daily living. She was able to take a leave from employment to look after him. For many months thereafter, she continued to assist him with daily tasks and to drive him to various appointments and activities.

[5] Cpl. Provost was off work for several months but returned to work on a graduated basis on July 30, 2012. He returned to full-time duties in January 2013 but still was restricted in the nature of work he could perform. He was unable to drive for a year after the accident. He returned to active duty on May 21, 2014. Cpl. Provost says that his career has been severely impacted by the injuries suffered in the accident. He lost more than two years of active duty, which he says will result in a future loss of opportunity to advance in policing as he would have done but for the accident. When he started with the RCMP his goal was to hold the office of commissioner. This is an ambitious goal as there is only one commissioner and a few deputy and assistant commissioners in the RCMP. However, he argues that he had the education and drive to achieve this goal and that he may have done so had the accident not derailed or delayed his career. He seeks a substantial award for the future loss of opportunity.

[6] The defendants acknowledge that Cpl. Provost suffered serious injuries in the accident, but say he has made an excellent recovery. The defendants acknowledge the short hiatus in Cpl. Provost's career advancement, but say he is still on track to

advance up the ranks of the RCMP. They emphasize the exceptional performance reviews he received both before and after the accident. He was elevated to the rank of corporal shortly after his return to active duty and will soon be able to apply for the rank of sergeant. Further, they say there are many subjective factors that affect career advances in the RCMP and that Cpl. Provost's chances of advancing or failing to do so are the same as they were before his injury.

[7] In action M142533, the AG Canada claims for the damage caused to Cpl. Provost's Hyundai, which was written off, as well as for the damage to another RCMP vehicle, a Chevrolet Tahoe, hit by the stolen truck. It also seeks recovery of amounts paid by the RCMP for medical expenses incurred for the benefit of Cpl. Provost. These include medication, physiotherapy and counselling expenses. The AG Canada also says it is entitled to recovery of the wages paid by the RCMP to Cpl. Provost when he was off work. The notice of civil claim does not advance such a claim but the AG Canada supports Cpl. Provost's claim for the wage benefits he received so that it can be indemnified for those amounts based on its right of subrogation. As Cpl. Provost received all of the wages and benefits he would have been entitled to had he not been injured, he did not suffer any income loss for the considerable amount of work he missed after the accident, other than the loss of opportunity to work overtime.

[8] The issues that must be considered given the circumstances and the positions of the parties are:

Cpl. Provost

a) What is the nature and extent of the injuries suffered in the accident?

b) What amount should be awarded for non-pecuniary damages?

c) What amount should be awarded for an in-trust claim for the services provided by Ms. O'Halloran to Cpl. Provost?

d) Can Cpl. Provost and/or the AG Canada sustain the claim for the wages and benefits paid to Cpl. Provost when he missed work because of the accident? If so, how much is payable?

e) What amount should be awarded for past loss of income, exclusive of the wage replacement benefits?

f) What amount should be awarded for future loss of earning capacity?

g) What amount should be awarded for special damages?

h) What amount should be awarded for cost of future care?

AG Canada

a) What amount should be awarded to the AG Canada for vehicle damage and medical expenses incurred for the benefit of Cpl. Provost?

What is the nature and extent of the injuries suffered in the accident?

[9] Prior to the accident Cpl. Provost had no physical limitations or significant health issues. He struggled to maintain his weight and took medication for high blood pressure, but had no difficulty carrying out the duties of an operational RCMP officer. Unfortunately, his physical and psychological conditions changed suddenly and dramatically because of the injuries suffered in the accident. Cpl. Provost and Ms. O'Halloran described in some detail the pain and lack of mobility he experienced in the first two to three months after the accident. He pursued his rehabilitation diligently and by the time of trial was functioning fully at work. However, Cpl. Provost still experiences pain and still has physical limitations caused by his injuries and difficulties arising from PTSD.

[10] There is no real dispute between the parties about the extent of the injuries suffered by Cpl. Provost in the accident. Given the parties' general agreement, I need not describe the injuries in detail. They include:

- Soft tissue injuries including to his neck, left knee and right hip;
- Increased headaches;
- A fracture to his left hand (fifth metacarpal);
- An undisplaced cervical fracture at his C7 vertebra;
- A bicondylar tibial plateau fracture to his right knee, requiring surgical fixation and, later, surgical removal of hardware; and
- PTSD.

[11] Cpl. Provost suffered soft tissue injuries to his neck, left knee and right hip. He suffered pain from these injuries for a few months but this was not a major concern as these symptoms were overshadowed by the more serious injuries. The soft tissue injuries healed uneventfully within a few months of the accident.

[12] Prior to the accident, Cpl. Provost infrequently experienced painful headaches. The frequency and severity of the headaches has increased since the accident. The headaches have been associated with physical exertion. Cpl. Provost was referred to a neurologist who prescribed medication that has kept the symptoms under control.

[13] He suffered a fracture to his left fifth metacarpal, which was painful for several months but healed completely. The injury would not have been disabling by itself but, in combination with the other injuries, it severely hampered his ability to function in the months after the accident.

[14] The C7 undisplaced neck fracture was painful after the accident and was not diagnosed for 24 hours. Once it was discovered, Cpl. Provost was placed in a hard Vista collar that prevented any movement. He had to wear the collar for an extended time. He has experienced stiffness and aching in his neck ever since the accident. Cpl. Provost is able to manage the symptoms and the injury is not disabling. However, it is likely that he will continue to suffer stiffness and discomfort and is at

risk of developing post-traumatic arthritis. If that happens, the symptoms will increase.

[15] The most serious physical injury suffered by Cpl. Provost was the bicondylar tibial plateau fracture to his right knee. Both sides of the upper end of the tibial plateau were fractured. A plate was inserted in the initial surgery but was later removed. This type of fracture increases the risk of post-traumatic arthritis. Two years after the accident, Dr. Calvert, who performed both surgeries, opined as follows in his report dated April 3, 2015:

> His knee injury has placed him at risk of progressive knee osteoarthritis. Given his demonstrated mild arthritis which has developed since the accident, he is probable to continue to have worse arthritis. …
>
> He has a partial disability to all impact activities and running sports. I state partial because he can run but to a much lesser degree. I do not foresee a reversal of this disability regardless of plate removal.

[16] The injury to the knee continues to cause intermittent pain more than five years after the accident. It will continue to do so in the future. The pain is provoked by activities such as running and jumping that cause impact loading to the joint. Dr. Marks, the defence orthopaedic expert, described the nature of Cpl. Provost's disability:

> It is my opinion that Mr. Provost is, on the balance of probabilities, going to have increasing difficulties with his right knee. This is a slow progression and no imminent collapse likely. The natural history however, would suggest possibility for further degenerative change, particularly of the lateral side of the joint, and this would lead to permanent functional limitations, impairment and disability at that stage. If, however, Mr. Provost does go on to further degenerative change of the right knee, total knee replacement is an excellent option with excellent outcomes well described in the literature.

[17] In cross-examination, Dr. Marks acknowledged that there is a high risk of knee replacement for individuals with bicondylar fractures; 11% within 10 years of the injury. If Cpl. Provost has a knee replacement within 10 or 15 years of the accident, he may well require a second knee replacement later in life.

[18] One of Cpl. Provost's major concerns about his knee is his inability to perform the RCMP's Physical Abilities Requirement Evaluation ("PARE"). In order to enter

the RCMP an applicant must complete the PARE, a timed physical test that involves completing an obstacle course. An officer is also required to re-take the test every three years and attempt to complete it in under four minutes. Since the accident, Cpl. Provost has been unable to complete the PARE. This does not affect his ability to work as a RCMP officer. However, it concerns him both as a matter of pride and because the inability to perform the equivalent municipal test (the Police Officers Physical Abilities Test; the "POPAT") limits his ability to seek employment with a municipal police force. This is because municipal police forces require applicants to complete the POPAT in order to qualify for the force.

[19] Dr. Lisa Caillier, a physiatrist who prepared an independent medical evaluation for the plaintiff, opined in June 2014 that even though Cpl. Provost is fully functional, there is some question about his ability to complete the PARE. He challenged the test unsuccessfully in late 2014. It was evident to the examiner that he was struggling because of right knee pain and he was told to stop. Shortly before trial, he was going to challenge it again but decided not to do so as he felt he could not complete the test.

[20] In spite of the extensive rehabilitation that Cpl. Provost followed, he is restricted in some activities. He is no longer able to go jogging with his wife, an activity they enjoyed prior to the accident. However, he has taken up cycling very seriously. Indeed, in 2015, he completed a 925-km trip in nine days.

[21] The accident also caused significant psychological injury to Cpl. Provost. The psychiatrists who assessed him agree that in the period after the accident, Cpl. Provost met the criteria for a diagnosis of PTSD. The experience of seeing the stolen truck's grill approaching his small car at high speed produced a strong emotional reaction in Cpl. Provost. This life-threatening experience caused him to have nightmares and flashbacks. Dr. Brian Scarth found that the symptoms "were of sufficient severity to disable him from his own occupational role as a RCMP officer."

[22] Cpl. Provost also developed anxiety provoked by driving or riding in a motor vehicle and his sleep was disrupted. He became angry and depressed, which

resulted in a loss of intimacy with his wife and a loss of interest in his work. He suffered a fractured hand when he punched a wall in anger in 2014. His wife and father described the considerable change in his personality and outlook; not only was he frustrated and angry, he became jaded.

[23] Cpl. Provost went through an extensive program of psychotherapy. As a result, within a year of the accident his PTSD was in partial remission. When he evaluated Cpl. Provost in September 2016, Dr. Scarth opined:

> I conclude from these points that although he has experienced improvement in symptoms to the point that I would consider the PTSD to be in partial remission, when exposed to triggers or reminders of the accident, he is not able to maintain adequate emotional composure. In my opinion, the degree of anxiety and emotional distress shown by Mr. Provost upon reminders of the trauma is not compatible with the full extent of his work requirements as an RCMP officer.

[24] Cpl. Provost did return to full-time active duty in May 2014 and has been able to carry out his duties since that time. Nevertheless, the constellation of injuries leaves him with ongoing pain and some partial disability. He will experience knee pain and some impairment of function. He is at high risk of developing post-traumatic arthritis and will likely need at least one knee replacement. He will continue to suffer from accident-related headaches. He continues to experience anxiety and needs treatment to assist with management of his PTSD.

What amount should be awarded for non-pecuniary damages?

Position of the Parties

[25] The plaintiff says $150,000 is a fair award to provide compensation for the physical and psychological injuries and symptoms he has suffered. The defendants submit that the proper range for non-pecuniary damages for Cpl. Provost is $120,000 to $150,000.

Analysis

[26] It is not surprising that the parties almost agree on the appropriate award for non-pecuniary damages. Even though Cpl. Provost is now functioning well at work

and in his personal life, he suffered serious injuries with some permanent consequences. He experienced significant pain and disability in the first year after the accident. He has worked diligently at rehabilitation and has been largely successful. He was fortunate to have tremendous support from Ms. O'Halloran and his employer. However, while the initial pain subsided and he regained most of his ability to function, he has been left with ongoing symptoms. He will have joint pain in his neck and right knee. The pain in his knee will likely increase and lead to a knee replacement. The PTSD will never be in full remission. He will require ongoing treatment to deal with his anxiety and mood issues.

[27] The parties relied on a number of decisions that inform the proper range for damages. I need not refer to all of them. The cases I found to be most helpful in establishing the award include:

- *Laureola v. Waterhouse*, [1995] B.C.J. No. 689 (S.C.). The plaintiff, a 52-year-old nurse, was awarded $90,000 (approximately $135,000 in 2018) when she suffered a tibial plateau fracture, post-traumatic arthritis, depression and a debilitating pain disorder. The symptoms prevented her from returning to work.

- *X. v. Y.*, 2011 BCSC 944. The plaintiff, a 43-year-old RCMP officer, was awarded $140,000 (approximately $152,000 in 2018) when he suffered a spinal fracture of his T12 vertebra. He suffered continuing pain and some mild psychological symptoms. He returned to work on a graduated basis after nine months but never returned to front line duties. The symptoms affected all aspects of his life.

- *Farand v. Seidel*, 2013 BCSC 323. The 28-year-old plaintiff was awarded $130,000 (approximately $138,000 in 2018) when she suffered a tibial plateau fracture that would lead to knee replacement. She also suffered other fractures and experienced chronic neck and back pain, as well as mild psychological symptoms.

- *Rizzolo v. Brett*, 2009 BCSC 732. The plaintiff, a 41-year-old groundskeeper, was awarded $125,000 (approximately $142,000 in 2018), when he suffered comminuted fractures of the tibia and fibula. He experienced chronic pain and had difficulties in every aspect of his life.

[28] In assessing non-pecuniary damages, I have taken into account the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, and in subsequent decisions. The plaintiff was only 34 years old at the time of the accident. He suffered substantial pain and was disabled for many months. He will be left with some pain and loss of function for the rest of his life. He experienced PTSD and will have to deal with ongoing anxiety. His family, marital and social relationships have been impacted and he continues to be frustrated by the changes imposed on him by the injuries. In spite of the remarkable physical recovery he has achieved through hard work and determination, he suffered and will continue to suffer a loss of enjoyment of the life he experienced before the accident. In these circumstances, a fair award for non-pecuniary damages is $150,000.

What amount should be awarded for an in-trust claim for the services provided by Ms. O'Halloran to Cpl. Provost?

Position of the Parties

[29] Cpl. Provost says the services provided by Ms. O'Halloran to support him in the first year following the accident went far beyond those normally expected in a marital relationship. The plaintiff seeks an award of $15,000 in trust for his wife, based on an estimate of the number of hours expended by Ms. O'Halloran at $20 per hour.

[30] The defendants' primary position is that the in-trust claim was not pleaded and that it would be unfair to consider the claim when it was raised for the first time in closing argument. Alternatively, the defendants submit that the nature and extent of the services provided by Ms. O'Halloran to her husband do not meet the test for an in-trust award.

Analysis

[31] When the defendants raised the argument that the pleading was insufficient to support a claim for this head of damage, I invited argument on a possible amendment to the notice of civil claim. The plaintiff prepared a proposed further amended notice of civil claim and on November 28, 2017, I granted an order permitting the amendment. I indicated that I would provide reasons for granting the amendment in the trial reasons for judgment.

[32] In opposing the amendment, the defendants relied on *X. v. Y.*, where Justice Dardi declined to make an in-trust award when the claim was raised for the first time in argument. Relying on *Ellis v. Star*, 2008 BCCA 164, Justice Dardi observed that an in-trust claim should be pleaded, and at para. 243, found that if the claim was allowed the defendants would be prejudiced:

> [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.

[33] In *Ellis,* the trial judge made an in-trust award even though it was not pleaded. The Court of Appeal overturned the award because the evidence did not support an in-trust claim and observed, at para. 21, that it is good practice to plead such a claim:

> [21] One aspect of this claim that is not directly in issue on this appeal, but is of some significance, is the question of the extent to which a claim for past in-trust services ought to be pleaded. The claim is addressed under the heading of special damages which normally requires that the claim be specifically pleaded as is the case with out-of-pocket expenses. The trial judge relied on *Frers v. De Moulin* (*supra*) for the proposition that an in-trust claim does not have to be specifically pleaded and *Frers* was not challenged by the appellant in this case. Nonetheless, it appears to me that a claim of this nature ought to be pleaded to provide a degree of specificity to the claim. As I have indicated, the pleading point is not specifically put in issue on this appeal, but in my view, good practice suggests that in future cases it ought properly to be pleaded.

[34] I agree that it is good practice to plead an in-trust claim. However, this Court retains the discretion to allow an amendment to pleadings even at the close of evidence: *G.G. v. M.A.*, 2013 BCSC 1834. The discretion to permit an amendment should be exercised liberally in order to enable the real issues to be determined and tried. If actual prejudice can be demonstrated or the amendment would be useless, it should not be granted: *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145 (C.A.).

[35] I granted the amendment because I was satisfied that the evidence of Cpl. Provost and Ms. O'Halloran was more than sufficient to support an in-trust claim. In other words, this is a claim that should be tried and determined. Further, the terms of the order allowing the amendment eliminated any prejudice to the defendants.

[36] The possibility for and viability of the in-trust claim would have been evident to counsel for the defendants. Counsel submitted that while they were aware of the potential for such a claim, they did not cross-examine Ms. O'Halloran on her evidence about the extensive services she provided to Cpl. Provost. There was no need to challenge her evidence because the claim was not advanced. Their prejudice occurred because they lost the opportunity to conduct cross-examination on that evidence.

[37] The unusual circumstances of this case permitted an order that would allow the in-trust claim to be adjudicated without prejudice to the defendants. As I have indicated, this action was heard at the same time as the *Brundige* action. The defence counsel in this case were also defence counsel in *Brundige*. The parties agreed in advance of the trial that the evidence in this case would be heard first followed by the evidence in *Brundige*. Accordingly, defence counsel were scheduled to be in court for another three weeks on the companion case. I ordered that Ms. O'Halloran be recalled for cross-examination on the in-trust claim. This took place during the *Brundige* trial at a time that was convenient to the defendants.

[38] I am satisfied that the opportunity to cross-examine Ms. O'Halloran eliminated any possible prejudice.

[39] The evidence of Ms. O'Halloran was not seriously challenged in cross-examination. She took a month of paid leave to care for Cpl. Provost. In that month she cared for him full time. The constellation of injuries he suffered – broken neck, knee fracture and left hand fracture – meant that he was unable to do anything for himself during the early recovery. Ms. O'Halloran had to change Cpl. Provost, take him to the bathroom, help with toileting, give him showers, administer shots, and do all of the cooking and driving. The time required to care for him was extensive, as Ms. O'Halloran testified. For example, it took 90 minutes to shower him and 15 minutes to move him to the toilet. During this period, Cpl. Provost was short-tempered, angry, depressed and in pain.

[40] After the first month, Ms. O'Halloran returned to work and spent less time caring for Cpl. Provost, although she continued to spend three or four hours a day doing so for another two or three months. After that, she continued to drive Cpl. Provost to medical appointments and to work into 2013.

[41] The relevant factors to consider for an in-trust claim are set out in *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124:

> (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
>
> (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship …;
>
> (c) the maximum value of such services is the cost of obtaining the services outside the family;
>
> (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
>
> (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,
>
> (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

[42] I have no hesitation in concluding that the services provided by Ms. O'Halloran in the first few months after the accident were necessary and causally

related to the accident. The extent of those services was over and above what would normally be expected in a spousal relationship. After the initial few months, the nature of the services undoubtedly changed and became more akin to those expected from a spouse or family member. Given the nature of the services and the time spent, I conclude that an award of $10,000 for in-trust services is reasonable.

Can Cpl. Provost and/or the AG Canada sustain the claim for the wages and benefits paid to Cpl. Provost when he missed work because of the accident? If so, how much is payable?

[43] Cpl. Provost claims $36,995, representing the amount paid to him by the RCMP while he was off work. This is an estimate based on the time he was completely disabled from work (from April 24, 2012 to July 30, 2012), and the time he missed while in a graduated return-to-work program before he returned to full-time hours in early January 2013. The amount of the claim was estimated by Darren Benning, the plaintiff's expert economist, who assumed a graduated return starting at ten hours per week with a steady increase in hours each month until the return to full time. This probably understates the value of the time away from work as Cpl. Provost and Ms. O'Halloran testified that he worked fewer hours at the start and did not increase his hours significantly until the end of the five-month graduated return period.

[44] While Cpl. Provost advances this claim, it is very much in the nature of a subrogated claim. The AG Canada says it has the right to claim this amount and advanced arguments in support of Cpl. Provost's claim. In that regard, I note that the AG Canada did not include a claim for salary and benefits paid to Cpl. Provost in the notice of civil claim in action M142533. It did include claims for "medical costs" and "rehabilitative costs" paid for his benefit. However, the AG Canada says it has an equitable right of subrogation and is entitled to advance the subrogated claim in accord with established legal principles.

[45] Cpl. Provost also advances a claim for past loss of opportunity based on his inability to work overtime and a delay in his promotion to corporal. I have considered that claim separately below.

[46] The claim for wages and benefits paid to Cpl. Provost raises the perplexing problem of whether collateral benefits are deductible from a damages award, which the Supreme Court of Canada canvassed in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; and more recently in *IBM Canada Limited v. Waterman*, 2013 SCC 70. Other British Columbia courts have applied these principles when considering whether salary benefits paid to an injured RCMP officer while he or she was unable to work could be recovered. In *X. v. Y.*, Justice Dardi found that the RCMP had a right of subrogation and had not waived that right, even though it was not pursuing a claim. Accordingly, she awarded the full amount of the wage benefits to the plaintiff as a quantification of the plaintiff's past loss of earning capacity, even though the plaintiff already received those benefits from the employer. In *Slater v. Gorden*, 2017 BCSC 2265, Justice Forth declined to award any amount for the lost wage benefits paid by the RCMP to the plaintiff. She found that the evidence did not support a finding that the RCMP had a right of subrogation.

Position of the Parties

[47] Cpl. Provost submits that this case is indistinguishable from *X. v. Y.* and that I should follow that decision. The AG Canada has a right of subrogation that has not been waived. Applying the principles set out in *Ratych* and *Cunningham*, the full amount of the wage benefit should be awarded.

[48] The AG Canada supports the position taken by Cpl. Provost. It says it has an equitable right of subrogation. That right has not been waived; indeed, it is actively advancing the claim. It says that the right of subrogation arises independently from, and without the need for, any contractual right because it has paid the full amount of Cpl. Provost's loss. The remedy is necessary to prevent an unjust enrichment; it would be unjust to permit the tortfeasors to benefit from the employer's payment of Cpl. Provost's income loss.

[49] The defendants submit the evidence in this case does not support the assertion that the RCMP has a right of subrogation. They argue the case is

distinguishable from *X. v. Y.* because Cpl. Provost led no evidence about the RCMP's right of subrogation or the RCMP's position on waiver of any such right. The defendants say the absence of evidence makes this case indistinguishable from *Slater*.

Analysis

[50] The relevant evidence is limited. Cpl. Provost testified that he received his full salary from the time of the injury until he returned to full-time work. In other words, he was fully indemnified by his employer for the loss of income he was entitled to receive as an RCMP officer during his period of full and partial disability. RCMP officers are not unionized; there is no collective agreement that sets out the employer's obligation to pay an officer who is injured and disabled in the course of employment. No evidence was led about any other form of employment agreement between RCMP officers and their employer. However, it is not controversial that it is the practice or policy of the RCMP to continue to pay an injured officer his or her full wage benefits. Cpl. Provost was fully paid while off work. This is not an isolated circumstance; there have been numerous other personal injury actions in this Court where the RCMP has followed that policy or practice.

[51] The courts in *X. v. Y.* and *Slater* looked to *Ratych* and *Cunningham* for guidance on the issue of the deductibility of collateral benefits. I accept Justice Dardi's summary of the law as set out in *X. v. Y.* She noted at para. 220 that the primary concern is to prevent double recovery; if a plaintiff suffered no loss, "he should not be entitled to recover damages on that account." However, there is an exception to the general principle as set out at paras. 221-222:

> [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 of Justice Dardi.]

[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 of Justice Dardi.]

[52] In *Waterman*, the Court considered the deductibility of pension benefits from an award of damages for wrongful dismissal. Justice Cromwell, writing for the majority, again canvassed the authorities and considered the principles about private insurance benefits in order to determine if the pension benefits should reduce the damage award. He noted at para. 69:

> [69] I conclude from this review that whether the benefit is in the nature of an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit have been important explanations of why particular benefits fall, or do not fall, within the private insurance exception. The Court has been sharply and closely divided on the issue of the deduction for an indemnity benefit to which the plaintiff has contributed. However, there is no decision of the Court of which I am aware that has required deduction of a non-indemnity benefit to which the plaintiff has contributed, like the pension benefits in this case.

[53] After considering the broader policy considerations, at para. 76, Justice Cromwell set out five conclusions arrived at from a review of the authorities:

(a) There is no single marker to sort which benefits fall within the private insurance exception.

(b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.

(c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.

(d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.

(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

[54] Applying the three Supreme Court of Canada cases to the circumstances before the Court, it is clear that the circumstances do not fall within the "private insurance exception". Accordingly, and contrary to the submissions of the defendants, the conclusions of Justice Cromwell are not of particular assistance to my consideration of the benefit here. The benefit paid to Cpl. Provost is clearly an indemnity for the loss he suffered and would normally be deducted. However, the issues here are whether the AG Canada, as Cpl. Provost's employer, has a right of subrogation and whether that right has been waived. If the employer does not have a right of subrogation that is the end of the enquiry because the wage benefit would be deductible. If the AG Canada does have a right of subrogation, then the benefit is not deductible, unless that right has been waived. Waiver produces that result because it is only the existence of the right of subrogation that prevents the benefit from being treated as collateral and deductible.

[55] Surprisingly, the two British Columbia cases arrived at contrary decisions when applying *Ratych* and *Cunningham* to similar facts. In *X. v. Y.*, the court heard evidence from a senior officer who stated that the RCMP had a right of subrogation that it was not pursuing. The plaintiff did not know if the RCMP was seeking reimbursement. The court concluded that the senior officer's evidence did not establish a waiver of the right of subrogation; no one with authority had made a clear

and unequivocal informed decision to waive the right of subrogation. Accordingly, even though the RCMP was not actively pursuing recovery of the benefit, the full amount of the wages paid were recoverable by the plaintiff. As noted in *Cunningham* at 415, "[i]t does not matter whether the right of subrogation is exercised or not."

[56] In *Slater*, there was no evidence before the court about subrogation or the right of the RCMP to reclaim the amount paid to the plaintiff. On this basis, the court distinguished *X. v. Y.* at para. 115:

> [115] The evidence in this case does not support a finding that the amount paid was in the nature of insurance. Furthermore, unlike the evidence in *X. v. Y.*, the evidence in this case does not support a finding that the RCMP has the right of subrogation to reclaim the amount paid to the plaintiff. There was no evidence whatsoever led on these issues. There remains an onus on the plaintiff to lead some evidence and she has failed to do so.

[57] With contradictory rulings on similar facts, I cannot resolve this issue on the basis of judicial comity. As noted by Justice Wilson in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), it is possible to go against the decision of a brother or sister judge if a subsequent decision has affected the validity of the impugned judgment. I must consider which of the two decisions to follow.

[58] While no evidence was presented about the RCMP's right of subrogation in the present case, this is of little consequence. The right of subrogation does not depend on the views of a senior officer as to its existence; it is an equitable right that arises in particular circumstances. The evidence about the employer's view of its right of subrogation (as in *X. v. Y.*) does not establish that right, just as the absence of that kind of evidence (as in *Slater*) does not disprove the existence of the right.

[59] In *Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd.*, 2001 BCCA 600 at paras. 45-47, the court explained the equitable doctrine of subrogation. It is an "empirical remedy" that prevents unjust enrichment in certain circumstances. The doctrine is flexible and does not depend on the existence of contractual rights; it depends on the payment of an indemnity:

> [45] In basic terms, subrogation means "the substitution of one party for another whose debt the party pays, entitling the paying party to all of the

> rights, remedies or securities that would otherwise belong to the debtor." see *Black's Law Dictionary*, 7th ed. (St. Paul: West Group, 1999) at 1441. It has long been available as an "empirical remedy" to prevent unjust enrichment in a variety of circumstances where the doctrine of privity would otherwise prevent recovery for the party who suffered a loss… [citations omitted].
>
> [46] The right of subrogation does not depend on the existence of a contractual term, but arises independently upon payment of the indemnity: see *Ryan v. MacGregor*, [1926] 1 D.L.R. 476 (Ont. C.A.) at 482. Although the doctrine of subrogation is most commonly associated with insurance cases, it has a more general application: see Morrison*, supra.* I think that it is equally applicable to private indemnity agreements, which are similar to insurance contracts.
>
> [47] The courts have also found a right of subrogation to exist in situations where the insurer was not legally obligated to pay its insured: see *Manitoba Public Insurance Corp. v. Digerness* (1994), 121 D.L.R. (4th) 331, following *King v. Victoria Insurance Co.*, [1896] A.C. 250 (P.C.). In *King*, the Privy Council set out the policy justification for allowing an insurer to be subrogated to the rights of the insured without proof that the loss sued on was within the terms of the insurance (at 254-5):
>
> > . . . it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must shew that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling.

[60] When I apply these principles to the circumstances here, I conclude that the AG Canada has a right of subrogation as it has fully indemnified Cpl. Provost for the loss of income suffered from the defendants' tortious actions. While it was not obligated to pay that loss based on a collective agreement or other contractual arrangement, that does not prevent the AG Canada from being subrogated to Cpl. Provost's rights. It is able to rely on the equitable doctrine of subrogation, which prevents the tortfeasors from being unjustly enriched by the payment of Cpl. Provost's loss. As the AG Canada has fully indemnified Cpl. Provost, it is able to stand in his shoes for this claim.

[61] Having found that the AG Canada has a right of subrogation, pursuant to *Cunningham*, there should not be any deduction for the wage loss benefits. That is the case whether or not the AG Canada seeks to recover the amount it paid from

Cpl. Provost. That is a matter that rests solely between Cpl. Provost and his employer.

[62] The second question is whether the right to subrogate has been waived. There is no basis on which I could conclude that the employer has waived its right of subrogation. Unlike in *X. v. Y.* and *Slater*, the AG Canada was before the court as a party in action M142533 seeking to recover its losses from the accidents involving the truck driven by Mr. Bolton. Counsel made submissions asserting the right of subrogation and supported the claim in Cpl. Provost's action on that basis. There is no doubt that the right has not been waived.

[63] In summary, Cpl. Provost is entitled to an award of $36,995 for past wage loss, representing the amount paid to him by the RCMP while he was off work.

What amount should be awarded for past loss of income, exclusive of the wage replacement benefits?

Position of the Parties

[64] Cpl. Provost seeks an award of $35,000 as compensation for his past loss of opportunity occasioned by the accident. There are two aspects to this loss: first, he says he lost the opportunity to work overtime after the accident; and second, he says he would have been promoted sooner but for the accident.

[65] The defendants say the evidence does not establish any loss for a delay in promotion. They are highly critical of the extremely optimistic promotion scenarios that form the basis for Mr. Benning's calculation of this alleged loss. They also advance this argument in relation to the claim for future loss arising from delayed promotion. The defendants say that promotions within the RCMP depend on numerous subjective factors and the plaintiff has failed to establish a real possibility of any such loss either in the past or the future. With regard to the alleged past loss, the defendants say there are other factors that influenced the time of his promotion that have nothing to do with the accident. These include the fact that Cpl. Provost took an eight-month parental leave in 2016.

[66] The defendants concede that Cpl. Provost lost the opportunity to work overtime and agree that some amount should be awarded for that loss to cover the period from April 2012 to January 2013. However, they say this should be a modest amount in the range of 10% of his annual income (about $7,500).

Analysis

[67] The law regarding past loss of earnings is not controversial. An award for past loss of income is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 at para. 32. A plaintiff need not establish the actual loss of earnings on a balance of probabilities; rather, a plaintiff must establish a real and substantial likelihood of the alleged pecuniary loss caused by the accident. The court must assess the value of the loss, taking into account the degree of likelihood of the loss: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; and *Sendher v. Wong*, 2014 BCSC 140 at paras. 159-162. Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is only entitled to recover the past loss net of income tax.

[68] I will consider the two aspects of this claim separately.

Loss of opportunity to work overtime hours

[69] Cpl. Provost was working with the property crime unit at the time of the accident. He estimates that he worked 8 to 20 hours of overtime each month. He explained in some detail why that occurred. The defendants do not seriously challenge his testimony. Corporals Simpson and Hughes provided similar evidence about the opportunities available to Richmond RCMP officers to work overtime hours. Cpl. Simpson says he earned $42,000 in overtime in the year before trial. Cpl. Provost says he was unable to earn any overtime during the months he was off work and during the graduated return-to-work period. Thereafter he did not work as much overtime as he would have without the accident.

[70] I accept much of Cpl. Provost's evidence about how much overtime he worked prior to the accident and about the availability of overtime work for RCMP

officers. At the time of the accident, his first child had yet to arrive and he had completed his MBA so he would have been able to work a lot of overtime hours.

[71] The overtime loss is not capable of easy calculation. Any overtime he worked after returning to work would have to be deducted and the amount awarded must be net of income tax. When I consider all of the circumstances, I conclude that a fair award for his net loss of overtime work is $27,500.

Loss of opportunity from delayed promotion

[72] Cpl. Provost also claims for the loss of opportunity to obtain an earlier promotion. The RCMP allows an officer to apply for promotion from constable to corporal after seven years' service. He was in a position to apply in January 2014. He could not apply until he was back to active duty in May 2014. He made his first application shortly after that. He was promoted to corporal in October 2016, but was appointed as an acting corporal, with pay at that level, in May 2015. The difference in the hourly rate for the two positions was not substantial: $41.25 for constable and $43.52 for corporal.

[73] The promotion process is time-consuming. The application takes 80 to 100 hours to prepare. The officer must show verifiable competencies and provide examples. There is no doubt that the process is subjective. In addition, an officer can only apply for a promotion when there is an opening for that position. Cpl. Provost maintains that his promotion was likely delayed because he was not performing active duties for two years and this meant he could not establish that he had the required competencies.

[74] I do not accept Cpl. Provost's argument on this aspect of the past income loss claim. There are a number of reasons for arriving at this conclusion:

- Cpl. Provost must show a pecuniary loss. While he was not promoted until October 2016, he began to receive a corporal's pay in May 2015, only one year after the earliest date for promotion. The "loss" for a delay in

receiving pay for the rank of corporal for one year (without overtime) is modest: less than $5,000.

- The plaintiff presented no evidence of someone within the RCMP bureaucracy with specialized knowledge of the promotion system about the opportunities that might have been available to the plaintiff or how his injuries may have harmed his opportunities. There was no direct evidence suggesting that being non-operational resulted in a delayed promotion. Further, the plaintiff's performance reviews were excellent before and after the accident.

- Cpl. Simpson was approximately six months senior to Cpl. Provost and also a good candidate for promotion. He was appointed acting corporal in September 2014, about eight months earlier than Cpl. Provost. In other words, the position that became available in 2014 may have been filled by the more senior police officer in any event.

- Cpl. Provost received very strong reviews from Deputy Chief Lipinsky for the "Special Project" work he performed after the accident. Deputy Chief Lipinsky offered high praise for the quality of Cpl. Provost's work. This would have assisted him with his promotion opportunities.

- The evidence showed that there is a strong perception amongst RCMP members of a bias in the promotion system. Cpl. Provost acknowledged that he believes it is subject to unfairness and inequity.

- Cpl. Provost's decision to take an eight-month parental leave in April 2016, which was taken "out of spite" when Cpl. Provost felt he was unfairly passed over for promotion, may have affected the timing of his promotion.

[75] When I consider all of these factors, I conclude that Cpl. Provost has failed to establish a real and substantial likelihood that he suffered a past pecuniary loss arising from a delay in promotion that was caused by the accident. Accordingly, the

total award for past loss of income is $27,500 (in addition to the sum of $36,995 as noted above).

What amount should be awarded for future loss of earning capacity?

Position of the Parties

[76] Cpl. Provost says he has suffered a significant future loss of capacity to earn income. His physical and psychological injuries impaired his ability to carry out the duties of a police officer up to trial and will continue to do so for the rest of his working life. He will continue to suffer pain, will be restricted in his ability to function, and is unable to complete the PARE as a result of his physical injuries. The PTSD will likely remain in partial remission but has left a serious psychological mark. He is unable to respond properly in emergency situations and doubts his ability to provide assistance to fellow officers in emergency situations. His inability to perform the POPAT means he has also lost the ability to "badge over" to a municipal police force where salaries are higher. He argues that his ability to advance within the RCMP ranks has been diminished as a result of his physical and psychological limitations. He is no longer able to compete as well as he once could in the highly competitive RCMP advancement process.

[77] Cpl. Provost says the loss scenarios in Mr. Benning's expert report, which show the magnitude of loss based on a variety of assumptions, provide a useful guide to quantification of his loss. He says the amount awarded has to take into account numerous negative contingencies arising from his injuries: he will not be able to work as many years as he could have without the accident; he will not be able to work as much overtime; he will not achieve promotion to as high a rank as he would have; he is unable to move to a municipal police force to take advantage of higher salaries in those forces; he will be unable to work when he requires knee replacement surgery; and he will miss work from time to time because of physical or psychological symptoms related to the accident.

[78] Cpl. Provost says that a fair valuation of his future loss of capacity to earn income is $380,000.

[79] Mr. Bolton says Cpl. Provost's career trajectory since returning from parental leave has been excellent and that he has not been negatively affected by the injuries suffered in the accident. He was promoted to corporal, has been working at full duties, and was moved to "Special Projects". In all positions he has received excellent performance reviews. Mr. Bolton says it is not possible to conclude that Cpl. Provost has suffered any disadvantage. While his ability to badge over to a municipal force later in his career may be affected by not being able to pass the POPAT, Cpl. Provost admitted that it is probable he will still have opportunities to double dip: that is, to receive his pension and work in a remunerative position based on his policing experience.

[80] Mr. Bolton says the Benning scenarios are unrealistically optimistic because they assume rapid upward promotion through the ranks. Mr. Bolton says there is no evidence to support the possibility that Cpl. Provost's career could have had that kind of rapid ascension without the accident. Nevertheless, Mr. Bolton acknowledges that Cpl. Provost has suffered some loss of overall capacity. He submits that a fair valuation of that loss is $90,000, approximately one year of his current salary.

[81] Dueck argues that Cpl. Provost has failed to prove a real and substantial possibility of a future loss of income. Rather, he has put forward an argument based on his goals and expectations. He asks the court to accept that any possibility that he will not attain those goals must be caused by injuries suffered in the accident. Dueck says that is not the proper way to approach this question. Cpl. Provost cannot establish that his expectations were realistic and the evidence shows that his career with the RCMP is progressing very well in spite of the accident. There is still a strong possibility that he will achieve his goal of becoming a senior officer or commissioner. However, if he does not do so, it would be mere speculation to conclude that any failure relates to the injuries suffered in the accident. This defendant says the evidence and arguments in support of Cpl. Provost's claim for future loss do not rise above mere speculation; he has not shown a real and substantial possibility of future loss caused by the injuries suffered in the accident.

Analysis

[82] The parties do not disagree about the applicable law; rather, they disagree about the extent to which Cpl. Provost has been able to establish a real and substantial possibility of a future loss. I conclude that the evidence presented does establish a possibility of future loss. This is because of the serious nature of the knee, neck and psychological injuries, and the lingering effects thereof. After setting out the relevant law, I explain how I have arrived at this conclusion.

[83] The legal framework for assessment of a plaintiff's future income loss has been described and refined by a series of decisions of the Supreme Court of Canada and the British Columbia Court of Appeal. These were recently summarized by Justice Voith in *Brewster v. Li*, 2013 BCSC 774 at paras. 142-143. I need not set out the full summary or the citations as the following principles are not contentious:

- The claim is for the loss of a capital asset that must be valued on simple probability where hypothetical events are given weight according to their relative likelihood.

- A plaintiff is entitled to be compensated for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring.

- The court may compare what the plaintiff would probably have earned but for the accident and what he will probably earn having suffered the injuries.

- The award must be fair and reasonable. The court must assess the loss rather than calculate it mathematically.

- Since the course of future events is unknowable, allowances must be made for contingencies, not all of which are negative.

- Two approaches can be used to assess a future loss of earning capacity: the earnings approach (where a pecuniary loss is quantifiable in a

measured way) or the capital asset approach (where the court considers factors such as those set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.)).

- While the task of quantifying the loss is not mathematical, the use of economic and statistical evidence can be a helpful tool in determining what is fair and reasonable: see *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[84] With these principles in mind, I will set out my assessment of what Cpl. Provost would probably have accomplished in his career but for the accident and what he will probably accomplish having suffered the consequences of the accident. This is not a case where his loss can be readily quantified in a measurable way. Rather, his loss must be assessed by considering his lost ability to take advantage of all of the opportunities that might otherwise have been available to him.

[85] Cpl. Provost is extremely bright, capable, personable and hard-working. His father was an RCMP officer. While he did not excel in high school, once he reached university Cpl. Provost began to apply himself. He took a business degree but decided that he wanted to pursue a career in policing, like his father. He worked for a short period for a national franchise business but once he was accepted into the RCMP, he dedicated himself to pursuit of a policing career with the RCMP. From his early days with the force, his goal was to advance through the ranks to the highest levels of the RCMP. Once he was posted in Richmond, he enrolled in a Master of Business Administration program in order to obtain the type of educational qualification that would enhance his chances of promotion. His dedication and work ethic enabled him to complete the MBA degree while continuing to work full time. He is also able to speak French, which is a considerable asset for advancing within the RCMP.

[86] Considerable evidence was led about the opportunities available for RCMP officers to leave the force and find work with a municipal police force. Many officers decide to do this in part because of the higher salaries offered by municipal forces.

Deputy Chief Lipinski gave evidence about how officers advance within the RCMP, as well as about the possibilities of moving to a municipal force.

[87] In spite of the attraction to a higher salary in municipal forces, I conclude that Cpl. Provost's career goal prior to the accident was to stay within the RCMP and attempt to work his way up the ranks. He was attracted to the national force. He liked the idea of becoming a senior officer in the largest, most important police force in the country. To use the colloquial term, he wanted to be a "big fish in a big pond". That does not mean, however, that he would never have taken advantage of a move to municipal policing. Like Deputy Chief Lipinski, he may have reached a stage in his career when he decided to do so. Prior to the accident, he would have kept the possibility of a move to a municipal force open as an option.

[88] It was evident from Deputy Chief Lipinski's evidence, as well as the evidence of others, that the process for obtaining promotions within the RCMP is highly bureaucratic. At the lower ranks it is also highly competitive. There is less competition the higher one climbs in the ranks, but at the same time, there are fewer positions. An officer must demonstrate the required competencies in order to be considered for promotion. In some positions an officer may have difficulty demonstrating recent experience with a particular competency, however, it is possible to re-establish a required competency even if the officer has not worked within an area for some time.

[89] The evidence established that there is a level of subjectivity to promotions. As in most large organizations, those charged with making decisions will have people that they favour. As Cpl. Provost complained to his psychologist, it is possible for advancement within the RCMP to be delayed "for political reasons". In other words, advancement within the RCMP is not dependent entirely on merit. This appears to be a common complaint among officers.

[90] Taking into account Cpl. Provost's success within the RCMP prior to the accident, and his résumé, skills and determination, I conclude that he probably would have risen to the level of a senior officer within the RCMP but for the accident.

He may well have risen to the position of a commissioned officer. The actual rank he would have attained cannot be ascertained with any level of confidence given the subjective variables involved.

[91] The first two questions that arise when considering whether the accident has changed Cpl. Provost's capacity to earn income are: (1) Is there any change in the likelihood he will remain with the RCMP? (2) Is there any change in his ability to take advantage of the opportunities to advance within the RCMP?

[92] I would answer the first question affirmatively. In light of his reduced ability to perform the PARE/POPAT, he is now less capable of changing police employers. In other words, it is more likely that he will continue to work for the RCMP. He has lost the ability to easily make a career change to a municipal police force. Of course, this is not entirely negative, as it remains his preferred career path. However, losing the ability to readily badge over to a municipal force is a real loss of capacity.

[93] The second question is more difficult to answer. As the defendants argue, in spite of the serious nature of his injuries, Cpl. Provost has continued to perform work at a very high level. This is demonstrated by Cpl. Provost's performance evaluations, which are filled with high praise for his abilities. This is the case even in the period of time when he had returned to work but was not yet fully operational. For example, the April 2013 review describes him as a "valuable asset on the Property Crime Unit (PCU)" and notes that "[d]espite [his] restrictions, Constable Provost has been an active and contributing member to PCU". The evaluation describes his "strong communications skills" that allow him to "quickly build rapport with persons, whether they are suspects or witnesses in routine investigations." He is able to work well with little or no supervision, work well within a team environment, and understands his role to make the unit successful.

[94] Cpl. Provost's performance evaluations in 2017 are superlative and include the following comments:

> In his short time as a supervisor, he has been observed to effectively challenge members and their investigation processes so as to ensure high

> quality investigations. His attention to detail undoubtedly ensures excellent client satisfaction.
>
> Cpl. Provost's strong intellect is obvious to anyone who engages in conversation with him or who reviews anything he writes. He is an exceptionally strong communicator who enjoys an enduringly quick mental agility.
>
> Cpl. Provost is a tenacious and intuitive investigator and this ability enhances his supervisory skillset nicely in that he will often recognize things that others have missed.
>
> Cpl. Provost has a firm grasp of both the operational and administrative responsibilities that are part of everyday policing and he does an excellent job of executing his duties in those contexts. He is forward thinking in that he can anticipate problems before they arise, communicate solutions he may have already pondered and implement strategies that contribute to the stasis of the good working environment…
>
> One of the hardest parts of supervision, which includes holding members accountable, albeit with tactful, honest sensitivity, is a skill that Cpl. Provost already inherently possesses. His leadership, interpersonal skills and professionalism have already proven him to be a strong supervisor.

[95] I conclude that Cpl. Provost remains a very strong candidate for advancement within the RCMP. In spite of his injuries, he continues to demonstrate strong leadership abilities. He has not lost the advantages of his education (the MBA degree and French language), intelligence and communication skills. He has also demonstrated leadership in a supervisory role. These demonstrated abilities will continue to allow him to succeed with his goal of advancing up the RCMP ranks.

[96] The more difficult question is whether Cpl. Provost will be able to advance as high up the ranks as he would have without the accident. While I cannot predict what will happen with any certainty, I can conclude that the injuries suffered in the accident have increased the likelihood that his career advancement will stall earlier than it otherwise would have. There are a number of ways this could happen. First, the change in his attitude and personality, while subtle, might have a negative impact over the years. Second, the lingering effects of the physical injuries may affect his ability to perform his job as the years go by. The combination of the physical and psychological injuries may cause him to hold back on seeking career advancement at some point in his future. In addition, it is likely Cpl. Provost will have at least one knee replacement during his working years and he may require two.

Depending on his age when he undertakes the surgery, he may have a lengthy absence from work.

[97] All of these possible future contingencies could affect his ability to advance within the force. While none of these are certain, the changes to his physical and emotional wellbeing, when taken together, create a real and substantial risk of future loss.

[98] In addition to the chance that he will not achieve as high a ranking as he might have without the accident, there is also a real and substantial risk that he will not work as long as he could have and the risk, as mentioned above, that he will be unable to take advantage of the ability to badge over to a municipal force.

[99] Mr. Benning's scenarios, while based on overly optimistic assumptions as to Cpl. Provost's without-accident career path, give some guidance on the loss that would be suffered by Cpl. Provost as a result of delayed promotion, early retirement, or an inability to move to a municipal force. For example, if it is assumed that but for the accident Cpl. Provost would have attained the rank of corporal in 2014 and retired as a superintendent at age 55, and that is compared with a "with accident" career of becoming a corporal in 2017 and retiring at 55 at one rank lower, his loss over the career is $320,000. If it is assumed he could have badged over to a municipal force and earned an additional $16,000 per year (the difference between the RCMP and Delta constable pay), the loss is $206,000. The pay gap between the RCMP and a municipal force goes up with each rank. For example, at the sergeant level the difference over a career is about $325,000.

[100] The assessment of the loss in this case is extremely difficult. This is because Cpl. Provost's career and lifetime earnings cannot be predicted, with or without the accident, with any certainty. However, I conclude that a fair award for Cpl. Provost's future loss of earning capacity is $225,000.

[101] In arriving at this assessment, I have assumed that the possibility of loss will be greater at the latter stages of Cpl. Provost's career. I concluded he has not

suffered any pecuniary loss arising from a delay in promotion up to the date of trial. In other words, in spite of the accident his career advancement is on the same path it would have been but for the accident. In addition, at the present time, he is managing to perform well, which means that for the next period of his career he will likely continue to be promoted at about the same time as he would have but for the accident. However, I conclude that he probably will not be able to sustain the same level of career advancement, or that he will not be able to work as long as he would have without the accident. Alternatively, he may not be able to take advantage of the ability to work for a municipal force if he decides to leave the RCMP. All of these are real and substantial possibilities leading to future loss.

[102] In summary, I award $225,000 in damages for the loss of future capacity to earn income.

What amount should be awarded for special damages?

[103] Cpl. Provost claims for expenses he incurred to assess his care needs after discharge from hospital and for training provided at a rehab clinic. The defendants do not object to those claims in the amount of $4,147.29. He also says he spent $3,339.48 on moving expenses in 2012 after the accident, as he was unable to do the move himself. However, he conceded at trial that even without the accident he would have rented a moving truck and bought beer and pizza for the friends who assisted him with the move. Cpl. Provost now seeks $7,200 in total for the special damages claim; he reduced the moving expense claim by approximately $300, which is his estimate of the cost of the truck rental, beer and pizza.

[104] Dueck says Cpl. Provost has not proved that the moving expenses would not have been incurred but for the accident. Mr. Bolton says the moving cost claim should not be allowed as Cpl. Provost has not produced invoices to substantiate the expense.

[105] A plaintiff is required to prove special damages: *Sandher v. Binning*, 2012 BCSC 1000. This will normally require production of receipts or invoices. However, a court is always able to accept oral evidence to prove a fact. Here, I am satisfied that

Cpl. Provost has provided sufficient evidence to establish that the moving expense claim is valid. I accept that he and Ms. O'Halloran would have carried out the move as described if Cpl. Provost had not been injured. I also accept that the cost of the move was approximately $3,000. In these circumstances, the proper way to deal with the imprecision in the proof of the expense is to discount it. Accordingly, I award the sum of $2,500 as the net increase in the expense of the move. The total amount of special damages awarded is thus $6,647.29.

What amount should be awarded for cost of future care?

[106] Cpl. Provost claims for two future care costs: a contingency to cover the cost of counselling if required; and amounts to cover the cost of future care for his knee, including a knee brace, a gym pass and physiotherapy to assist with his recovery after the anticipated knee replacement operation or operations. He seeks a total of $15,000.

[107] The defendants do not dispute that Cpl. Provost has proved he may require counselling in the future but say that the cost of the counselling he received prior to trial was paid for through the RCMP and there is no evidence to suggest he will have to pay for it himself in the future. They also say that the amount sought for the cost of care for the knee injury is too high.

[108] I have no hesitation in concluding that Cpl. Provost has established that he will probably require counselling and will probably require at least one knee replacement surgery. He will also need to access physiotherapy and may require a knee brace. I do not accept that the accident has or will cause him to incur additional expenses for a gym pass.

[109] While I accept that he has proved the need for these future costs, the amounts suggested are too high based on the evidence presented. While Cpl. Provost's counselling expenses have been paid in the past by the RCMP and may be paid by his employer in the future, the right of subrogation would apply to those future expenses if and when they occur. I conclude that a fair award for the possibility of future counselling is $3,500. I base that amount on the estimate of

$6,000 for one year of counselling, which I have discounted based on the various contingencies, including timing of the counselling sessions and the number of sessions required. I award $1,500 to cover future knee care expenses taking into account similar contingencies.

[110] In summary, I award the sum of $5,000 for the cost of future care.

What amount should be awarded to the AG Canada for vehicle damage and medical expenses incurred for the benefit of Cpl. Provost?

[111] The parties agree that the AG Canada is entitled to recover the cost of the repair or loss to the RCMP vehicles damaged in the two accidents, in accordance with the liability determination. The total cost to repair the Chevrolet Tahoe was $9,250.53. The Hyundai driven by Cpl. Provost was written off and the parties agree it had a value of $13,801.

[112] The parties agree that the AG Canada paid $43,500.69 in medical and rehabilitative costs for Cpl. Provost as a result of the injuries suffered in the accident. While they agree on quantum of the special damages paid for Cpl. Provost, the defendants oppose the claim on the basis that the AG Canada has no legal basis on which to advance it. However, they conceded in argument that their defence stands or falls on the question of whether the AG Canada has a valid and enforceable right of subrogation.

[113] As I concluded above, having fully indemnified Cpl. Provost for his lost income, the AG Canada has a right of subrogation. Applying the same principle to its payment of the medical and rehabilitative costs, I arrive at the same conclusion; the AG Canada is entitled to be indemnified for the special damages it paid on behalf of Cpl. Provost. In arriving at this conclusion, I note that the court in *X. v. Y.* made a similar award when it allowed the special damages claim for physiotherapy expenses that had been paid by the AG Canada.

Summary

[114] I award the following amounts to Cpl. Provost:

a) Non-pecuniary damages: $150,000;

b) In-trust damages for Ms. O'Halloran's services: $10,000;

c) Wages and benefits paid by the RCMP: $36,995;

d) Past income loss: $27,500;

e) Future income loss: $225,000;

f) Special damages: $6,647.29; and

g) Cost of future care: $5,000.

[115] The AG Canada is entitled to damages as follows:

a) Vehicle damage to the RCMP Chevrolet: $9,250.53;

b) Vehicle damage to the RCMP Hyundai: $13,801; and

c) Medical/rehabilitative costs for Cpl. Provost: $43,500.69.

[116] Subject to any submissions the parties wish to make on costs, Cpl. Provost and the AG Canada are entitled to costs at Scale B.

"Butler J."