IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Geddert v. Stokes,*
2021 BCSC 656

Date: 20210409
Docket: M158425
Registry: Vancouver

Between:

Franz Bernhard Geddert

Plaintiff

And

Paul Richard Stokes

Defendant

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:	J.S. Stanley M. Murphy
Counsel for the Defendant:	R.C. Brun, Q.C. S. Christopher
Place and Date of Trial:	Vancouver, B.C. January 4 – 8, and 11 – 15, 2021
Place and Date of Judgment:	Vancouver, B.C. April 9, 2021

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[1] The plaintiff, Franz “Frank” Geddert, is a window washer. He was injured when he fell from a ladder on August 13, 2015 while working at a condominium development at 210 West 2nd Street, in North Vancouver, British Columbia (“the accident”).

[2] The plaintiff alleges that the accident was the result of the defendant striking the ladder with his motor vehicle, and seeks damages from the defendant for the injuries that he sustained in his fall.

[3] The defendant, Paul Stokes, was a deliveryman living in the condominium complex at the time of the accident. He concedes that he was negligent in a manner that contributed to the accident, but contends that the plaintiff is partly liable for the accident. In the alternative, the defendant contends that the accident was caused or contributed by the negligence of others unnamed as defendants or third parties. In his response to civil claim, the defendant identified only C&C Property Group Ltd. (“C&C”), the property management firm for the condominium development.

[4] C&C was, at all material times, contracted to the owners of the condominium development, Strata Plan VR-278 (the “Strata”), to provide management services to the condominium complex where the plaintiff was injured.

I. Background

[5] The plaintiff was born on October 3, 1959. He was 55 at the time of the accident and is now 61. He was adopted by a loving couple as a young child, as was his brother. Both boys described their respective childhoods a “happy” and “fortunate”. The plaintiff attended and graduated from high school in Vancouver in 1977. After high school, he attended the British Columbia Institute of Technology where he took courses in plumbing and pipefitting, which he completed in 1983. Due to a shortage of available positions at the time, he was unable to secure an apprenticeship in plumbing, and worked as a labourer.

[6] In 1984, the plaintiff obtained employment as a window washer with Ace Window Washing, where he received most of his training. He worked for this

company for some six years, and then began his own sole proprietorship, Coast Window Cleaning, where he continued to work until the accident.

[7] The plaintiff preferred working on high and low-rise buildings as opposed to residential homes. He built his business primarily by word-of-mouth references from his customers. He estimated that about 60% of his work was on low-rise buildings of four stories or less. He took great pride in his work, which he enjoyed, looking forward to going to work each day. The work had the added benefit of keeping him very fit, another matter in which he took great pride.

[8] The plaintiff married his first wife in 1984. The couple had three sons.

[9] In 1988, the plaintiff fell and injured the scaphoid bone in his left wrist. He was off work for six months. The injury did not affect his ability to perform at work, but did affect his ability to play golf and hockey.

[10] The plaintiff and his first wife separated in 1999, and later divorced. He married his second wife in 2001, and they separated in 2009.

[11] Shortly thereafter, the plaintiff began a romantic relationship with another woman, which continued until roughly 2013. They took a number of trips to France, a place that he enjoyed.

[12] Shortly after the conclusion of this relationship, the plaintiff began a relationship with a woman named Angie Vinnai, whom he had originally met on a trip to Mexico in 2009 or thereabouts. Ms. Vinnai worked as a registered nurse in Ontario. The two were reacquainted when Ms. Vinnai visited British Columbia in 2013.

[13] The plaintiff says that in 2014, he had what he described as an epiphany regarding his love life and his treatment of women. He says he dropped his “ice man” persona. I understood his self-description to capture a self-imposed detachment from others, for self-protection. I also understood that his persona

manifested in an inability to express emotional attachments or feelings to others. Before this epiphany, he described himself as a “bull in a china shop”.

[14] The plaintiff confirmed that Ms. Vinnai had issues with alcohol when he became reacquainted with her. The plaintiff and Ms. Vinnai were engaged in either 2014 or 2015. Ms. Vinnai moved to British Columbia to live with the plaintiff about six weeks before the accident. The plaintiff and Ms. Vinnai had not married by the time of the accident, but the plaintiff stated that he changed his approach with Ms. Vinnai, saying he tolerated things with her that he would not have tolerated before.

[15] Ms. Vinnai gave evidence that it was her intention to secure registration as a nurse in British Columbia, and that she began the process to do so in 2014, but never completed it, nor obtained employment of any kind in this province.

[16] The plaintiff and Ms. Vinnai separated in the fall of 2016. He confirmed he was waiting to see if she had dealt with her alcohol issues before giving their relationship a second chance.

II. Legislative Provisions

[17] The plaintiff submits that the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318 [*Motor Vehicle Act*], contains provisions that help inform the requisite standard of care.

[18] Section 144(1) of the *Motor Vehicle Act* prohibits careless driving:

> **144**(1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or

[19] Section 193 of the *Motor Vehicle Act* mandates caution when backing up a vehicle:

> **193** The driver of a vehicle must not cause the vehicle to move backwards into an intersection or over a crosswalk, and must not in any event or at any place cause a vehicle to move backwards unless the movement can be made in safety.

[20] Section 1 of the *Motor Vehicle Act* defines “highway” as including “every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited”.

[21] The *Workers Compensation Act,* R.S.B.C., 1996, c. 492 [*Workers Compensation Act, 1996*], was in force at the time of the accident. What was then s. 10(7) provided that:

> (7) If, in an action brought by a worker or dependant of a worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss or damage caused by that negligence must be determined although the employer or worker is not a party to the action.

[22] Sections 115(1) and 116 of the *Workers Compensation Act, 1996* set out the general duties of employers and workers, respectively. Those provisions provided, in part, that:

> **115**(1) Every employer must
>
> (a) ensure the health and safety of
>
> (i) all workers working for that employer, and
>
> (ii) any other workers present at a workplace at which that employer's work is being carried out, and
>
> (b) comply with this Part, the regulations and any applicable orders.
>
> **116**(1) Every worker must
>
> (a) take reasonable care to protect the worker's health and safety and the health and safety of other persons who may be affected by the worker's acts or omissions at work, and
>
> (b) comply with this Part, the regulations and any applicable orders.
>
> (2) Without limiting subsection (1), a worker must
>
> (a) carry out his or her work in accordance with established safe work procedures as required by this Part and the regulations,

> (b) use or wear protective equipment, devices and clothing as required by the regulations

[23] Section 13.1 of the *Occupational Work and Safety Regulations,* B.C. Reg. 296/97, defines a movable work platform as "a work platform that can be re-positioned during the course of the work".

[24] Section 13.5(2) of the *Occupational Work and Safety Regulations* provides that:

> (2) A portable non-self-supporting ladder must,
>
> (a) as shown in Figure 13-1, be positioned so that the ladder is leaning against the vertical plane of support at an approximate angle of 75° when measured from the horizontal plane of support,
>
> (b) if the ladder provides access to or egress from an upper landing,
>
> (i) project approximately 1 m (3 ft) above the upper landing

[25] Sections 18.1 and 18.3 of the *Occupational Work and Safety Regulations* provide:

> **18.1** In this Part:
>
> "traffic control" means the use of signs, flashing arrow boards, sign boards, buffer or shadow vehicles, barricades, cones, barriers, detours, traffic lights, traffic control persons (TCPs) or other techniques and devices to manage the flow of traffic;
>
> "traffic control person" or "TCP" means any person designated or assigned by the employer to direct traffic.
>
> …
>
> **18.3** Traffic control equipment, arrangements and procedures must meet the requirements of the latest edition of the *Traffic Control Manual for Work or Roadways* (the "*Traffic Control Manual*") issued by the Ministry of Transportation, unless otherwise specified by this Regulation.

III. The Workers Compensation Defence

[26] In his response to civil claim, the defendant has alleged that both he and the plaintiff were, at the time, workers as defined in the *Workers Compensation Act, 1996,* and that the plaintiff's action is therefore barred by s. 10(7) of that act.

[27] The evidence before me establishes that at the time of the accident, the plaintiff was covered by Personal Optional Protection under the *Workers Compensation Act, 1996*, and that both C&C and the Strata were employers under that act.

[28] In *Mitrunen v. Anthes Equipment Ltd.*, 1985 CanLII 566 (B.C.C.A.), the Court of Appeal interpreted s. 10(7) of the *Workers Compensation Act,* R.S.B.C. 1979, c. 437 (which remained essentially unchanged in the *Workers Compensation Act, 1996*) to mean that:

> If, in an action brought by a dependent of the worker, it is found that the death [or injury] was due partly to a breach of duty of care of one employer under the part, no damages are recoverable for the portion of the loss or damage caused by the negligence of that employer.

[29] The defendant says the plaintiff cannot recover any damages for loss that arises out of a breach of duty of care owed to him either by C&C or by the Strata. He says this will be so even if the Court determines that the plaintiff did not contribute to his injuries in any fashion.

[30] Alternatively, the defendant argues that if the Court determines the plaintiff did contribute to his injuries, then his right of entitlement against the defendant would be reduced not only as a consequence of his own contributory negligence, but also by the amount of any damages attributed to the breach of duty by C&C or the Strata.

[31] C&C was not named as a party in this action, and the Strata was not named at all in the pleadings. Despite this, I have concluded that if I find the plaintiff was contributorily negligent, then I must also determine if C&C and the Strata are liable for the plaintiff's injuries.

[32] In *Piper Estate v. Mitsubishi Heavy Industries Ltd.,* 2009 BCSC 1310, Mr. Justice Pitfield interpreted s. 10(7) as prohibiting the addition of an employer covered by the *Workers Compensation Act, 1996* as a third party. Mr. Justice Pitfield concluded that the intent of that act was to eliminate or reduce litigation. He found that the court can make the required finding of whether the employer contributed to

the injuries without the employer present as a third party. He found that any inconvenience created by the statutory prohibition on adding employers as third parties could be overcome by seeking production of the employer's records and examining the employer.

IV. The Accident

[33] The building where the accident occurred has 36 units and is four stories in height. It has two separate garages, each with separate garage doors to the east and the west of a central walk-in entrance to the building. There are windows on the three levels above the two garage doors.

[34] On August 11, Ms. de Haan, the property manager for the condominium building, arranged for Ms. Scott, the representative of the condominium's strata corporation to post signs in the building advising that all inaccessible windows, the outside of the balcony railing glass, skylights and the front entrance would be cleaned from 8:30 a.m. to 5:00 p.m. on August 13, 14 and 17, 2015. Residents were advised that they should close all windows and remove all screens to accommodate the window cleaning.

[35] The plaintiff gave evidence that there are a variety of means by which outside glass can be cleaned. One way is to climb up a ladder, and work from the ladder. A second way is to climb up a ladder and step off the ladder to work at each story from available patios or other outside structures. A third way to clean outside windows is by using an electronic boom instead of a ladder. A fourth way to clean outside windows is with the use of a Tucker pole. This pole can be extended up to 60 feet, and allows a hose to run inside it. A fifth way to clean outside windows is by securing a bosun's chair to anchors on the roof of a building and then lowering yourself down from the roof. A sixth way is to use an electronic boom, which can be used if roof anchors are unavailable. A seventh way to access upper levels is by the use of a movable platform.

[36] Whichever method of access to the glass is employed can restrict the means by which the glass is actually cleaned. The plaintiff gave evidence that few

customers were prepared to foot the $400-500 expense to permit the use of an electronic boom.

[37] Working from a ladder or on a patio or from a bosun's chair allows the use of a squeegee, whereas the use of a Tucker pole does not. The plaintiff and at least one of his customers are of the firm view that the use of a squeegee produces a superior result.

[38] The plaintiff explained that most "low-rise" buildings lack roof anchors, and cannot be cleaned from a bosun's chair. The condominium complex at 210 West 2nd Street in North Vancouver does not have anchors on its roof, so the use of a bosun's chair was not an option for the plaintiff.

[39] The plaintiff gave evidence that he would normally start work at 8:30 a.m., but he has no recollection of the events that occurred in the morning of August 13, 2015, nor of the accident itself, nor of the six weeks or so after his fall.

[40] The plaintiff said that he believed that on the day of the accident, he arrived at the condominium complex sometime before 10:30 a.m. To wash the windows on the stories above ground level, he intended to climb up a 40-foot ladder, step from it onto the outdoor patios, and clean the windows from the patios. While he gave evidence that he intended to clean more than the outside glass that the property manager expected him to clean, I find that his intention did not affect how he would reach the various patios.

[41] It is apparent from photographs taken shortly after the plaintiff's fall that at the time of his fall, he was working above the eastern garage door. The defendant was exiting the garage by reversing onto the driveway when his van contacted the ladder. The plaintiff's fall was caused by the contact between the defendant's van and the ladder that the plaintiff was on at the time of the accident.

V. Liability

(a) Relevance of the Occupational Work and Safety Regulations

[42] The defendant contends that Part 18 of the *Occupational Work and Safety Regulations* contemplates people working in areas where there is potential for conflict with vehicles. Working in such an area is permissible if reasonable steps are taken to address the potential for conflict with vehicles.

[43] In *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, the Supreme Court of Canada made it clear that the civil consequences of breach of a statute should be subsumed in the law of negligence and the notion of a nominate tort of statutory breach, giving a right to recovery merely on proof of breach and damages, should be rejected. The Court determined that proof of a statutory breach may be evidence of negligence and the statutory formulation of the duty may afford a specific and useful standard of reasonable conduct.

[44] The defendant contends, and I accept, that the duties imposed on workers and employers pursuant to the *Workers Compensation Act*, *1996* and the regulations thereto, while not binding for the determination of liability, are nonetheless some guidance as to what might be seen as a reasonable standard of care for workers and employers.

(b) Negligence of the Defendant

[45] The plaintiff contends that the defendant is wholly liable for causing his fall from the ladder.

[46] The defendant contends that the plaintiff and/or C&C were partly liable for the accident.

[47] In order to assess the liability, if any, of the plaintiff or C&C, it is first necessary to examine the admitted liability of the defendant.

[48] The defendant worked as a deliveryman at the time of the accident. He owned and drove a 2005 GMC Savana van. He gave evidence that on the day of the

accident, at around 9:00 a.m., he reversed his van slowly out of the parking garage and up the driveway, and came into contact with the plaintiff's ladder.

[49] The plaintiff alleges that the defendant did not observe, nor pay sufficient attention to the notice of window washing that was there to be seen in the elevator, the lobby, and the door out to the garage that the defendant would have used to gain access to the garage.

[50] Ms. Scott gave evidence that her usual practice was to post and deliver such signage to the residents of the condominium complex to warn of expected tradesmen in various locations around the condominium complex. But Constable Polat, who attended the complex shortly after the accident, did not notice such signage anywhere other than the elevator. The defendant did not use the elevator on the day of the accident, and denied seeing such signage that day.

[51] I am not persuaded that the defendant saw the signage that warned of window washing at the complex on August 13, 2015.

[52] At trial, the defendant confirmed the description of the accident that he gave at his examination. He described backing his van out of the parking garage and hitting the ladder as follows:

> 86Q If you can just describe the accident for me, as best you can.
>
> A Yes. So, I got into my van and it was forward facing in the spot. So, I pulled to the right, and we had the first spot or, like, yeah, the first spot on the right when you go to the parkade. So, I had to pull up forward to back out. And once I pulled forward, I opened the gate. Once the gate was coming up, I looked in my right rear-view mirror and saw that there was a pickup truck. So, I turned my vehicle sideways so that I would back up beside it. And I looked in my left mirror, there was nothing there, so I backed up. And just as I was leaving the gate, I hit the ladder, and then as I hit the ladder, I saw him fall. And then I pulled up, just because the gate was going to close on my van, got out of the van, came out to see he was on the ground, and called for help, and then called 911.

[53] The plaintiff contends that the defendant's conduct fell below the standard of care by needlessly opting to reverse out of the garage, when there were other safer

options available to him, and by not taking the care necessary when he reversed his van.

[54] The plaintiff argues that the defendant failed to turn his van around before exiting the garage. He argues that ample room was available in the garage to do so in the wide aisle. The plaintiff contends that the absence of most cars during usual business hours enhanced the defendant's ability to do so. Instead, the plaintiff says that the defendant failed to consider that reversing his van the way he did could not be anticipated by those around him.

[55] The defendant agrees that there was a way for him to park his vehicle so that he did not have to back out of the garage, and could drive forward out of the garage. He also agrees that he was aware from his prior experience that vehicles were often parked where the plaintiff had parked his truck; other residents, gardeners, or others.

[56] Alternatively, the plaintiff says the defendant could have driven his van forward out of the parking lot, after negotiating a sharp left turn from his parking spot, or made a less sharp turn, to then back into the parking lot to straighten his vehicle before proceeding to drive forward up the driveway.

[57] Alternatively, the plaintiff contends that the defendant could have opened the garage door and simply looked to his left to see if there were any obstacles in the driveway before he started to reverse his van.

[58] The defendant confirmed the following questions and answers from his examination for discovery at the trial:

> 89Q Why wouldn't you just go front?
>
> A Because the way our parking spot is, is I can't turn because there's a wall, so. And I can't go forward and turn. So, because of my van, I had to pull to the right, and then back out.
>
> 90Q Is there any way to park the van so that you're back facing as opposed to front facing up against the wall?
>
> A I mean, yea, if I backed in, and then pulled forward into the spot, but the way that I came into my parking garage is forward, and so I back in.

…

201Q And I take it you are aware that, as an operator of a motor vehicle, you realize that you can't back up your vehicle unless you know it's safe to do so?

A I guess, yeah.

…

212Q All right. And I take it, because it didn't have any windows in the back of the van, you knew that you couldn't see what was fully behind you based upon using your passenger's side mirror and your driver's side mirror; correct?

A Yes.

213Q So, you knew that when you were backing up in that vehicle, you wouldn't know exactly what was behind you, because both of your mirrors wouldn't allow you to see fully what was behind you; correct?

A Yes.

214Q And you knew that on the day of the accident when you backed up and hit Mr. Geddert's ladder; correct?

A Yes.

[59] The defendant saw the plaintiff's truck parked on the driveway before he backed out of the garage but did not take this as a sign that people might be in the area, failing to see the ladder and the cone, which were there to be seen, and which would have alerted him not to drive into the ladder.

[60] The defendant's van was not equipped with rear windows and he knew that he could not see what was behind him by using just the available passenger's and driver's side mirrors. He gave evidence that based on his prior experience, he believed it was safe to back his vehicle out of the garage as he did on the day of the accident. He was sorely mistaken.

[61] While the defendant gave evidence that he routinely backed out of the garage and proceeded backwards up the driveway, over the sidewalk and onto the travelled street on West 2nd Avenue, I do not accept that he could expect to do so safely, as he could not see what was behind him while making those maneuvers.

[62] I reject the defendant's assertion that his practice of backing up the driveway was safe because he had experienced no prior difficulty from doing so. Either his

practice was safe, or it was not, and the absence of any prior problem may have been nothing more than good fortune.

[63] The authorities establish that motorists must exercise a high degree of care when reversing a vehicle.

[64] In *Araujo v. Vincent,* 2012 BCSC 1836 [*Araujo*], the parties attended the same high school. While leaving the school ground, the plaintiff dropped her cell phone, and bent over to pick it up. While she did so, the defendant backed his truck into her.

[65] Madam Justice Griffin commented on the dangers of reversing a vehicle and standard of care required when doing so:

> [34] It is clear that backing up a vehicle poses greater risks than driving forward, because of the fact that visibility is impaired and because typically the driver will have been facing forward, looking in front, and not looking behind prior to the decision to reverse. When facing forward, a driver sees people or objects approaching from the side and can anticipate that they might be passing in front of the vehicle suddenly or even when they disappear from view, such as a running dog, a cyclist, or a small child, but the same cannot be said for what is happening towards the rear of the vehicle. A driver does not have rear peripheral vision to alert him to approaching objects.
>
> [35] A reasonable and prudent driver foresees the possibility that something might have crossed into the vehicle's reverse path, unnoticed by the driver. A reasonable and prudent driver understands this and only backs up a vehicle after taking time to look behind. A reasonable and prudent driver considers the circumstances of where the vehicle is and makes an assessment of how much time is needed to look around to make sure nothing has crossed into the vehicle's path.

[66] In *Araujo,* Griffin J. found the defendant had not taken enough time to observe what was happening behind his vehicle and did not meet the standard of care of a reasonable and prudent driver.

[67] In *Kope v. Tse*, 2019 BCSC 1197, Madam Justice McDonald referred to prior authorities, and concluded that:

> 47 Section 193 of the *Motor Vehicle Act* effectively prohibits a driver from causing a vehicle to move backwards unless it can be done safely. Section

> 193 places the onus to ensure safety and a high standard of care upon the reversing driver. Courts have described this standard as including a duty to be aware, as reasonably possible, of objects behind and in the driver's path while reversing. Justice Hyslop noted that importantly, this is expected "... not just when the driver starts to reverse, but throughout the entire reversing procedure and to its completion": *Carson v. Henyecz*, 2012 BCSC 314 at para. 99.
>
> 48 While s. 193 imposes a high standard of care, it is not does not impose absolute liability, nor does it require perfection. This Court has interpreted the standard to mean a driver who is backing up must guard against "such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience", but the driver "...is not bound to guard against every conceivable eventuality": *Araujo v. Vincent*, 2012 BCSC 1836 at paras. 30-31 citing *Dechev v. Judas*, 2004 BCSC 1564 at para. 22.

[68] In *Sullivan v. Sullivan*, 1996 CanLII 2548 (B.C.S.C.), Mr. Justice Blair found the defendant wholly liable for an accident which occurred as he had parked his truck in such a way that prompted him to reverse out of a parking area onto a driveway. The defendant had modified his pickup truck for cosmetic reasons which had the effect of creating blind spots behind the pickup that were not accommodated by his rearview mirrors. While backing up, the defendant struck a child.

[69] Mr. Justice Blair found the defendant negligent in reversing without properly checking to ensure that there were no children in the area and that he could move his pickup safely, knowing that children used the parking area and driveway as a playground. Further, Blair J. found that the defendant was negligent in reversing his pickup with a restricted rear view resulting, from the modifications that heightened the vehicle.

[70] As indicated above, the defendant concedes, and I agree, that he was negligent in backing his van blindly out of the garage, and up the driveway, causing the accident that injured the plaintiff.

(c) Contributory Negligence

[71] In *Bradley v. Bath*, 2010 BCCA 10, at para. 25, Mr. Justice Tysoe referred, with approval, to the following passage from John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 302:

> Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the *accident* in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt.

[72] The plaintiff denies that he was contributorily responsible for the accident. He contends contributory negligence requires that carelessness on his part must be carelessness in relation to the risk which made the actual harm that he suffered foreseeable; *Cempel v. Harrison Hot Springs Hotel Ltd.*, (1997) 43 B.C.L.R. (3d) 219 at para. 13. The plaintiff argues that in the circumstances, he could not have expected the defendant to emerge from the parking lot driving his van as he did.

[73] The defendant relies on *Mahe v. Boulianne*, 2010 ABCA 32 [*Mahe*]. In *Mahe,* the plaintiff claimed against a farm owner for injuries sustained when he fell off a ladder that had been mounted on a platform constructed on top of the truck. The method of doing the work was suggested by the defendant, and the plaintiff proceeded with the recommended approach. The plaintiff fell off the ladder at a time when he was not protected with a safety harness or other precautions. On appeal, it was determined that the fault of the farmer was in failing to warn the plaintiff of a known defect. The fault of the tradesman was in failing to use the ladder in an acceptable way, in conjunction with appropriate safety equipment. It was ultimately determined that the plaintiff was 60% at fault and the defendant 40% for failing to warn of the known defect.

[74] Here, there was no known or undisclosed defect in the plaintiff’s set-up, so the decision in *Mahe* does not assist the defendant.

[75] The plaintiff submits that it was reasonable for him to temporarily place his ladder on the driveway knowing he would only be on it for one minute to access the

patios and having taken reasonable precautions to alert vehicles to his presence and which he had effectively used many times in the past.

[76] Mr. Marcoux was the Worksafe B.C. investigator who attended the scene of the accident (now a Worksafe B.C. occupational safety officer). He found fault against the plaintiff, the defendant, and C&C for the accident. He agreed that Worksafe performs a results-based analysis to reach conclusions and conceded that he did not know the safety rationale behind many of the standards he referenced. His job was simply to apply those standards. When Mr. Marcoux reached his conclusions on the cause of the accident, he was unaware that the plaintiff was to be on the ladder for less than fifteen minutes. He agreed that this would obviate the need to use a harness or restraint system as otherwise required by the Worksafe standards.

[77] Part 18 of the *Occupational Work and Safety Regulations* refers to the *Traffic Control Manual for Work on Roadways*, but Mr. Marcoux gave evidence that this publication by the Ministry of Transportation and Highways does not apply to work on private residences and would not apply in this instance. This is consistent with s. 1.2.2 of *Manual* which states that the application of the *Manual* is limited to municipal roads and provincial highways.

[78] Before he ascended his ladder, the plaintiff in this case placed his truck on the eastern side of the driveway, blocking the use of that side of the driveway. The defendant was aware of the presence of the plaintiff's truck. The driveway was 16 feet 10 inches wide, 33 feet 6 inches long from the garage door to the sidewalk, and had an 8% slope.

[79] The plaintiff put his ladder more or less in the center of the driveway, and placed an orange cone to the west of the ladder, and a step ladder on the western side of the driveway covering a part of the driveway itself. He left colored bottles of cleaning fluid on the driveway between the step ladder and the cone.

[80] The plaintiff gave evidence that he had often used this configuration in the past, without encountering difficulty or danger. As with the defendant's assertion that he had no prior problem from his practice of backing out of the garage and up the driveway, I reject the plaintiff's assertion that his set-up, which he said he had previously employed, can be seen as inherently safe, just because he had experienced no prior difficulty arising from it. Either his set-up was safe, or it was not.

[81] The standard required by the *Occupational Work and Safety Regulations* and the *Traffic Control Manual for Work on Roadways* requires traffic control devices to fulfill a need, command attention, convey a clear, simple meaning, provide adequate time for a response, and command respect of road users. As I have said, this standard does not apply to private residences. Nonetheless, the plaintiff argues his configuration would have complied with this standard.

[82] In this case, the need would be to warn drivers driving forward from the garage and up the driveway, and not to address the actions of someone reversing blindly, as was the defendant. I find that the configuration that the plaintiff used was sufficient to command the attention of reasonable users of the driveway and convey the message that a worker could be above that driveway. That would afford a reasonable driver adequate time to respond to the presence of such a worker, and to respect the safety of that worker.

[83] Mr. Marcoux said that the existence of an 8% slope precluded the use of ladder, the rationale for this standard being to guard against a risk of falling. He said the alternative to using a ladder to meet the Worksafe standards to address the issue of the slope was the rental of a movable platform that would provide a mobile platform. Mr. Marcoux gave evidence that a suitable one could be rented for as little as $100 per day.

[84] However, I find that the placement of the ladder on the slope in this case played no role in the accident as the ladder did not fall. It remained erect even after it was struck. Even a sizeable platform would have made no difference, as the

defendant could not have seen it any better than the ladder itself as he backed blindly out of the garage.

[85] I find that the plaintiff did not fall because of the placement of the ladder on the 8% slope, and conclude that its placement there was not in any way causative of the accident and cannot form the basis for a finding of contributory negligence.

[86] I must consider whether the plaintiff should have foreseen that a vehicle driver would proceed as the defendant did, to back up the driveway without the ability to see what was behind him.

[87] The defendant drove his van into the plaintiff's ladder, while backing out of the eastern garage in his van. His van had no back windows, and in the result, while able to use his side-view mirrors on either side of his van, the defendant was unable to see directly behind him, and was effectively backing up the driveway blind.

[88] I find that it would be unreasonable for the plaintiff to anticipate a driver acting in the negligent fashion that the defendant used to exit the garage, and conclude that he was not obliged to govern himself in anticipation of such negligence.

[89] The defendant relies on *Swan v. Stall* (19 Oct. 1982), Vancouver B802059 (B.C.S.C.) [*Swan*]. In that case, Mr. Justice Munro considered the case of a deceased worker who had been working on a giraffe truck with bucket located on the Granville Street Bridge, when the vehicle was rear-ended causing him to be thrown from the elevated bucket. The bucket was equipped with a safety belt device which he was required to wear pursuant to the Worker's Compensation Board regulation. Mr. Justice Munro concluded that had the plaintiff been using the safety belt, it is probable he would have sustained less severe injuries and would not have fallen to the roadway and been killed. The court found the deceased to be 20% at fault for his failure to comply with the Worker's Compensation Board regulations.

[90] I find that the plaintiff had ascended his ladder to the second story of the condominium complex sometime before 10:30 a.m. on August 13, 2015. I find that he did so intending to step off the ladder onto the second-floor patio directly above

the eastern garage entrance in order to clean the glass on the patio, and that he was on his ladder for a maximum of two minutes.

[91] The plaintiff did not secure himself to the balcony above the eastern driveway given the short length of time that he expected to be on the ladder, the fact that he would need to gain access to the balcony via his ladder, and the questionable ability of the posts on the balcony to support his weight, in the event he fell from the ladder.

[92] I find that the circumstances facing the plaintiff in *Swan* are distinguishable from this case, and accept that the plaintiff in this case could not have secured himself as proposed by the defendant before he reached the second story of the condominium complex where he was working. I also find that his plan to leave the ladder shortly after ascending it obviated the need to secure himself as the defendant says he ought to have.

[93] I find that the plaintiff was not contributorily negligent for the accident.

(d) C&C

[94] In his response to civil claim, the defendant sought to apportion fault to C&C. He made no reference to the *Occupier's Liability Act* R.S.B.C. 1996, c. 337 [*Occupier's Liability Act*], and no evidence was tendered to demonstrate that C&C was an occupier of the condominium complex. The plaintiff submits, and I find, that the *Occupier's Liability Act* does not apply to C&C.

[95] The standard of care flowing from any duty owed by C&C must be assessed having reference to all of the evidence.

[96] The defendant's allegations of negligence against C&C include inadequate signage and a failure to notify the residents of the condominium complex of the plaintiff's expected presence and work at the complex. The defendant also alleges that C&C failed to place adequate cones or barriers on or about the driveway so as to divert vehicular traffic from coming into contact with the plaintiff or his equipment.

[97] I find that while Ms. Scott took some steps to notify the residents of the condominium complex that the plaintiff would be working on the day of the accident, the defendant was unaware of the signage she put up. That said, I find that the defendant's ignorance of this warning was not a cause of the accident. Had he acted reasonably, notice of the plaintiff's work would have been unnecessary, and the placement of additional cones would not have prevented the accident. Insofar as barriers are concerned, the suggestion of such barriers would be the imposition of a standard of perfection, when a reasonable standard is all that was required. I find that the reasonable standard was met by C&C.

[98] The defendant further alleges that C&C was negligent in failing to provide necessary equipment to the plaintiff. I find that it had no duty to provide equipment to the plaintiff, and that the equipment that the plaintiff had was sufficient to allow him to safely address the reasonable risks that could be anticipated.

[99] Finally, the defendant alleged that C&C was negligent in failing to supervise the plaintiff and his worksite.

[100] The services that C&C was to provide included the:

> Supervis[ion] of tradesmen and sub trades as necessary to carry out regular, normal, maintenance of the common property and common assets of [Strata Plan VR-278] including elevators, swimming pools, saunas, boilers, landscaping etc., to ensure that the common property and assets of [Strata Plan VR-278] is maintained to the satisfaction of [the Strata Plan].

[101] The defendant contends that the property manager of the condominium complex where the plaintiff was injured, C&C, an employer as contemplated by the *Workers Compensation Act* and the regulations pursuant thereto, was obliged to supervise the plaintiff's work and provide traffic control for him.

[102] The defendant contends, and I find, that Ms. de Haan essentially left it up to the plaintiff to determine how to perform his duties safely. She had little hands-on work involved in meeting with and supervising tradespeople. There was a system in place to allow the garage door to be locked out. The defendant confirmed that this

was done when a gardener showed up to work on the property. Ms. de Haan appeared to be unaware that this was a possibility, although at the same time she appeared to suggest she would have been willing to do this procedure, had the plaintiff requested.

[103] No evidence was adduced to support the argument that window washers are normally supervised. The defendant gave evidence that he had never been supervised in his work.

[104] This lack of prior supervision is not necessarily determinative of a safe practice, but is some evidence of a standard within the field of window washing that is of some consequence.

[105] I find that the failure to provide supervision to the plaintiff whilst he was working at the condominium complex did not contribute in any material way to the accident. The defendant engaged in momentary and unforeseeable negligence that would not have been avoided even with supervision.

[106] As I found with respect to the plaintiff, I similarly find with respect to C&C, that there was sufficient traffic control established by the plaintiff to accommodate a reasonable user of the driveway where the accident occurred.

[107] I thus find that C&C was not contributorily negligent for the accident.

(e) Strata Plan VR 278

[108] The standard of care flowing from any duty owed by the Strata must also be assessed having reference to all of the evidence.

[109] In his response to civil claim, the defendant did not specifically refer to the Strata. Despite the failure to refer to the Strata in his response, I will nonetheless consider its role, if any, in the cause of the accident.

[110] The allegations against the Strata largely mirror those against C&C, and for the reasons that I have dismissed the claim of contributory negligence against C&C, I also dismiss those similar claims against the Strata.

[111] But there is a distinction between C&C and the Strata. The Strata meets the definition of occupier in s. 1 of the *Occupiers Liability Act* as it has “responsibility for, and [some] control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises”.

[112] The duty of supervision of occupiers was discussed by our Court of Appeal in *Woo v. Crème De La Crumb Bakeshop & Catering Ltd.*, 2020 BCCA 172. There, Mr. Justice Abrioux wrote for the Court:

> 46 First of all, I do not agree that the judge's use of the word "ensuring" at para. 112 of the Trial Reasons is an articulation of a standard of perfection imposed on an occupier. The judge's language is similar to s. 3(1) of the *OLA,* which provides that an occupier owes a duty to take reasonable care "to see that a person... will be reasonably safe in using the premises." In the circumstances of this case, I am satisfied that phrasing the test as a requirement to take steps "to ensure" rather than "to see" that the premises are reasonably safe is of no legal consequence. More importantly, the judge's reasons must be considered as a whole. In my view, it is noteworthy that in the paragraphs following the impugned statement, the judge states:
>
> > ...
> >
> > [114] The defendant submits that imposing a duty on owners or occupiers to supervise the activity of qualified tradespersons would be unduly onerous and would likely be beyond the knowledge or expertise of many owners.
> >
> > [115] I disagree. First, s. 5 of the *OLA* requires supervision in the context of independent contractors (*Grochowich v. Okanagan University College*, 2004 BCCA 325 at para. 23). A lesser duty in a situation when this exclusionary provision does not apply would be inconsistent with the legislation. Second, the obligation of owners and occupiers is not to supervise or direct tradespersons in every aspect of how they carry out their work. Rather, it is to take reasonable steps to protect persons on the premises from an "objectively unreasonable risk of harm" (*Agar* at para. 30) in respect of the condition of the premises, activities on the premises or the conduct of third parties (*OLA* s. 3 (2)).
> >
> > [116] At a minimum, that must involve maintaining an adequate system of supervision and intervening to stop manifestly unsafe activities or procedures. To suggest

> otherwise would be to permit owners and occupiers to turn a blind eye, if not to sanction, unsafe practices with no fear of liability. In my respectful view, that position is untenable.

[113] As I have stated above, there was no evidence adduced to support the argument that window washers are normally supervised.

[114] The question thus arises of whether the Strata maintained an adequate system of supervision and intervening to stop manifestly unsafe activities or procedures.

[115] As I have already concluded that the actions of the defendant causing the accident were not foreseeable to the plaintiff, I find equally that they were not foreseeable to the Strata, and conclude that by leaving the assessment of risk and the steps to address such risks to the plaintiff, the Strata maintained the necessary system of supervision.

VI. Damages

[116] The plaintiff seeks non-pecuniary damages and special damages, as well as damages for past wage loss, loss of future earning capacity, cost of future care, and loss of an interdependent relationship.

(a) The Plaintiff's Injuries

[117] The plaintiff was in a coma for some weeks following his fall, and by the time he awoke, his rib and clavicle fractures had healed. He does not recall any pain from those fractures. He does suffer lower back pain approximately three times per year, which can last for up to two weeks, and adversely affects the plaintiff in both walking and sitting. The plaintiff also continues to experience pain and restrictive movement of his left arm, and has a loss of dexterity in his non-dominant left hand.

[118] The plaintiff's recovery from his injuries has been little short of miraculous. His brain injury has had the greatest impact on him.

[119] The plaintiff relies on the expert report of Dr. H.A. Anton, a physiatrist. Dr. Anton provided an opinion based on an evaluation he conducted of the plaintiff on April 12, 2019. He listed the plaintiff's injuries in his report as follows:

1. A traumatic brain injury with a right subdural hematoma; subarachnoid hemorrhage throughout both frontal lobes; a hemorrhagic contusion in the right frontal lobe; and shear hemorrhages within the temporal lobes bilaterally and in the cerebellar hemisphere.
2. An undisplaced skull fracture in the left occipital bone (at the back of the skull).
3. Chest injuries which included a small left-sided pneumothorax (air in the chest cavity); a left lower lobe pulmonary contusion; multiple left sided rib fractures; and a "flail chest" (a dangerous complication of multiple rib fracture in which part of the chest wall detaches from the rest of the chest wall).
4. A neck injury with multiple cervical fractures including undisplaced cervical fractures of the left C1 transverse foramen; C3 vertebral body; right C3 lamina; and C6 and C7 spinous processes.
5. A lower back injury with undisplaced fractures of the left lumbar transverse processes of L2, 3 and 4.
6. A displaced fracture of the spine of the right scapula through the body into the inferior tip.
7. A fracture through the olecranon of the left elbow with two fracture fragments.
8. A primarily demyelinating left brachial plexus injury.

[120] Dr. Anton stated that the plaintiff's most significant injury was a traumatic brain injury (TBI). He said the consequences of a TBI depend in part on patient factors such as age and general health.

[121] Dr. Anton discussed the plaintiff's reported memory difficulties, and reported that it was probable his cognitive function has improved since he was tested by Dr. Mead-Wescott in 2016, but that it was also probable the plaintiff has at least subtle residual impairment of cognitive function. I accept that the plaintiff's brain injury has resulted in some modest word finding difficulties.

[122] Dr. Anton commented on the plaintiff's reported changes in his personality, noting that he was edgier, more likely to lose his temper, and more verbally aggressive, and that those changes were worse when he was stressed or anxious. Dr. Anton expressed his view that the changes in the plaintiff's personality could have arisen from psychological factors, but concluded that it was also possible those are at least in part due to residual effects of his TBI.

[123] Dr. Anton commented about the plaintiff's balance:

> Mr. Geddert had some apparent subtle problems with balance on heel-toe tandem walking and the Sharpened Romberg test. Considering the nature of his TBI, he probably has some subtle impairment of high level motor function and balance that would become most apparent in tasks that required good balance and when he was fatigued.

[124] Dr. Anton considered the issue of balance to be distinct from the episodes of dizziness the plaintiff reported.

[125] The defendant relies on the assessment of Dr. S. Paquette, a neurosurgeon. Dr. Paquette examined the plaintiff on November 30, 2018. He agreed that any reduction in the plaintiff's short-term memory would be permanent. He also stated that changes in personality can occur over time, but the personality change in the plaintiff and his loss of filter is attributed to the injury.

[126] With respect to the increased risk of cognitive decline, Dr. Paquette stated that the plaintiff is at a risk; however, it is not in the realm of "far more likely".

[127] In terms of his risk of developing early onset dementia, Dr. Paquette stated that within the general public, the probability of developing early dementia is low. He said there is a slight increase to that risk with the plaintiff; however, it is still a low probability.

[128] The defendant also relies on the expert report of psychiatrist Dr. P. Janke. Dr. Janke examined the plaintiff on February 5, 2019. He determined that the plaintiff understood that his life was different and that there was no more room for recovery. He did not agree that the plaintiff was at a significant risk for developing depression,

but conceded that he might be more vulnerable than someone from the general public.

[129] With respect to the plaintiff's insight, Dr. Janke found that the plaintiff did have partial awareness and insight. The plaintiff had disclosed that he was argumentative and that he was handling things differently after the accident. Therefore, Dr. Janke did not agree that that lack of insight will inhibit rehabilitation in the plaintiff's case.

[130] The plaintiff relies on two expert reports from Dr. L. Mead-Wescott, a neuropsychologist. Dr. Mead-Wescott examined the plaintiff on two occasions, on May 18, 2016 and on March 11, 2020. She reported that the plaintiff encountered a lot of frustration in 2016 when completing his assessment, and had a reduced level of frustration when he completed a reassessment in 2020. She concluded that the plaintiff needed more management and handholding.

[131] Dr. Mead-Wescott, expressed her opinion that:

> Mr. Geddert remains prone to frustration and anxiety in response to challenging cognitive tasks - and he continued to require a higher than usual level of support during the present assessment, by means of empathy, encouragement and gentle humor. Nevertheless, this represents a significant improvement in his overall tolerance and his emotional regulation in comparison to his much more dysregulated behaviour during the initial evaluation in May 2016.

[132] Dr. Mead-Wescott concluded that the plaintiff's neuropsychological deficits and his ongoing (if reduced) difficulties with irritability, anger, and reduced frustration tolerance were directly attributable to the TBI he sustained in the accident. She felt that he met the criteria for diagnosis of Mild Neurocognitive Disorder due to a TBI, with behavioural disturbance. She concluded that there is little expectation for further neurological recovery, and that it was thus appropriate to view his current cognitive deficits as the long-term cognitive sequelae of his injury.

[133] While there is some evidence of more anger on the part of the plaintiff since his fall, I find that this is more accurately described as frustration on his part.

[134] The plaintiff's brother Harry described the plaintiff as forgetful. As an example, he pointed to the plaintiff's frequent inability to locate his car after parking it, and his inability to recall what he ordered for a restaurant meal. He described the plaintiff's driving as nerve-racking and distracted. Harry's fiancé, Sue Chiu, confirmed each of these observations.

[135] Harry, Ms. Chiu, and one of the plaintiff's sons described the plaintiff's "lack of a filter" that has given rise to inappropriate racist and sexual comments by the plaintiff, which I accept is the result of his brain injury, and create awkwardness in social and other settings.

[136] I accept that, from time to time, the plaintiff has some difficulty finding the correct word to use in conversation, and lacks insight into his limitations. I regard his word finding difficulties as minimal, and find that while his insight is limited, that he does understand, but does not enjoy much of the change in his thought process since the fall.

[137] I accept the plaintiff's evidence that he laments the termination of his relationship with Ms. Vinnai, but I find, as I will explain below, that it was an unhealthy relationship, without any real future, and I attribute his lamentation to his loss of memory and an idealization of that relationship that is unrealistic.

(b) Non-Pecuniary Damages

[138] In *Dikey v. Samieian*, 2008 BCSC 604 at paras. 139, Madam Justice Gray described the purpose of non-pecuniary damages as "those that have not and will not require an actual out-lay of money. The purpose of such an award is to compensate an injured party for such things as pain, suffering, disability, inconvenience, disfigurement, and loss of enjoyment of life. The award is to compensate [the plaintiff] for losses suffered up to the date of trial and that [the plaintiff] will suffer in the future."

[139] At para. 140, Gray J. cited the Supreme Court of Canada in *Lindal v. Lindal (No. 2)*, [1981] 2 S.C.R. 629 at 637:

> Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a “tariff”. An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R).

[140] A non-exhaustive list of factors to be considered when assessing non-pecuniary damages was set out in *Stapley v. Hejslet,* 2006 BCCA 34 at para 46:

(a) age of the plaintiff;
(b) nature of the injury;
(c) severity and duration of pain;
(d) disability;
(e) emotional suffering;
(f) loss or impairment of life;
(g) impairment of family, marital and social relationships;
(h) impairment of physical and mental abilities;
(i) loss of lifestyle; and
(j) the plaintiff’s stoicism (as a factor that should not, generally, penalize them).

[141] As I have indicated above, the plaintiff is 61 years of age, and sustained serious injuries. What is unique is how the plaintiff has coped with his injuries, and overcome many of them. He managed to make the best of a very unfortunate situation. He endures some pain, but due to his initial coma, was spared from the pain from his rib and chest injuries, and much of what might be expected from his back injuries. The back pain and pain associated with his left arm and scapular injuries remains to some extent, but does not disable him from most activities, nor does he focus on this pain. I accept that some of this might be attributed to stoicism on his part, but the reality for the plaintiff is that his pain from the injuries that he sustained in the accident is reasonably tolerable for him. His left shoulder brachial plexus injury has made a less than complete recovery.

[142] The plaintiff's left arm is, and will be, an ongoing disability, as will the change in his personality that has left him socially awkward in certain settings, and removed some of the his "filter".

[143] On the other hand, the plaintiff is blessed with a family, including Ms. Chiu, that are protective and supportive of him, and I am satisfied that they will continue to be. To be sure, the plaintiff has suffered emotionally from the loss of his relationship with Ms. Vinnai, and even though I have found that the relationship was unhealthy and without a promising future, the plaintiff has experienced difficulty accepting the loss of that relationship. Fortunately, he seems to have found a healthier relationship since the accident.

[144] Since the accident, the plaintiff believes his injuries have improved. He travelled to France by himself in 2017 and accompanied his brother and Ms. Chiu on a trip to Las Vegas. While he stopped playing hockey 13 years ago (before the accident), he has been fishing and hiking since the accident, though he tends to be careful while engaging in these activities. He is currently living in a one-bedroom apartment and is able to keep his home clean without assistance. He does his own dishes and laundry. He still has a motorcycle and gets it insured so that he can ride it for the nicest times of the year.

[145] While he takes care of his own banking and business records, he requires some assistance from his brother and Ms. Chiu in order to do so.

[146] Both the plaintiff and the defendant referred me to decisions where damages were awarded for injuries that they assert are comparable to those sustained by the plaintiff.

[147] The plaintiff referred me to *O'Connell v. Yung,* 2010 BCSC 1764 [*O'Connell*]; *Clost v. Relkie*, 2012 BCSC 1393 [*Clost*]; *Jarmson v. Jacobsen*, 2012 BCSC 64 [*Jarmson*]; *Van v. Howlett*, 2014 BCSC 1404 [*Van*]; and *Ngo v. Fong*, 2020 BCSC 624 [*Ngo*].

[148] In *O'Connell,* the plaintiff was a 57-year-old office worker. Ms. O'Connell sustained a severe traumatic brain injury with shear and surface injuries to her brain; fractures to her cervical spine, right femur, right ankle, left tibia, left fibula, ribs, toes, nose, and sternum; and internal injuries that included a laceration of her spleen and a contusion to her liver. She was able to make a good recovery from most of her physical injuries over time, but was left with ongoing problems resulting from her femur fracture that would likely require ongoing treatment and future surgery. Her brain injury left her with permanent deficits in many areas, including cognitive and executive functioning and a changed personality including reduced insight and judgment, reduced decision-making ability, immaturity, decreased energy, disinhibition, apathy, emotional blunting, decreased interest, self-centredness, and reclusiveness. Madam Justice Fisher found that in addition to her ongoing physical limitations, the plaintiff had an increased risk of developing seizures or dementia in the future, and might develop delirium with any future illness. Ms. O'Connell had gone from someone who was active, social, employed, and with a stable and happy marriage and close relationships with family to someone who did not have a normal emotional affect and who was unable to work, plan or organize, have a normal relationship with her family and friends, or care for herself. Her limitations were significant and permanent. Madam Justice Fisher awarded her $275,000 in general damages (approximate present-day value: $330,400).

[149] In *Clost*, the plaintiff was a 59-year-old pharmacy technician and hairdresser. Ms. Clost suffered a severe traumatic brain injury, a compound fracture of her femur, several fractured ribs, fractured wrists, fractured heels, tinnitus and hearing loss, and cognitive, psychological, and emotional difficulties and impairments as a result of a motor vehicle accident. Following the accident, she was in a coma for approximately a month, and was hospitalized for five months following the collision. She suffered a significant foot and ankle injury, for which future surgery was recommended. She suffered from sleeplessness, loss of hearing, tinnitus, and debilitating fatigue. She also had significant personality changes, including loss of emotional control, impulsivity, disinhibition, emotional lability, reduced insight, immaturity and others. She continued to have subtle but significant cognitive impairments, particularly in

relation to concentration and short-term recall. Madam Justice Baker awarded her $300,000 in general damages (approximate present-day value: $343,800).

[150] In *Jarmson,* the plaintiff was in excellent physical health and was very physically fit before he suffered a traumatic brain injury, fractures of his femur, wrist, and foot, chest trauma with a collapsed right lung, contusions to his eye, facial lacerations and lacerations to his toe and elbow as a result of a motorcycle accident. Mr. Jarmson spent three months recovering from his physical injuries. He was found to have a complex regional pain syndrome in his right foot, heterotopic bone formation in the right thigh muscle, stiffness of the right knee, tears of tendons and cartilage of the right shoulder, post-traumatic stress disorder, and depression.

[151] Mr. Jarmson remained on leave from his teaching job for approximately one year following his accident, and after he returned to his job, despite accommodation, his ability to cope was badly compromised, and a few years after the accident plaintiff retired from teaching. He was left with permanent physical, neurological, and psychological symptoms and limitations and an adjustment disorder, depression, and altered body image. He had chronic pain in his right knee, right foot, and right shoulder and continued to be impacted by daily fatigue, both mental and physical, and remained prone to emotional meltdowns. Mr. Justice Meiklem awarded him $230,000 in non-pecuniary damages (approximate present-day value: $263,600).

[152] In *Van,* the plaintiff was a 47-year-old cook and part-time manicurist who suffered a severe brain injury, serious injuries to her head and face including factures and dental injuries. Ms. Van also suffered fractures of her ribs, bruising to her right lung, and spent approximately nine weeks in hospital before being discharged to an out-patient. As a result of her brain injury, she suffered a complete personality change. Her brain injury led to psychological problems, conflicts, picking fights, and she was often angry, critical and verbally abusive, had trouble making decisions, was careless in personal hygiene and appearance, and was forgetful and unreliable. The plaintiff was left with permanent cognitive and psychological deficits and given the severity of her brain injury she essentially suffered a loss of self and

ability to control her own life. She was rendered unemployable and required considerable daily care. Her injuries were catastrophic and she essentially suffered a loss of self and loss of ability to have control over her own life. No aspect of her life was left unimpaired and her prognosis was very poor. Mr. Justice Grauer, as he then was, awarded her $351,000 in general damages (approximate present-day value: $392,900).

[153] In *Ngo,* the plaintiff was a 26-year-old civic engineer who had newly emigrated from Vietnam when she was injured by the defendant's motor vehicle while walking as a pedestrian. Ms. Ngo suffered a moderate traumatic brain injury, a lacerated liver, headaches, diplopia in her left eye, soft tissue pain in her knee, dizziness and severe cognitive, mood and anxiety issues. She spent three days in hospital and was diagnosed as having suffered three bilateral subdural hematomas. She had a period of amnesia and had limited recollection of the events for about a month post-accident. Her lasting injuries from the collision included knee pain and severe mood issues. Although she was able to continue her English studies, she was unable to pursue her certification in civic engineering in Canada. Her employment attempts at a bakery presented challenges, as she needed to take notes of simple steps in her work and reminders. Her manager testified that the plaintiff made more mistakes than other employees. Madam Justice Francis awarded her $210,000 in non-pecuniary damages.

[154] The defendant referred me to *Paterson v. Iwasaki*, [1991] B.C.J. No. 3021, 1991 CanLII 654 (S.C.); *Hill v. Palmer*, [1993] B.C.J. No. 860, 1993 CanLII 15 (S.C.); *Musto v. Whistler Mountain Ski Corporation*, 2000 BCSC 1583; *Harrington v. Sangha*, 2011 BCSC 1035 [*Harrington*]; *Clark v. Bullock*, 2013 BCSC 944 [*Clark*]; *Corbett v. Wawanesa Mutual Insurance Co.*, 2011 NBQB 114 [*Corbett*]; *Turner v. Dionne*, 2017 BCSC 1905 [*Turner*]; *Broad v. Clark*, 2018 BCSC 1068 [*Broad*]; and *Bennett v. Bell*, 2019 BCSC 1925 [*Bennett*].

[155] I find that the decisions in *Paterson*, *Hill*, and *Musto*, even if increased to take into account the effect of inflation, are sufficiently dated to render them of little assistance.

[156] In *Harrington,* the plaintiff was 45 years of age when her trial was heard. Ms. Harrington had suffered a traumatic brain injury, and sustained an injury to the upper trunk of the left brachial plexus in a motor vehicle accident. She was left with very little movement of the left shoulder and was unable to lift her left arm at the shoulder. Mr. Justice Willcock, as he then was, found that she would have difficulty using her left hand in day-to-day activities. Her brain injury affected her cognition leaving her irritable and disinhibited, and her memory and concentration were poor and she was unemployable. She suffered chronic pain in her back, neck, and arm, for which she required significant medication. She had problems bathing, showering, dressing, and performing hygiene-related tasks. She was awarded non-pecuniary damages of $210,000.00 by Willcock J. (approximate present-day value: $247,000).

[157] In *Clark,* the plaintiff was 58 years of age when he was injured in a motor vehicle accident. Mr. Clark sustained a chest contusion, fractured sternum, fractured vertebrae, fractured rib, knee injury, shoulder injury, mild traumatic brain injury and tinnitus. He was significantly disabled for four months following accident and his resulting cognitive limitations prevented him from working as pilot. His brain injury lead to reduced tolerance for frustration and increased susceptibility to anger. Mr. Justice Barrow awarded him non-pecuniary damages in the amount of $120,000 (approximate present-day value: $135,800).

[158] In *Corbett,* the plaintiff was 17 years of age when she was injured in a motor vehicle accident. Ms. Corbett suffered fractures to her right wrist, left wrist, right pelvis, right hip, right tibia, left tibia, a brachial plexus injury that left her ability to use her right arm quite limited, a laceration of her scalp, and a closed head injury that resulted in a severe traumatic brain injury. She was hospitalized for a considerable period of time, during which she underwent surgery. The plaintiff suffered a severe loss of her ability to enjoy life. Her memory was significantly affected, both for verbal

and visual information, and her functional capacity was significantly compromised. Mr. Justice Glennie found that she would be unable to return to employment, and would likely require supervision to ensure that she did not inadvertently harm herself. He awarded her non-pecuniary damages of $200,000 (approximate present-day value: $235,200).

[159] In *Turner,* the plaintiff was 19 years of age when she was injured in a motor vehicle accident. Ms. Turner suffered compression fractures to vertebrae, extensive soft tissue injuries around her spinal column, and a mild traumatic brain injury. She was left with debilitating chronic back pain and severe psychological problems. She had cognitive difficulties, including problems with memory, focus, and concentration. Her injuries rendered her essentially unable to work and profoundly affected her life. Her relationships were impaired, she was socially isolated, and she became dependent on narcotic medication. The prognosis for her physical and psychiatric symptoms was very guarded, but not hopeless. Madam Justice Adair awarded her non-pecuniary damages of $200,000 (approximate present-day value: $214,200).

[160] In *Broad,* the 23-year-old plaintiff was injured in a motor vehicle accident. Ms. Broad suffered soft tissue injuries to her neck, shoulder, hip and back, annular tear and protrusion in her lower back causing permanent pain. In addition to significant pain and limitations, she complained of driving anxiety. Her chronic pain and physical limitations impacted her emotional health, relationships with family including her partner and children, and her ability to complete everyday tasks such as household work and meeting her children's needs. The plaintiff's overall prognosis for improvement was poor and the likelihood of her return to work, even part time, was not realistically achievable. Madam Justice DeWitt-Van Oosten, as she then was, found that the plaintiff was likely to be impacted by her injuries for the entirety of her life and awarded her non-pecuniary damages in the amount of $185,000 (approximate present-day value: $193,900).

[161] In *Bennett*, the plaintiff was aged 44 when he was injured in a motor vehicle accident. Mr. Bennett sustained injuries to his neck, upper back, shoulders and foot.

He also suffered a mild traumatic brain injury, dizziness, and hearing difficulties. He underwent spinal surgery for his neck and two foot surgeries. He consistently presented with emotional difficulties, including frustration, low mood, irritability, and difficulty coping with the impact of his pain. He was diagnosed with persistent depression and adjustment disorder. The global result for the plaintiff had been devastating to his quality of life and there was no indication that it would improve. Mr. Justice Betton concluded that the plaintiff would suffer chronic pain that would continue to impact his overall health and particularly his mental health. Mr. Justice Betton found that the plaintiff would be unable to return to his prior career as a school teacher, as well as any other meaningful employment, and that he had lost the opportunity to become an administrator. The plaintiff was found to be unable to pursue most of that which gave him purpose and pleasure, reducing his self-esteem and image. Non-pecuniary damages were assessed at $202,500 (approximate present-day value: $209,100).

[162] With the exception of *Ngo*, I find that the injuries suffered in the cases relied upon by the plaintiff were more devastating than those sustained by the plaintiff in this case.

[163] I find that the injuries sustained by the plaintiffs in *Clark*, *Turner*, and *Broad* were less devastating than those sustained by the plaintiff in this case.

[164] While the decision of Mr. Justice Glennie in *Corbett* is of some interest, I do not consider that an assessment of non-pecuniary damages from a Canadian court beyond our provincial borders can be given a great deal of weight, given the regional differences that inform such decisions.

[165] I do find significant parallels between the injuries sustained by the plaintiff and those suffered by the plaintiffs in *Harrington* and *Bennett*. Taking into account the plaintiff's significant injuries and balancing this with his miraculous, albeit incomplete recovery, I assess his non-pecuniary damages at $225,000.

(c) Past Wage Loss

[166] Prior to the accident, the plaintiff experienced slow downs in work in the early months of the year, and for a part of the fall months. He missed little time from work due to non work-related injuries. He gave evidence that prior to the accident he was working 8 to 10 hours per day.

[167] By 2015, the plaintiff had accumulated only about $45,000 in savings, He gave evidence that he planned to work full-time until he was 70, and thereafter work part-time until he turned 75.

[168] The plaintiff returned to work, albeit, I find, prematurely, in April of 2016. He explained that he did so because he wanted to pay his bills, keep a roof over his head and support Ms. Vinnai, who, along with his family, discouraged him from returning to work thinking it was unsafe.

[169] Following his return to work in April 2016 the plaintiff gave evidence that he could not work more than four hours per day due to fatigue. He eventually increased this to five hours per day, working 20 to 25 hours per week. He is rarely able to do six hours a day. He says his energy level is less than it was before the accident and that he is now working at 50% of the speed he did before the accident, so it takes him twice as long to do things.

[170] The plaintiff hired his friend Christian to help with jobs that required 40 foot ladders because he does not have the strength to maneuver them, and he feels it is dangerous for him to be on 40 foot ladders. He gave evidence that he has lost some 40 foot jobs and turned some down.

[171] Although the plaintiff stated that he has no issues working in a bosun chair, I do not accept his evidence in that regard. Drs. Anton, Mead-Wescott, Ancill and Paquette all agreed that the plaintiff is not suited to continue working as a window washer with his deficits.

[172] Dr. Anton considered that the plaintiff's age could be a barrier both to retraining and finding alternative work that is a better fit for his current capacity, and expressed the view that the plaintiff's subtle cognitive impairment could possibly make retraining and/or further education difficult.

[173] Dr. Mead-Wescott testified that she did not feel the plaintiff is suitable for safety sensitive work. She said it would be difficult for him to find work that he could do safely and competently from a cognitive perspective. She commented that in the event that other vocational directions were desired, his difficulties with attention, processing speed, memory, and problem solving could create barriers to new learning and to completion of unfamiliar tasks. In her view, the plaintiff's emotional "dyscontrol" and lack of frustration tolerance have the potential to adversely impact relationships with co-workers, supervisors, and customers.

[174] The plaintiff gave evidence that he declared all his income to the Canada Revenue Agency, apart from modest cash earnings described in his evidence.

[175] The plaintiff's income tax returns were not introduced in evidence. He did produce Notices of Assessment from the Canada Revenue Agency from 2010 to 2019. His Notices of Assessment showed gross business incomes of $69,075 for 2010, $64,405 for 2011, $79,189 for 2012, $75,770 for 2013, $76,052 for 2014, $49,000 for 2015, $13,150 for 2016, and $19,261 for 2018. His gross income for 2017 and 2019 is unknown, although he reported net income for both years.

[176] His net business income as stated on the Notices of Assessment is $27,925 for 2010, $26,710 for 2011, $39,579 for 2012, $33,495 for 2013, $35,952 for 2014, $30,000 for 2015, $10,150 for 2016, $16,256 for 2017, a loss of $205 for 2018, and $17,074 for 2019.

[177] I have no confidence in the net incomes set out in the Notices of Assessment that were produced. I doubt that all of the expenses claimed by the plaintiff for tax purposes could be justified as deductions. The plaintiff described his typical annual

business expenses as insurance of $5,000 and 75% of the cost of his vehicle. He also wrote off his vehicle insurance, gas expenses, and maintenance expenses.

[178] The plaintiff relies on the estimates of economist Mr. Darren Benning. Accepting assumptions provided to him by counsel for the plaintiff, Mr. Benning estimated the plaintiff's income loss to the date of trial at $125,996.

[179] However, there are several issues with the assumptions the underlie Mr. Benning's estimate.

[180] In reaching that figure, Mr. Benning was not given the plaintiff's Notices of Assessments for either 2010 or 2011. In the result, absent those notices, Mr. Benning arrived at an average net income of $37,995. When the plaintiff's 2010 and 2011 Notices of Assessment were put to Mr. Benning, he agreed that the plaintiff's average annual income before the accident was $32,400.

[181] Mr. Benning was asked to assume a 4% increase per year from the date of the accident onwards. However, Mr. Benning agreed that the plaintiff's income showed variability that did not add up to the 4% increase each year that he was instructed to assume.

[182] I am not persuaded that the assumption of a 4% increase in the plaintiff's billings did or could be expected to take place.

[183] Mr. Benning also agreed that the income the plaintiff reported over three years before the accident demonstrated a decline, and that if the net income of 2012 was viewed as an aberration, the plaintiff's income had apparently decreased between 2010 and 2015.

[184] Mr. Benning was also asked to assume average earnings of $16,000 per year over the past three years in reaching his estimate, but these earnings are not reflected in the plaintiff's Notices of Assessment. There are also obvious difficulties with basis for these assessments. There are invoices missing each year since 2018,

and the plaintiff conceded that the net income reported on his tax returns simply did not seem right.

[185] While it is apparent that the plaintiff clearly failed to report cash that he was paid by individual tenants of buildings whose windows he was contracted to clean, I do not consider this to be a source of income of any real significance. The under-reporting of income does not assist the plaintiff in his claim for past loss of income, as more accurate record keeping may have resulted in greater annual figures than those assumed by Mr. Benning.

[186] In the result, I am prepared to use the figures from the Notices of Assessment that were produced to determine the plaintiff's income loss to date of trial.

[187] Notwithstanding the difficulties with the plaintiff's tax filings, the defendant accepts that the plaintiff's present net earnings are approximately $16,000 per year. Accepting that number, the defendant says that an estimate of past loss of income based on the actual pre-accident earnings history is $94,489.

[188] I assess the plaintiff's post-tax income loss to the date of the trial in this matter at $100,000.

(d) Loss of future Earning Capacity

[189] In *Reilly v. Lynn*, 2003 BCCA 49, at para. 101 Mr. Justice Low and Mr. Justice Smith summarized the principles to be applied when assessing a claim for loss of future earning capacity:

> … The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring*: Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* (2001),

> 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: Milina v. Bartsch, supra, at 79. In adjusting for contingencies, the remarks of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd., supra*, at 253, are a useful guide:
>
> > First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse ... Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small ...
> >
> > [Emphasis added by Low and Smith J.J.]

[190] In order to put the plaintiff back in their original position, it is for the court to compare the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Karim v. Li*, 2015, BCSC 498 at para. 145.

[191] The plaintiff also relied on Mr. Benning's estimate of future income loss. He was instructed to assume that as a consequence of the accident, the plaintiff will earn $16,000 per year to age 65 and thereafter will earn nothing.

[192] Mr. Benning applied no negative contingencies for voluntary removal from the work force or part time work. He did not take into consideration any other contingencies other than premature death and injury.

[193] Mr. Benning was instructed to prepare illustrative figures for future wage loss assuming the plaintiff's without accident earnings would have been $48,076 (with no assumed further increases). He was also instructed to assume that, but for the accident, the plaintiff would have worked full-time to age 70 and, thereafter, 50% to age 75.

[194] The defendant relies on a response to Mr. Benning's report written by Mr. Mark Gosling. In his report, Mr. Gosling commented that the average retirement age for self-employed Canadian males is 68.4.

[195] Mr. Benning agreed with this average retirement age. He also agreed that males working in high intensity or "heavy jobs" tend to retire earlier due to regular wear and tear. However, Mr. Benning said that the main factors influencing retirement age are health and finances.

[196] The defendant contends that the plaintiff was employed in a very heavy industry and disputes the assumption that, absent the accident, he would have been able to continue working full-time to age 68.

[197] The plaintiff's health, but for the injuries he sustained in the accident would, in my view, have allowed him to work past age 68.

[198] The assumption that the plaintiff would have worked full-time to age 70 is supported by the evidence. The reality is that the plaintiff has accumulated so little in savings and has no pension, other than CPP and old age security. In my view, his financial circumstances would not have permitted him to retire any sooner.

[199] The plaintiff's evidence was that he intended to work between 25 and 40% of his full-time hours between age 70 and 75. The most compelling factors that would determine how much work he would have done between age 70 and 75, absent the accident are his health and his need to work. His physical health remains good and his financial situation absent the accident would have been worse than he appreciates. I find that he would have needed, and have been physically able to work 50% of his full-time, but for the accident.

[200] The plaintiff is highly motivated to work and capable of working. While I find that it is unsafe for the plaintiff to be working from any height to clean windows, I also find that he is to some extent defined by his vocation, and will continue it, as he can, for the same length of time he would have absent the accident, regardless of

the dangers he faces. Contrary to the assumption provided to Mr. Benning, I find that the plaintiff will continue as a window washer until his age 75.

[201] Ms. Eva Pretty is on the board of directors for the building located at 5926 Tisdell, Vancouver, BC. The plaintiff has been washing windows at that location for close to 20-25 years.

[202] Ms. Pretty stated that since the accident, the plaintiff has made a number of mistakes. She stated that the board has concerns about the plaintiff's ability to do his job. However, despite these mistakes and concerns, the board and Ms. Pretty have hired the plaintiff every year since 2017. In part, this is because he did better work than his temporary replacement.

[203] Based upon the assumptions he was instructed to make, Mr. Benning calculated a future loss of income earning opportunity for the plaintiff at $444,000. This was reduced by $56,000 for assumed earnings of $16,000 per annum to age 65, resulting in a net figure of $388,000, after his income tax liabilities are taken into account.

[204] I am not prepared to accept Mr. Benning's calculations, not because of any mathematical error, but because I find that some of the assumptions upon which he was asked to rely are not supported by the evidence that I have heard.

[205] I do not accept the assumption that Mr. Gosling's was asked to make, that the plaintiff would retire before age 75. I am not persuaded that the assumption that the plaintiff will earn nothing after age 65 can be relied upon. In my view, he will continue to earn some income between age 70-75.

[206] I would add a negative contingency that the plaintiff's quality of work is unlikely to be sustained, and will likely result in the loss of some of his customers, as was apparent from the evidence of Ms. Pretty.

[207] The defendant relies on Mr. Gosling's estimate of loss of earning capacity. His reports were based on the plaintiff's Notices of Assessment for the five years

prior to the accident. His analysis assumes that the plaintiff will be able to earn approximately $16,000 per year going forward to an approximate retirement age of 68.

[208] In assessing loss of earning capacity, the defendant agrees that the plaintiff should have access to vocational funds and counselling, should he decide to change work. If the plaintiff does change work, the defendant contends that he should be able to find employment at or above minimum wage working approximately 20 hours per week.

[209] Effective June 1, 2020, the minimum wage in British Columbia was set by regulation at $14.60 per hour. Assuming 20 hours of work per week, the minimum wage would generate earnings of over $15,000 per year, which is close to the $16,000 estimate provided to Mr. Benning.

[210] Using Mr. Gosling's future loss of earning potential calculation, the plaintiff's loss of earning capacity would be approximately $122,784.

[211] The assessment of the plaintiff's claim for loss of future earning capacity is far from clear. As I have indicated, I find that the assumptions given to Mr. Benning are based upon earnings and increases in billings by the plaintiff that inflate this aspect of his claim unfairly, and the assumptions that Mr. Gosling was instructed to rely upon unfairly reduce the claim.

[212] Gazing as deeply as I can into the crystal ball, I find that a fair award for the plaintiff's loss of opportunity to earn income in the future is $200,000.

(e) Special Damages

[213] The parties agree that the plaintiff's special damages amount to $53,218.66.

(f) Cost of Future Care

[214] The principles applicable to the assessment of cost of future care were recently summarized in *Dzumhur v. Davoody*, 2015 BCSC 2316. At para. 244 Mr. Justice Kent concluded that the purpose of any award is to provide physical

arrangement for assistance, equipment and facilities directly related to the injuries. The focus on the injuries to the innocent party, but fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable. Mr. Justice Kent recognized that the test for determining the appropriate award is an objective one based on medical evidence, but that the concept of "medical justification" is not the same or as narrow as "medically necessary", and specific items of future care need not be expressly approved by medical experts.

[215] The principle of full compensation for future care was confirmed by the Supreme Court of Canada in what is known as the “trilogy” of cases: *Andrews v. Grant & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George) et al.,* [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 257.

[216] In Cooper-Stephenson and Adjin-Tettey, *Personal Injury Damages in Canada*, 3rd ed (Toronto: Thomson Reuters, 2018) at 567, the authors summarize the principle as follows:

> The full compensation thesis established in the trilogy has been used over and over as a background principle to justify the provision of home care for seriously disabled plaintiffs. The general approach was affirmed by McLachlin in *Watkins v. Olafson*, where she stated that the trial judge's conclusion on the need for home cares was "in conformity with the emphasis on full and adequate compensation for seriously injured plaintiffs expressed by this court in Andrews...". She reasserted the pre-eminence of the compensatory principle in *Ratych v. Bloomer*, stating that "the plaintiff is to be given damages for the full measure of his loss as best as can be calculated"…

[217] Dr. Anton gave recommendations for the plaintiff’s future care in his report dated August 12, 2019. He accepted that the plaintiff still receives psychological counselling, occupational therapy, and supervised exercise with a kinesiologist. He recommended that those treatments and services should continue until it is clear the plaintiff has reached a plateau.

[218] Dr. Anton advised that once the plaintiff reached a plateau, he would probably still benefit from up to 12 sessions per year with a kinesiologist to review and modify

his exercise program, and some additional psychological counselling if he were to develop depressive symptoms in future.

[219] Dr. Anton also expressed the opinion that if the plaintiff's life situation changes in future and or he is unable to continue in his current work then he would probably benefit from occupational therapy reassessment and support, and vocational counselling to help him deal with transitions in his life.

[220] Should the plaintiff develop increased symptoms in the left elbow due to progressive arthritis, Dr. Anton expressed the view that he would probably benefit from 12 to 24 sessions of physiotherapy for therapeutic exercise and pain management, but stated that the left elbow was functioning and that surgery was unlikely.

[221] Dr. Anton did confirm that the plaintiff has the ability to care for himself. He can clean and cook on his own, and does not require a handyman or housekeeper.

[222] The plaintiff's brother Harry stated that following the accident, the plaintiff has issues with short-term memory, left arm dexterity and mood swings. He described situations where the plaintiff parked his vehicle and could not find it. He gave evidence on the plaintiff's quality of driving, especially with stop signs and traffic lights. The plaintiff was not asked about his driving abilities during examination in-chief.

[223] I am, however, leery of Dr. Anton's view that the plaintiff can take care of his own finances. The plaintiff's brother Harry agreed that the plaintiff does okay with online banking and he has been doing pretty well since he and Ms. Chui assisted with the set-up of his online accounts, and said that in the last two years, he has not helped the plaintiff with his banking needs. However, Ms. Chiu has helped him out, and he has had someone else prepare his income tax returns. He does not believe that his cognitive abilities have improved.

[224] In her report dated March 11, 2020, Dr. Mead-Wescott confirmed that the plaintiff did not have any issues with pain at that time. He identified issues with his

left hand; however, he denied any feelings of anxiety, fear, or trauma. She confirmed that he disclosed that he was working four hours per day and that he could go up to five hours. He was working 16-20 hours per week at that time. He values working because it gives him a sense of being self-sufficient. He also disclosed to her that he has remained social.

[225] Dr. Mead-Wescott opined that the plaintiff would need a variety of future care, including ongoing occupational therapy for cognitive strategy development as needed, counseling to help him find ways of managing his temper and emotional outbursts, and hopefully to gradually increase his insight regarding how he may need to adapt to his post-injury life.

[226] Dr. Ancill, a psychiatrist, supported the recommendation that the plaintiff have access to further psychological treatments but deferred to the psychologist for the number of sessions required.

[227] Ms. Abdel-Barr is an occupational therapist. She commented that the plaintiff relies on his sons to assist him with tasks that are outside of his physical capacity and relies on a combination of strategies to complete tasks using mainly his right hand. Her future care recommendations were that the plaintiff continue to participate in a supportive exercise program to maximize his strength and range of motion. She concurred with the recommendations of Dr. Anton that the plaintiff participate in an active rehabilitation program with a kinesiologist/personal trainer to continue to improve his physical functioning and to prevent deterioration, would not be an ongoing treatment.

[228] Ms. Abdel-Barr supported continued care through a psychologist given the plaintiff’s mild levels of depressive and anxiety symptoms and reported difficulty with managing anger and frustration related to how his injuries have affected his life. She endorsed Dr. Anton’s recommendation that the plaintiff continue to see his psychology counsellor Ms. Lori Reid for counselling until he reached a plateau and as long as it is beneficial in managing his anger, reducing his anxiety and coping

with his residual injuries and have future consideration for additional depressive symptoms.

[229] Ms. Reid has seen the plaintiff once every one-two months since 2016 and Ms. Abdel-Barr recommended that he have a provision for 6-12 sessions of psychotherapy within the next year followed by three-six sessions annually for maintenance on a long-term basis to provide monitoring of his mood and anxiety symptoms and possible early emergence of neurocognitive disorder.

[230] Ms. Abdel-Barr agreed that the costs of an endocrinologist and a general practitioner will be covered under the Medical Services Plan.

[231] Ms. Abdel-Barr's recommendation for massage therapy differs from what Dr. Anton recommended. She recommended 12 sessions per year based on the plaintiff's current attendance and the reported benefits.

[232] Ms. Abdel-Barr was aware that following the accident, the plaintiff had not retained a handyman or a housekeeper for any household chores, but she would not defer to the opinion of Dr. Anton, who testified that the plaintiff does not need a handyman or a housekeeper because he is capable of completing his household chores.

[233] Neurosurgeon Dr. Paquette noted that the plaintiff had a good recovery and attributed some of that to his rehabilitation efforts in the community. He expressed his view that an occupational therapist would be best suited to assess the plaintiff's care needs. Dr. Paquette agreed that if therapeutic efforts are not maintained at the plaintiff's current level he was at risk of physical decline. He agreed that efforts to maintain the plaintiff should continue.

[234] Dr. Janke agreed that the plaintiff has benefitted from regular sessions with his counsellor, Ms. Reid and that he should continue to see her on a regular basis to stabilize and maintain his mood. Dr. Janke agreed that the plaintiff would need intervention to cope with his personality changes.

[235] Dr. Janke agreed that an occupational therapist was prudent in the initial phase of the rehabilitation that it would also be useful for check-ins. He also agreed that the plaintiff should have a life care plan to help him with his brain injury, and said that it is highly unlikely that the plaintiff would never be without a need for services, confirming that brain injured patients who became isolated from services can result in self harm and harm to others.

[236] Harry and Ms. Chiu both stated that the plaintiff has struggled since his accident with executive functioning and planning. They felt that this became worse when he stopped seeing his occupational therapist in 2019, and said that they have both received more calls for assistance since then.

[237] They have helped the plaintiff with business matters, filling out forms for applications and banking and have helped him with his taxes. They also helped him with finding a new apartment and getting a bed.

[238] Ms. Chui provides the plaintiff with emotional support and is his sounding board for frustrations he has. She nudges him to get things done. She assists him with technology like computers, phones and other devices. She helps with time management and planning. She feels she needs to advocate for help for him and that he has regressed. She stated that he needs a lot more support than she and Harry are able to provide.

[239] The plaintiff summarized his cost of future care claim based upon the following recommendations given by the various witnesses as follows:

Recommendation	**Recommended by**	**Frequency**	**Present value**
vocational assessment	Anton, Mead-Wescott	onetime	$1,502
vocational counselling	Anton	10 hours total	$1,398
physiotherapy	Anton	12-24 sessions	$1,894
massage therapy	Abdel-Barr	3 times per year	$5,761

psychology	Anton, Ancill, Abdel-Barr	initial 12 sessions with 6 sessions per year ongoing	$1,885 $16,633
case manager - occupational therapy	Abdel-Barr	6-12 hours per year with 36 hour lifetime for transitional needs	$4,083 $17,700
Levetiracetam	Anton, Paquette, Shukla, Cameron	$383 per year	$6,849
tax preparation	Anton	$500 per year	$8,922
homemaking including seasonal cleaning to age 65	Abdel-Barr	5 hours per month	$7,021
homemaking from age 65 to 70	Abdel-Barr	8 hours per month	$25,999
moving	Abdel-Barr	16 hours, 2 times	$836
home maintenance (interior) to age 65	Abdel-Barr	10 hours per year	$2,144
home maintenance (interior) after 65 to 75	Abdel-Barr	15 hours per year	$7,445
lightweight vacuum with replacement 5 yrs.	Abdel-Barr	every 5 years	$1,378
kinesiology	Anton	initial 12-24 sessions with ongoing up to 12 sessions per year	$1,582 $16,419
yearly pass to community centre with pool	Abdel-Barr	$415 yearly	$7,778
		TOTAL	$137,259

[240] I agree with the defendant that it is highly unlikely that the plaintiff will need, or agree to a future surgical intervention, but as he may need such intervention, I would allow 25% of the anticipated cost, or $1,042.50, for this potential cost.

[241] The defendant concedes that the plaintiff should receive an award for a vocational assessment and counselling, in the amounts claimed by the plaintiff. The plaintiff's claim for these costs amounts to $2,900, but the defendant says that the award should only be $2,300 for these future costs. Given the defendant's concession, I award the plaintiff the sum of $2,900 for these future care costs.

[242] The defendant also argues that the plaintiff's claim for massage therapy was not recommended by Dr. Anton, and should not be allowed. I agree, for that reason, and because the Provincial Health Insurance does not cover the full cost of massage therapy, I will award the plaintiff the cost of two of the three claimed massage treatments at $3,840.66 per year.

[243] The defendant also concedes that the plaintiff will require 24 sessions of physiotherapy in the future, which he argues will have a cost of $1,920, present valued. As the plaintiff only claimed $1,894 for physiotherapy, I will allow that amount for the present value of that future care cost.

[244] The plaintiff's claim for the present value of psychology sessions is presented for 12 initial sessions and six sessions per year thereafter. The defendant does not concede the initial 12 sessions, given that the plaintiff has had initial sessions, and I agree that the initial 12 sessions claimed should not be allowed, leaving the appropriate amount for the present value of six sessions per year at $16,663.

[245] In my view the claim for a case manager is unnecessary as presented. I find that it is unlikely that the plaintiff will avail himself of such assistance, but instead will rely, as he has done, on his family for such advice and guidance. In the result, I award the plaintiff the sum of $5,000 to provide some monetary compensation to his family members for such assistance.

[246] I accept that some award should be made to the plaintiff for occupational therapy in case he suffers from flare-ups necessitating such therapy. I find that his claim for such assistance is excessive, and award him the sum of $5,000 for such therapy in future.

[247] The defendant contends that the likelihood is that the plaintiff would have had Pharmacare coverage absent the accident, and will likely have it in the future. However, Pharmacare does not cover the cost of prescription drugs. Low-income individuals may be eligible for Pharmacare, which may cover part or all of the cost of some prescription drugs. But a surprising amount of drugs are not covered, the list is pretty arbitrary. Even if he qualifies for Pharmacare, as he likely would, I am not sure it's fair to say it would "likely" cover this expense. Given the principle of full compensation, his claim for the cost of Levetiracetam in the amount of $6,849 is allowed.

[248] The plaintiff claims the cost of moving assistance, contemplating two moves in the future. While I am not satisfied that there is an evidentiary basis for this claim, it is conceded by the defendant in the amount of $836 as claimed, so I will allow that amount for that future cost.

[249] The defendant also argues that the claims for homemaking, home maintenance and ergonomic equipment should be dismissed, given the plaintiff's abilities to care for himself. I agree that the plaintiff will need little in the way of assistance for these things, and has not demonstrated the need for the little ergonomic equipment claimed, however, I would allow him the sum of $5,000 for some modest assistance for some future homemaking and home maintenance assistance.

[250] I find that the plaintiff's claim for future kinesiology is excessive and allow what is conceded for this future cost by defendant of $12,895.

[251] As the defendant concedes the cost of a Community Center pass at a present value of $7,778, I will award that amount for that future cost.

[252] The items included in plaintiff's claim for future care costs that I accept amount to $69,698.16, which I will round up to $70,000 for this head of damages.

(g) Loss of an Interdependent Relationship

[253] The standard of proof to establish a future pecuniary loss is simple probability. It is not necessary for a plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur. All that has to be established is a real and substantial risk of pecuniary loss: *Graham v. Rourke,* [1990] O.J. No. 2314 (C.A.).

[254] The plaintiff claims that the changes in his behaviour resulting from his brain injury was sufficient to destroy his relationship with Ms. Vinnai. As a result, he says, he lost a valuable interdependent relationship. He also claims his behaviour will likely impede his ability to form and maintain new relationships. He submits that the threshold test of a real and substantial possibility of loss has been met.

[255] The plaintiff led evidence from Mr. Benning that the value of his loss of an interdependent relationship with Ms. Vinnai is $55,000 to date and $74,000 in the future, based on the assumptions that the plaintiff was in an interdependent relationship with a 48-year-old woman at the time of the accident, who, but for the accident, would have earned the average earnings of a B.C. registered nurse to age 65. He was asked to assume that the relationship had a 50% chance of failure and that the plaintiff will not form a similar relationship in the future.

[256] During his high school years, the plaintiff suffered from seizures, and was cruelly ridiculed by classmates. He would go home from school and punch holes into walls, and developed what he described as an "ice man" personality.

[257] Ms. Vinnai was 48 when she ended her relationship with the plaintiff and returned to work in Ontario as a registered nurse. While she gave evidence that she had worked full-time hours most of her life and had worked full-time for several years before she began her relationship with the plaintiff, she never worked in British Columbia in any capacity. Despite working as a nurse for many years before coming

to British Columbia, Ms. Vinnai did not have savings and her only source of income was $2,500, which she received as spousal support.

[258] Ms. Vinnai gave evidence that her plan was to get her licence as a registered nurse in British Columbia. She stated that she had initiated the process in 2014 while in Ontario by logging on and getting a registration number and paying the initial fee for the application. She also said that in order to get her B.C. nursing licence, she needed a criminal reference check, complete list of hours worked as a nurse to date, a declaration for her name change and an outline of her work history.

[259] Ms. Vinnai gave evidence that while the plaintiff was in hospital, she had to get her criminal record check and some paperwork notarized, but said that she did not have a printer and she needed a number of documents printed. Ms. Chiu testified that she had offered to help Ms. Vinnai a number of times with her B.C. licensing application, but Ms. Vinnai would always cancel on her.

[260] While Ms. Vinnai said that she had sent out some resumes to some long-term care facilities she did not complete her application and ultimately did not find work in B.C. She attributed this to the uncertainty about her relationship with the plaintiff and the need to care for him. I find that she did little to obtain licensure in B.C. once she decided to move here.

[261] Harry confirmed that following the accident, he expressed concerns to the social worker at Lions Gate Hospital about his brother financially supporting Ms. Vinnai. He also confirmed that Ms. Vinnai failed to attend meetings to arrange the plaintiff's assets during his coma and she did not appear to be stepping in to help at that time.

[262] I find that the relationship between the plaintiff and Ms. Vinnai could not fairly be described as one of co-dependence. It was one of financial dependence on Ms. Vinnai's part, and financial support on the part of the plaintiff.

[263] Ms. Vinnai confirmed that she was not paying for any accommodation costs and was only paying for groceries and her meals. This is the arrangement she had

with the plaintiff before the accident. She stated that she was paying her own medical and car insurance.

[264] The plaintiff gave evidence that even during his first couple of months of co-habitation with Ms. Vinnai, he would put up with little things which she did that annoyed him.

[265] While the plaintiff sustained a brain injury that caused a change in his personality, with increased temperament and lack of social filter, I do not accept the plaintiff's submission that this caused a change in his behavior towards Ms. Vinnai to the same extent she described. To the contrary, I find that with some exceptions where he lost his temper, he was deferential to her.

[266] Ms. Vinnai identified as an alcoholic after the accident. Although she has been sober for over four years, she did not address her drinking before her relationship with the plaintiff ended.

[267] Ms. Chiu described the plaintiff as an emotional wreck after his breakup with Ms. Vinnai. She helped him set up an online dating account, and he is now in a relationship with a woman that both Harry and Ms. Chiu described as a "good" relationship. The plaintiff himself agreed that his current relationship is one that is serious and committed.

[268] I was offered no evidence of the likelihood of a co-dependant relationship between the plaintiff and his current partner, nor given any evidence of her financial or employment circumstances.

[269] Interestingly, the plaintiff was not asked in his evidence in chief if his new partner was gainfully employed, so I am left to speculate about whether his present relationship is more financially beneficial than the one he might have had with Ms. Vinnai.

[270] I decline to do so, and find that the plaintiff has failed to establish the claim he advanced for the loss of an interdependent relationship.

VII. Management Fees

[271] The parties will make submissions respecting this head of damages after receipt of these reasons for judgment.

VIII. Costs

[272] The parties will make submissions with respect to costs after receipt of these reasons for judgment.

IX. Conclusion

[273] I find that the defendant is solely responsible for the accident. I award the plaintiff the following damages:

i)	Non-pecuniary damages:	$225,000;
ii)	Income loss to date of trial:	$100,000;
iii)	Loss of future Earning Capacity:	$200,000;
iv)	Special damages:	$53,218.66; and
v)	Cost of Future Care:	$70,000.00
	Total:	$648,218.66

[274] The parties may make submissions with respect to management fees and costs. If either party wishes to make oral submissions, arrangements should be made through the Registry to appear before me. If neither party wishes to make oral submissions, they may make written submissions not to exceed 20 pages in length. The plaintiff will deliver any such written submissions first, and the defendant will be allowed 14 days after the receipt of the plaintiff's written submissions to respond. The plaintiff will then have 7 days for reply, not to exceed 10 pages if reply is necessary.

"The Honourable Chief Justice Hinkson"