
CANADA / JUDGMENT

Best v. Thomas

2014 BCSC 1033

COURT

Supreme Court of British Columbia

DECIDED

10 June 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCSC 1033 Best v. Thomas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Best v. Thomas,

2014 BCSC 1033

Date: 20140610

Docket: M101629

Registry: Vancouver

Between:

Shawn David Best

Plaintiff

And

April Teresa Thomas,

Joan Mary Thomas

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiff:

A. Vecchio, Q.C.

J.U. Buckley

N.M. Kelly

Counsel for the Third Party:

K. Armstrong

S. Stewart

Place and Dates of Trial:

Vancouver, B.C.

February 17-21, 2014

February 24-28, 2014

March 3-7, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2014

I. Introduction. 4

II. The evidence. 5

A. Prior to the Accident 5

B. The Accident 6

1. The plaintiff's evidence. 6

2. Ed Johnson Jr. 7

3. Ed Johnson Sr. 7

4. Tammy Brock. 8

5. April Thomas. 8

6. Joan Thomas. 9

C. After the Accident 10

1. The plaintiff's evidence. 10

2. Aliesha Best 14

3.	Brenda Spafford.	15
4.	Jason Best	18
	D. Medical Evidence.	20
5.	Dr. Martin Milewski	20
6.	Neurological consult with Dr. Kennely Ho.	24
7.	The plaintiff's progress after Dr. Ho's involvement	27
8.	David Moffitt - physiotherapist	27
9.	Occupational therapists - Scott Myles and Abdollah Rezazadeh.	29
10.	Assessments by experts for court	31
11.	Conclusion on the medical cause of the plaintiff's condition.	36
12.	Barbara Baptiste - the plaintiff's cost of future care expert	37
13.	Cost of care critique.	41
	E. Conclusion on the plaintiff's current condition, abilities and prognosis for the future.	41
1.	Credibility and Reliability of Evidence.	41
	III. Liability.	42
	IV. Causation.	42
	V. Damages.	42
	A. Non-Pecuniary Damages.	42
	B. Past Wage Loss.	45
	C. Loss of Future Earning Capacity.	45
	D. Cost of Future Care.	47
	E. Special Damages.	50
	F. Past in trust claim for special damages.	50
	G. Summary.	52
	VI. Costs.	52

I. Introduction

- [1] On September 13, 2008, in Port Alberni, B.C. the plaintiff, Shawn Best, was rear-ended by a van while he was stopped on his motorcycle, waiting for the vehicle ahead of him to turn left. April Thomas was the driver of the van. She did not have a valid driver's licence. Joan Thomas, April Thomas's grandmother, owned the van. The Insurance Corporation of British Columbia ("ICBC") is named as a third party.
- [2] Mr. Best was taken from the accident scene in an ambulance and released from hospital several hours later. Witnesses to the accident or its aftermath, the Johnson family, provided him a place to stay and took him to the bus depot the next day so he could return home to Maple Ridge. Mr. Best was stiff and sore immediately after the accident and those symptoms worsened over the ensuing days and weeks. He developed tremors in his limbs. Mr. Best's family doctor sent him to Royal Columbia Hospital on October 9, 2008. The following day, Mr. Best had surgery on his C5-6 disc.
- [3] While the surgery appeared successful in that it removed the disc fragments which had been pressing on Mr. Best's spinal cord, he did not gain relief from it and continues to suffer from a variety of ailments. He maintains he is permanently disabled and competitively unemployable due to a combination of physical and psychiatric conditions caused by the accident. He claims for special damages, including an in trust claim respecting family members who cared for him, past wage loss, loss of earning capacity, non-pecuniary damages at the upper end of the range and damages for future care.
- [4] The defendants were not represented by counsel; however, April Thomas testified and Joan Thomas's examination for discovery evidence was read in. There is no concession of liability by ICBC, nor any concession with respect to damages. ICBC's position is that the plaintiff's condition is largely or entirely the result of conversion disorder, a psychiatric condition.

II. The evidence

A. Prior to the Accident

- [5] Mr. Best is divorced and has no children. He left high school in grade 11 but achieved his GED about two or three years later. He has two younger brothers: Jason, who is two and a half years younger, and Jonathan, who is five years younger than Jason.
- [6] Mr. Best took programs at BCIT and Ridge Meadows College to attain certificates relevant to the work he wished to pursue with the District of Maple Ridge. He obtained a job as a building service worker in facilities and maintenance with the District of Maple Ridge and worked in that capacity for six or seven years until an opportunity with the parks department came up. He started as a labourer in the parks department about three years prior to the accident. The parks job had the advantage of Monday to Friday day shifts rather than the seven day shift work with building maintenance.

- [7] The parks job involved a variety of activities ranging from cutting down trees, to operating machinery to working on the ball fields, and doing maintenance and sod repair, and edging for the sports fields. Mr. Best trained to operate various large lawn mowers, one of which had a 17' wing span. He had to load the mower onto a trailer and transport it from park to park so it was a physical job. He had no difficulties with the physical aspect of his job.
- [8] By all accounts, Mr. Best loved his job. He enjoyed dealing with the public and he liked the work schedule, work environment and benefits package associated with the position. Two of his former supervisors, Donald Cram and David Boag, testified that the plaintiff was a good worker who was very positive, and got along with the public, his supervisors and his co-workers.
- [9] Before the accident the plaintiff was a fit and active young man. In his own words, he enjoyed "pretty much anything that involved going outside", from hiking and biking to snowboarding and camping. He played ball hockey with friends. He went to the gym four or five days/week. The activity helped him with the physical aspects of his job. In the past he played ice hockey. He had also developed an interest in archery.
- [10] The plaintiff's brother Jonathan and his friends Masao Wakita and Chris Schwarz all testified about the plaintiff's enjoyment of a physical lifestyle prior to the accident.
- [11] Regarding his mental or emotional health prior to the accident, Mr. Best said he saw a doctor once or twice after he separated from his wife in 2007, but did not feel under constant stress. His family and friends characterized him as a happy and easygoing person.

B. The Accident

1. The plaintiff's evidence

- [12] On September 13, 2008, 13 days before his 32nd birthday, the plaintiff was on Vancouver Island with about 1,200 other motorcycle enthusiasts participating in a fundraiser toy run. Following the conclusion of the event, at about 2:00 p.m., the plaintiff was riding eastbound on Johnston Street in Port Alberni en route to the Nanaimo ferry terminal. At the intersection of Johnston Street and Leslie Avenue he stopped behind a vehicle waiting to turn left. In one of his mirrors he noticed a vehicle coming towards him. The vehicle, a van, hit the plaintiff from behind.
- [13] The plaintiff was propelled off his motorcycle. He felt his knees strike the handlebars as he went over them. His motorcycle was pinned underneath the van. He got up but felt shocked and stiff. The man who had been turning left, Ed Johnson Jr., stopped to assist the plaintiff, as did others.
- [14] The plaintiff was taken to hospital by ambulance and examined by a doctor. He felt stiff and told the doctor his neck, knees, back and legs were sore. He was given an injection and a prescription at the hospital. Ed Johnson Sr. took him to the Johnson family home near the accident scene and he stayed there overnight.

2. Ed Johnson Jr.

- [15] Ed Johnson Jr. was driving the vehicle ahead of the plaintiff and witnessed the lead-up to the accident. He was familiar with the area because his parents' house is on the corner of Johnston Road and Leslie Avenue. That intersection is not controlled by a traffic light or a stop sign and is slightly uphill from a dip in the train tracks. The weather was sunny and dry.
- [16] As he was waiting to turn left onto Leslie Avenue, Mr. Johnson Jr. looked in his rearview mirror and saw a van travelling "pretty fast", about 50 to 60 kilometres per hour. He knew it was going to hit the motorcycle behind him. He did not hear the sounds of tires squealing or braking. The plaintiff was thrown off the motorcycle but Mr. Johnson Jr. did not actually see him land on the ground.
- [17] Mr. Johnson Jr. completed his turn onto Leslie Avenue and stopped his vehicle. He had the plaintiff sit in his vehicle because it was hot out and he had air conditioning on. The plaintiff's motorcycle ended up at his dad's house on Leslie Avenue. When the plaintiff came back from the hospital later that day he seemed pretty mixed up and confused.

3. Ed Johnson Sr.

- [18] Ed Johnson Sr. was driving home in his truck, approaching the turnoff for his house when he noticed the aftermath of a motor vehicle accident. He saw his son's vehicle and became concerned. As he got closer, he could see the accident involved a motorcycle, which was underneath a van. Mr. Johnson Sr. has a background in first aid. He spoke with the plaintiff, who seemed shocked and disoriented by what had happened and became stiffer and in more pain the longer they spoke.
- [19] Mr. Johnson Sr. picked the plaintiff up later at the hospital because he knew the plaintiff was from out of town and his mode of transportation was ruined. The plaintiff was in a lot of pain and repeated himself to the point where Mr. Johnson Sr. became concerned about a concussion. The plaintiff tried to get on his motorcycle to go home that night but the Johnson family persuaded him to stay.
- [20] Mr. Johnson Sr. said the plaintiff had slurred his words very slightly at the accident scene but that seemed to get worse over the course of the evening and he was more difficult to understand. The next morning the plaintiff was in a lot of pain and making less sense when he spoke. Mr. Johnson Sr. drove him to the bus depot so he could get home. The motorcycle was taken away by a tow truck.

4. Tammy Brock

- [21] Tammy Brock, Mr. Johnson Sr.'s spouse, heard a commotion on the street in front of her home. She went outside and saw a motorcycle and a van on the street. Ms. Brock met the plaintiff later in the day after he was released from the hospital. The plaintiff wanted to ride his motorcycle back to Vancouver but Ms. Brock said he was in no condition to ride. He had a sore knee, he was limping, and he appeared shaken up and disoriented with slow speech.

Ms. Brock and her family persuaded him to stay overnight. As the evening went on his condition deteriorated. He slurred his words and was not able to form proper sentences. He struggled to get off the couch and appeared to be in pain. Ms. Brock said as he walked down the hall he seemed to shift to one side and could not walk in a straight line.

- [22] The next morning Ms. Brock was still concerned about the plaintiff because he was not able to answer questions properly. He slurred his words, could not form sentences properly and tended to drift off and repeat himself. She was worried about him getting back to Vancouver without help.

5. April Thomas

- [23] On September 13, 2008, April Thomas was in Port Alberni visiting her family with her three year old twin boys. The boys left the house to see their grandmother. Ms. Thomas panicked when she realized her children were gone. She asked for and received permission from her own grandmother, Joan Thomas, to borrow her van to pick up the boys. While returning to Joan Thomas's house with the boys, Ms. Thomas saw a car ahead of her going up the hill on Johnston. She did not notice it had switched lanes and did not see the motorcycle stopped ahead of her until it was too late. She hit the motorcycle and it came up onto the hood of the van and stuck there.

- [24] Initially Ms. Thomas testified she thought the rider was still on the bike after the collision, but upon having her memory refreshed from a statement she gave to an ICBC adjuster on October 2, 2008, agreed she said the rider fell off the motorbike.

- [25] The police ticketed Ms. Thomas for following too closely, failing to have proper child restraints in the vehicle and not having a driver's licence. She did not dispute the ticket. She agreed she told a second ICBC adjuster after the accident she had been driving about 50 kilometres per hour and that was her best estimate at a time when her recollection was much better.

6. Joan Thomas

- [26] Joan Thomas did not testify but the plaintiff read in excerpts from her examination for discovery:

Q: Ms. Thomas, you understand that you are here because you are a defendant in a lawsuit involving a motorcycle collision that occurred on September the 13th, 2008?

A: Yes.

Q: That occurred in Port Alberni?

A: Yes.

Q: That involved a mini van that you owned and another vehicle?

A: Yes

Q: So, Ms. Thomas, at the time of the collision, you owned a 2001 brown Chevrolet Venture mini van?

A: Yes.

Q: Bearing licence plate 187 HLA?

A: I don't remember the licence plate.

Q: I thought I would try.

Ms. Thomas, I have here today a statement that you gave . I just ask that you take a couple of minutes to review it.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RESUMED)

Q: Do you recall providing this statement on February 13th, 2009?

A: Pardon?

Q: Do you recall giving this statement in 2009?

A: Yes.

Q: That is your signature at the bottom right-hand on each of the three pages?

A: Yes.

Q: And this statement was true?

A: Yes.

Q: You will see on page 2 here, it says, "I recall April came in and asked me to use the van and I said, yes, although I knew she didn't have a driver's licence"; that statement was true?

A: Yes.

Q: You will see here it says she had my consent to drive the van when the accident happened, and that was true?

A: What's that?

Q: She had my consent to drive the van when the accident happened?

A: Yes, she did.

C. After the Accident

1. The plaintiff's evidence

- [27] Mr. Best returned home to Maple Ridge the day after the accident. His neck, lower legs, and back were sore. He saw his family doctor, Dr. Milewski, three days after the accident. The doctor sent him for an x-ray on his neck and for physiotherapy. The soreness and stiffness in his legs and back continued to worsen and it became hard for him to walk. During one session with the physiotherapist, while he was sitting on the recumbent cycle, his legs started to shake. He could not control the shaking and it moved up his left side to his arm. He thought the shaking started in his left leg but he was in pain and heavily medicated at the time so was not certain. He described the shaking as an electrical current shooting through the bones and muscles of his legs.
- [28] When the shaking in his legs became intense the plaintiff called his sister-in-law, Aliesha Best, and asked her to take him to the doctor. Dr. Milewski then referred him to Royal Columbian Hospital. The plaintiff recalled lying on a bed with his body shaking violently every 10 minutes or so. He underwent an MRI and doctors told him he would undergo spinal surgery to remove the discs that were compressing his spinal cord.
- [29] The plaintiff assumed the surgery would alleviate the spasticity, or shaking. It did not. The spasticity remains, albeit it in an improved state, and the pain has not gone away. The electrical feeling and the aches in his muscles continue, although medication and physiotherapy helps. If he puts pressure on a particular area of his foot it will activate the spasticity in his legs and they will kick out from underneath him. As a result he walks with most of his weight on his heels. This in turn puts pressure on his lower back and creates a constant pain whenever he walks around or moves.
- [30] The plaintiff said the first winter after the accident was a bad one with a lot of ice and snow and his body was extremely sore. The pain was so excruciating that he was trying to figure out how to cut off his legs and cauterize them in the fireplace to make it go away.
- [31] The plaintiff takes a wide variety of medications to relax his muscles and assist with spasticity, nerve pain, anxiety and general pain. He also uses cannabis for relaxation. The plaintiff finds warm and dry temperatures are much better for his pain. Sitting in a hot tub gives him short term relief. His trips to Venezuela, Mexico and Arizona were all helpful due to their warm climates.
- [32] Both of the plaintiff's legs still shake, the left more than the right. His balance is poor. He cannot walk in tandem gait (one foot in front of the other). He uses a cane and will not walk farther than 10 feet without it. He adopts a wide spread gait for stability. The plaintiff can walk up and down slopes depending on the steepness but cannot walk much farther than 100 metres on a flat stretch without becoming fatigued. He can stand for five or ten minutes before he starts hurting. If he shifts his balance and bends his knees too far they will buckle.
- [33] The plaintiff showers once every two or three days and shaves once a week or so because those tasks are too much work to do on a daily basis. He dresses himself but has to lean against the wall or he will fall over. He is able to get up when he falls. He cannot sweep the floor, vacuum or clean the bathroom as he is worried about falling. He can straighten the

sheets on his bed but he cannot change them. On a good day he can load laundry and put it in the dryer. Laundry is easier now in his rental home because the machine takes powdered detergent rather than liquid which he found difficult to pour. He does not use his scooter since he finds it too onerous to load into his vehicle.

- [34] The plaintiff's left arm shakes periodically and when that happens he will drop whatever he is carrying. He is left handed. Reaching for something provokes the shaking and he cannot reach overhead to put things up on a shelf. He has difficulty with fine motor skills. He can write but his hand cramps up after a short time. He can carry light groceries. He cannot prepare his own meals. The plaintiff's neck is always stiff, particularly if he tries to read or write. He gets headaches from trying to concentrate or having long conversations with people.
- [35] Fatigue is a problem for the plaintiff. He describes it as overwhelming, like having a vacuum hovering over him and sucking the energy out of him. He does not sleep well due to pain. He also hears noises as he is falling asleep and he does not wake up revitalized. He naps an hour or two per day on top of eight to ten hours of sleep at night.
- [36] The plaintiff sits down to urinate because he finds it easier to get a flow going. He does not like being far from a bathroom as he cannot hold the pressure and will either urinate or defecate. He has accidentally urinated about a dozen times and defecated twice. He has had problems with constipation and has learned to give himself an enema. He was hospitalized for constipation and retention of urine.
- [37] Since the accident the plaintiff has had issues with sexual functioning. He does not get any sensation during intercourse and will lose his erection. He is not currently in a relationship and has dated very infrequently since the accident. He had a vasectomy because he felt he would not be able to participate in activities with children or chase after one.
- [38] The plaintiff has suffered from pressure sores on and off for the past two years. He bumped one on a table when he fell and opened it up and had to go for intravenous therapy in the hospital. He takes antibiotics to treat them.
- [39] As for leisure activities, the plaintiff has tried archery but could not keep the bow steady. He also tried fishing and crabbing but did not enjoy those activities due to his limitations. He goes to the community centre and pool in Mission so he does not see people he knows at the facility in Maple Ridge. He has gained 40 or 50 pounds since the accident.
- [40] The plaintiff saw a psychiatrist, Dr. Bright, in early 2009 because he did not sleep for six days. He had ringing in his ears and would wake up with a flash of seeing the van coming towards him. He still gets the ringing and roaring sounds but not as many flashbacks. He saw another psychiatrist, Dr. Gopinath, because Dr. Bright was his friend's mother and she felt conflicted about treating him. He has not had psychiatric or psychological assistance for about two years prior to trial.

- [41] The plaintiff says he is frustrated as a result of the accident. He does not enjoy life. The doctors told him his condition was all in his head and he disagrees with that. He feels he has a spinal cord injury and there must be some type of nerve damage to cause the amount of pain he feels.
- [42] Alcohol consumption was an issue for the plaintiff about a year after the accident. He drank heavily for six months but testified he has stopped; however, when confronted with his examination for discovery evidence he admitted that he has an occasional drink.
- [43] On cross-examination the plaintiff agreed he was frustrated with changes in personnel in his house, in particular with the active rehabilitation therapists. His frustration led him to discontinue some of the assistance and to hire his own cleaners so he had some control over who came into his home.
- [44] I am mindful that the plaintiff experiences memory troubles. This was manifest in the way he gave evidence and the difficulties he had following the flow of questions. For example, his counsel asked him about incontinence but his response was directed at sexual dysfunction. He also gave different versions of his condition to different medical practitioners. It is important to assess his evidence in concert with what he told other people about his symptoms and what they observed. I will now turn to reviewing that evidence.

2. Aliesha Best

- [45] Aliesha Best is married to the plaintiff's brother Jonathan. She saw the plaintiff a few days after the accident. He was very stiff and sore and not moving around much. For the first few weeks after the accident she stopped by to see him every couple of days. By early October, the plaintiff's legs and one of his arms started shaking. Mrs. Best was concerned and took him to the doctor. The plaintiff could not walk to the car so she had to hold him up and almost carry him the short distance to where she was parked.
- [46] The plaintiff's doctor sent them to Royal Columbian Hospital Emergency. Mrs. Best spoke with medical personnel on the plaintiff's behalf as he was shaking and lacked the strength to repeat his story. The doctors seemed to want to discharge him but Mrs. Best pressed for further testing. As a result the plaintiff saw a neurologist, Dr. Ho, and had neurosurgery the next day.
- [47] Following the surgery Mrs. Best accompanied the plaintiff to doctors' appointments as he was unable to go on his own and could not remember what doctors told him about care plans. She took notes and reminded him what he had to do after appointments. She checked on him several times a day and monitored his medication so he stayed on the right dosages. As a teenager, Mrs. Best had cared for her grandmother so she was accustomed to assisting and advocating for people in medical situations.

- [48] Mrs. Best assisted the plaintiff after surgery on average for about four hours per day until December or January, and after that about five hours per week until he got his driver's licence back in April 2009. She took food to him, arranged for his medication to be blister packed, tidied the house and did laundry if necessary. She was also on call 24 hours a day if he needed her. Mrs. Best cited an example when the plaintiff fell out of bed one night and she went over and helped him get up. On another occasion in February 2009, Mrs. Best and her husband checked on the plaintiff at night. He was acting oddly and not making sense. They took him to the hospital and it turned out he was having an adverse reaction to Cesamet, the only drug Mrs. Best had not been monitoring.
- [49] Up until the early part of 2009, Mrs. Best said the plaintiff was suffering from shaking in the legs and arm, chronic pain, and difficulties with memory, balance and coordination. Eventually she was overwhelmed and asked the plaintiff's mother Brenda Spafford to come home from her holiday in Venezuela to help.
- [50] Mrs. Best said the plaintiff went from a warm, easygoing, outgoing guy to someone who is just not as happy as he was before. He loves being an uncle to her son but was uncomfortable holding him while he was a very young baby. She agreed the plaintiff has a bit more mobility now than immediately after the accident. He can drive on his own and walk with a cane, albeit not with a normal gait. He still has tremors and issues with balance. Mrs. Best agreed with counsel for ICBC that he does not use his scooter very much. He gets to the pool and physiotherapy appointments on his own. He socializes with family. He has travelled to warmer places for winter vacations with his mother. Mrs. Best said he is unable to walk on the dike because he gets too tired. She cited fatigue as a major issue for him.

3. Brenda Spafford

- [51] The plaintiff's mother, Brenda Spafford, is 62 and retired. At the time of her son's accident she was living in Penticton with her husband Fred. She learned about the accident while on a cruise with Fred, her son Jonathan and his then-fiancée, Aliesha. She saw her son a few days after she returned home from the cruise. He was in a lot of pain and had trouble walking. He complained of aching all over. She went home to Penticton, thinking he would heal from the accident, but returned to the Lower Mainland when he underwent surgery. Ms. Spafford visited him in hospital and following discharge. He was heavily medicated and slept a lot of the time. When he got up his legs shook uncontrollably as if he had Parkinson's disease. He tended to lie around and watch a lot of television, something he did not do before the accident.
- [52] Ms. Spafford took steps to make the plaintiff's life easier by arranging for internet banking and picking up cheques for him at ICBC. She said he found it difficult to have someone do things for him. While they would see each other a couple of times a year prior to the accident, he had lived independently from her for a long time. After the accident she was around a lot for him which she felt compromised his independence.

- [53] Ms. Spafford spent Christmas 2008 with the plaintiff then went away to Venezuela with her husband early in 2009. In February 2009, Aliesha asked her to come back to care for the plaintiff. Ms. Spafford helped him with banking, errands, grocery shopping, cleaning and vacuuming. He had home care but any time he did something in the kitchen he would spill and leave a mess so constant tidying was required. Ms. Spafford divided her time between Penticton and Maple Ridge in 10-day stints.
- [54] Ms. Spafford observed that winters are very hard on her son. Damp cold weather seems to "gnaw at his bones". Ms. Spafford and her husband took the plaintiff to Venezuela for six weeks in 2010. He would swim or go to the gym but would nap afterwards. He was better in warmer weather but still suffered from pain and fatigue. He also had several falls. In one instance his leg buckled and he fell on a glass end table. The table broke and he cut his arm. He had planned to move into his own condo on another floor but Ms. Spafford and her husband realized he could not stay on his own as he would not be able to bring bottled water or other necessities upstairs to his unit. As a result, he remained with them. He had other falls while in Venezuela.
- [55] Ms. Spafford said the accident has changed the quality of who her son is. She described his transition from an easygoing, friendly, happy, nice guy to someone in constant pain. He seems depressed, moody and withdrawn. She cannot remember the last time she heard him laugh. She said after he testified in court he was in bed for two days.
- [56] While Ms. Spafford acknowledged that the plaintiff lived on his own after the accident until Jason moved in, she said family members had keys to his home and would check on him every day, sometimes several times per day. She agreed the most intense family involvement was in October and November 2008. Ms. Spafford estimates she spent about 600 hours doing things for the plaintiff between the accident and the time his brother Jason moved in with him in about May 2010.
- [57] Ms. Spafford currently sees him on average four times per week depending on his pain level. She currently rents the plaintiff's townhouse from him as he lives in a more suitable place with Jason. She has no plans to live with him in his townhouse. He wants to be independent but she worries about what is going to happen to him in 10 or 15 years, or if Jason moves out.
- [58] Regarding his current condition, Ms. Spafford said the plaintiff still spills coffee all over the floor when he tries to make it. He does not cook because it exhausts him and he makes a terrible mess, so he is more likely to get takeout meals than cook for himself. His brother Jason and his girlfriend Maya do 90% of the cooking and laundry and he has someone come in and clean. He can get himself in and out of bed. He has trouble with buttons but he does dress himself. Ms. Spafford has gone shopping with him and on occasion his leg buckles and he has to go back to the car. She does not feel he can go on vacation on his own due to the risk of him falling.

- [59] Ms. Spafford agreed her son needs a cane and while he has a scooter, he rarely uses it as he pushes himself to maintain some form of normalcy. To her knowledge, he drives himself to medical appointments and to the Mission pool.
4. Jason Best
- [60] Jason was very close to his brother, Mr. Best, when they were young. They engaged in a lot of physical activities together such as camping, canoeing, hiking and snowboarding. In the years leading up to accident Jason would see the plaintiff once every few months. Jason said his brother had no physical impairments and was a very positive individual.
- [61] Jason picked the plaintiff up at the ferry after the accident. The plaintiff was rigid, in pain and moving slowly. He did not see the plaintiff for a few weeks by which time he was having problems with spasticity in his legs, was in excruciating pain and could not walk normally. Jonathan and Aliessa were the main caregivers at that time. Jason saw the plaintiff every few months and noted his brother had ongoing difficulties with ambulation, pain and frustration. He walked with a cane and used a scooter for a while because it was too painful to walk.
- [62] Jason moved in with the plaintiff in about May 2010 because the plaintiff was no longer receiving outside care for meal preparation and Jason felt he should step in and do more. Once he moved in he began to see the problems his brother had with balance and walking. The plaintiff had rails installed in the house for assistance because his balance was terrible. Jason also noticed dexterity problems. The plaintiff still cannot carry a cup of coffee without spilling it or dropping the cup. His leg tremors were initially uncontrollable although the medications have helped and he has found ways to deal with it.
- [63] At the beginning the plaintiff's attitude was "this will get better" but Jason said his brother now feels hopeless and accepts the state he is in. The plaintiff used to be very social with lots of friends but now does not go out much. After a while people stopped asking him to go out because they assume he will decline. He does, however, see friends on occasion. Masao Wakita and Chris Schwarz both testified they make efforts to see him on a fairly regular basis. The plaintiff goes to family functions but does not stay long. He has a tendency to isolate himself in his room. He was never depressed before. Now he is disappointed, frustrated and hopeless. Jason also said the plaintiff has problems concentrating and remembering things since the accident.
- [64] The two brothers moved from the plaintiff's townhouse to a rental property and then Jason's girlfriend Maya moved in. It has a large yard and Jason thought his brother might do a little gardening but if he does it is for short periods and he becomes fatigued.
- [65] When Jason first moved in with Mr. Best, Jason cooked meals, got the plaintiff up and moving, cleaned, grocery shopped, ran small errands, did laundry and made his brother's bed. The plaintiff was unable to do much of those activities himself but there have been some small improvements. The plaintiff can get himself in and out of bed and bathe himself

with accommodations. He walks with a cane and does not use his scooter much. He can drive his Hyundai Santa Fe and still has his pick-up truck. He is able to run his own errands, including banking, clothes shopping and light grocery shopping, and get himself to appointments. He still cannot carry more than one bag of groceries.

- [66] Jason still does the majority of meal preparation. If he does not make dinner, the plaintiff will eat fast food or have soup and has gained a substantial amount of weight since the accident. He does not have the dexterity to hold a knife and Jason does not think it is safe for him to cut up ingredients for healthy meals. Jason agreed the plaintiff can organize light meals and snacks for himself. He is able to wipe the counter but has trouble putting dishes away and washing them.
- [67] The plaintiff is unable to take out the garbage. Loading the laundry machine with liquid soap was a challenge to his dexterity but they currently have a top loading machine and Mr. Best can add powder without spilling it all over. Folding laundry presents a challenge. They have a cleaning service once a week. Jason feels this is not enough as his brother's dexterity issues cause a mess. He still drops dishes.
- [68] Jason does not feel his brother could live on his own without support. Jason calculated he provides three to four hours a day of assistance for his brother but on cross-examination, he could not say how much of that time was providing emotional support versus doing concrete tasks. He acknowledged that moving in with the plaintiff was convenient but it also allowed him to be there for his brother.
- [69] Physiotherapy wipes the plaintiff out for a day with fatigue. He can only walk about 100 metres due to fatigue. His balance is terrible. At any given time his legs will just give out. This has not changed over time though the plaintiff is more cautious than he used to be. Jason says his brother has a slow staggering walk and could not climb out a window to escape a fire. He fell through the glass in the shower due to balance issues. The glass has been replaced by a shower curtain.
- [70] Jason recalled the plaintiff had to be hospitalized to have a catheter put in his bladder and an enema because he had no bowel movement for several days. The latter has occurred more than once, but he was not sure of the exact number of times.

D. Medical Evidence

5. Dr. Martin Milewski

- [71] Dr. Milewski has been the plaintiff's family doctor since he was a young boy. He described the plaintiff as a pleasant fellow but a bit of a "worry wart". The plaintiff had no significant health complaints before the accident apart from a tendency towards anxiety which was amplified by the accident. The doctor observed that the plaintiff has become an unhappy person.

- [72] The plaintiff saw Dr. Milewski a number of times between August 2001 and the accident. The doctor agreed he was a fairly frequent visitor, given his age. In June 2007, he inhaled chemicals at work and had a reaction that was compounded by his anxiety. In December 2007 he went through another period of anxiety when he separated from his wife and needed some time off work. By January 21, 2008, he had settled his difficulties and was ready to go back to work. The plaintiff also complained at least once prior to the accident of having difficulty focussing his mind.
- [73] Dr. Milewski first saw the plaintiff in relation to the accident on September 16, 2008. He noted an impaired range of motion of all major joints as one would expect after the mechanism of injury the plaintiff had suffered. He prescribed Percocet for pain control and suggested physiotherapy. On September 24, the plaintiff reported some improvement but still had significant impairment in the cervical range of motion. He had difficulty raising his left arm more than 80 degrees, 10 degrees below the bottom of the normal range. Dr. Milewski prescribed more Percocet.
- [74] The plaintiff returned to Dr. Milewski on October 8 at the request of his physiotherapist who had noted significant hyperreflexia, clonus and a spontaneous tremor in both legs, along with sensory changes. Dr. Milewski found the plaintiff to be anxious and tense and prescribed him a muscle relaxant. He felt there was a large amount of emotional overlay since the tremor went away with voluntary movement or deliberate suppression. The tremors were, however, severe and bilateral and impaired the plaintiff's ability to sleep. The plaintiff returned the next day with no improvement. Dr. Milewski referred him to Royal Columbian Hospital for a neurological consult.
- [75] Dr. Milewski saw the plaintiff on October 17. He complained of increased pain and was still suffering from tremors. Dr. Milewski prescribed him morphine and other drugs to quell the tremors. On October 21, the doctor removed the surgical staples but still noted the plaintiff had extreme myoclonus (shaking of the limbs). He prescribed long-acting morphine, diazepam and a trial of baclofen, another muscle relaxant.
- [76] On October 30, the myoclonus was again extreme so Dr. Milewski referred the plaintiff back to Royal Columbian Hospital. On November 12, the plaintiff reported that the drugs were controlling his tremors relatively well but pain control was an issue. Dr. Milewski prescribed a muscle relaxant for anxiety and muscle tension.
- [77] In February 2009, Dr. Milewski learned the results of a follow-up MRI did not show any structural changes, but the plaintiff continued to complain of pain and tremors, even when at rest. Dr. Milewski prescribed Nabilone, a synthetic marijuana medication. The plaintiff ended up in hospital, possibly as a result of that medication. It was around this time that the plaintiff sought psychiatric help.
- [78] Dr. Milewski approved the plaintiff for driving in April 2009. Early that month he seemed much improved, but on April 22 he reported generalized discomfort and increasing pain.

- [79] The plaintiff went to Venezuela in the winter of 2009. In July 2010, Dr. Milewski recorded that he was complaining of poor pain control and was turning to alcohol. Dr. Milewski prescribed him Percocet. A month later the plaintiff reported that oxycodone was the most effective painkiller so the doctor increased his dosage of OxyContin. The plaintiff reported he was using marijuana regularly and asked about medical marijuana use, which the doctor declined.
- [80] In December 2010, the plaintiff complained his pain was worse and he was more fatigued and sedated. Dr. Milewski referred him to a clinical pharmacologist as well as a doctor at a fibromyalgia clinic, Dr. Hyams.
- [81] Dr. Milewski or his partner, Dr. Naidoo, saw the plaintiff a number of times in 2011 and 2012 to update his medications. Over this time it appeared that the pain control had worsened overall. Dr. Naidoo noted in October 2012 that the plaintiff seemed somewhat over sedated and refused to prescribe a fentanyl patch.
- [82] Dr. Milewski tested the plaintiff's condition at some, but not all, visits. He generally found brisk reflexes on both sides and increased tone, towards the spasticity range. He observed the plaintiff to walk on his heels in an effort to bypass the trigger for his leg tremors.
- [83] Dr. Milewski last assessed the plaintiff prior to writing his report for the Court on November 6, 2013. He noted:

Mr. Best was last assessed on 2013 November 06. I had not seen him since June 2013, at that time for a non-MVA-related problem. He reported that his condition has remained essentially the same. He was attending physiotherapy once weekly, and felt he was getting some benefit from acupuncture helping his numbness and circulation issues. He reported going to the leisure center for swimming and hot tub and was "trying to get on with his life". He noted his overall condition was worse in the winter.

With respect to the chronic pain, he reported worst spots as just below his neck, radiating downwards towards his lower back, aggravated by walking. He reported diminished sensation in the lower extremities with pulsations going down both legs. He reported using marijuana 5 joints per day which he found gave him relaxation and help with sleeping. He was prescribed fentanyl patch 100 micrograms every 3 days, as well as hydromorphone 8 mg 3 times a day as required. In addition he was apparently receiving quetiapine, gabapentin, diazepam, and Cipralex, prescribed by Dr. Hyams.

With regards to spasticity, he described it as constantly present; having some voluntary control but prolonged exertion very fatiguing. He reported falling less often than before but still reported poor balance and ambulation using cane. He had a scooter, but was using it infrequently now. He was able to drive safely.

Depression he described as present but he was coping. He occasionally had suicidal ideation, but no intention to carry through on it. He was no longer seeing counselor or psychologist and felt that he had come to terms somewhat with his condition. However he felt his overall condition inhibited socialization, and he had no steady relationship. He described intermittent difficulty emptying his bladder, bowels were described as okay. There was mild sexual dysfunction, essentially a feeling of impaired sensation.

He also reported "brain fog": Difficulty concentrating, distracting easily, and generally not as "sharp" as he felt before the accident. He felt able to manage his own finances and activities of daily living.

[84] On physical examination in November 2013, the plaintiff was able to get out of a chair on his own power; however, he had poor balance even with the assistance of a cane and exhibited significant spasticity in his gait. He had a tremor while at rest, worse on his left side, but could voluntarily control it. The plaintiff reported poor fine motor control, especially in his left hand. He had clonus in his knees and ankles, worse on the left side. Clonus is a rapid sustained beating response to a relaxed foot being flexed up by an outward force, also known as dorsiflexion. His cervical spine range of motion was diminished. He reported decreased touch sensation in his left hand and muscle tension on both sides of his lumbar spine.

[85] On cross-examination, Dr. Milewski agreed he had not diagnosed inflammatory arthritis. His concern about the plaintiff's use of prescription drugs was such that at one point he directed the plaintiff was not to be given narcotics unless it was absolutely necessary. He agreed the plaintiff complained of worse pain in cold weather and of falling due to his legs giving out. Dr. Milewski acknowledged the different drugs the plaintiff was on have a variety of negative side effects on memory, focus, coordination and balance. They can also cause drowsiness, dizziness, trouble sleeping, difficulty urinating, constipation, headaches, impotence or loss of libido. Other side effects include depressed mood and decreased sexual desire or ability. Dr. Milewski noted in his report a number of the plaintiff's symptoms were organically unexplained and he felt there was a conversion disorder. Overall, he saw no change in the plaintiff's symptoms over the last three years.

6. Neurological consult with Dr. Kennely Ho

[86] Dr. Ho is a neurologist. The plaintiff first presented to Royal Columbian Hospital Emergency on October 9, 2008 with a four-day history of abnormally uncontrollable shaking movements of his legs and his left arm and some difficulty with urination. This shaking is termed myoclonus, an abnormal shaking of the limb, usually rhythmic and high amplitude, more dramatic than a tremor. Myoclonus is a symptom rather than a disease.

[87] The plaintiff also complained of increasing pain in his neck, shoulders and back. He reported having been in a motorcycle accident on September 13 and said he had landed on his head. He told Dr. Ho he had experienced difficulties emptying his bladder.

- [88] When Dr. Ho examined the plaintiff he found ankle clonus. He also found bilateral downgoing plantars, or a Babinski reflex, which is a sign of neurological injury indicating an abnormality in the spinal track, cord or brain. Dr. Ho noted very brisk reflexes in the plaintiff's lower extremities. A spinal cord injury releases the control of the brain on leg movements so they become abnormally brisk. Dr. Ho said clonus is typical with spinal cord injuries, as is weakness more on one side than the other, which the plaintiff demonstrated; however, the myoclonus the plaintiff displayed was not typical.
- [89] The plaintiff's CT scan was normal but a spinal MRI showed a moderate left paracentral disc protrusion at the C5-6 level. Dr. Ho saw no abnormal signal changes in the spinal cord and the thoracic and lumbar spine images were normal. Dr. Ho diagnosed suspected acute disc protrusion at the C5-6 level as well as abnormal myoclonic movement disorder. He questioned whether there was a relationship between the two at that time.
- [90] Since spinal cord injuries can deteriorate quickly, Dr. Ho referred the plaintiff to Dr. Heran, a neurosurgeon. Dr. Heran performed a discectomy and anterior fusion at the plaintiff's C5-6 disc on October 10, 2008.
- [91] Dr. Ho next saw the plaintiff on October 24, 2008. He expected to see some improvement as a result of the surgery but the plaintiff continued to exhibit clonus. Dr. Ho prescribed anti-spasmodic medication. On October 30, 2008, Dr. Ho saw the plaintiff again. The plaintiff reported trouble with urinating and with bowel movements, a sign of spinal cord injury. His limbs were jerky as they had been a week earlier (both legs and left arm). Dr. Ho ordered a second series of MRIs. They showed the disc protrusion was slightly decreased compared to the pre-operative MRI. A brain MRI was also conducted. He also did a series of MRIs for spinal cord changes.
- [92] On December 2, Dr. Ho noted some improvement. He thought the injury was causing over activity and wanted to settle it down with anti-spasmodic medication. The medication had a short-term positive effect but by January 9, 2009 the plaintiff had deteriorated and exhibited sustained ankle clonus on both sides. Dr. Ho was frustrated because he thought he had a handle on the problem. He increased the anti-spasmodic medication and referred the plaintiff to the UBC Movement Disorder Clinic.
- [93] On January 27, 2009, Dr. Ho saw the plaintiff again and noted he was steadily getting worse. They discussed a strategy for the plaintiff to slide his foot along the ground rather than step on it normally in order to avoid triggering clonus. On February 3, the plaintiff's limb shaking had decreased and he was in the best shape Dr. Ho had ever seen him. He could not figure out what had caused the improvement and began to question whether there was a functional or psychiatric problem.

- [94] The plaintiff returned to Dr. Ho in June 2009. His condition had again deteriorated. Dr. Ho found clonus and spasticity but found it to be atypical. When he tried to elicit clonus he got a strange kicking response and it was irregular, not regular, sustained clonus. He discussed the possibility of psychiatric intervention with the plaintiff.
- [95] Dr. Ho did not see the plaintiff again after June 2009. He provided a report to the Court as well as an updated report in which he concurred with Dr. Hurwitz's conclusion that there was a combination of psychiatric and physical causes to the plaintiff's condition.
- [96] Dr. Ho agreed on cross-examination that the plaintiff gave him a different account of events and symptoms than he gave to Dr. Heran, the neurosurgeon. He characterized the plaintiff's case as a very challenging one. What puzzled him the most was the myoclonus coupled with the relative lack of weakness, which is not typical of spinal cord injuries. He could find no physical or mechanical cause for the myoclonus. There was no demonstrated injury to the cervical spinal cord by way of clinical features and multiple imaging studies, including the last MRI scan of the cervical spine on January 27, 2009. Dr. Ho concluded in his report:

In view of the observations of this movement disorder with its many odd features including features that suggested a functional component, as well as the inability to find a definite physical cause for this, I had come to the conclusion that the abnormal movement disorder was mostly "functional" in nature. Whether this was "caused" by the MVA is not entirely clear. The proximate "association" would be with the MVA although there was a time lag of about three weeks prior to the onset of the myoclonus. This may have served as a possible stressor and the associated psychological changes may have predisposed to the abnormal movements, although I must add that I am not a psychiatrist and this type of assessment is best left to psychologists and psychiatrists.

7. The plaintiff's progress after Dr. Ho's involvement

- [97] The plaintiff saw a variety of doctors after his last appointment with Dr. Ho. These included: Dr. Gopinath, a psychiatrist; Dr. McKeown at the UBC Movement Disorder Clinic; Dr. Caillier, a physiatrist; and Dr. Tham at the UBC neuropsychiatric unit. Those doctors were all inclined to the view that the plaintiff's condition was largely functional.
- [98] Others involved in the plaintiff's care were Dr. Perry, a clinical pharmacologist, and Dr. Hyams, who treats chronic pain. Dr. Hyams became the plaintiff's primary medication prescriber as he saw him more frequently than did Dr. Milewski.
- [99] The plaintiff also had treatment from a physiotherapist and assistance from two occupational therapists.

8. David Moffitt - physiotherapist

- [100] Mr. Moffitt began treating the plaintiff on December 19, 2008. At that time the plaintiff was using a walker. He had a 45 degree range of motion in his left cervical spine and 55 degrees in his right. Normal range of motion is 80 degrees. Mr. Moffitt noted a myoclonic response

to dorsiflexion of the plaintiff's foot. There was considerable muscle spasm in the plaintiff's lumbar spine at dorsiflexion as well, which Mr. Moffitt thought was a "guarding response" to external stimulus. The plaintiff reported the primary area of pain was in his upper cervical area, radiating to the left and right but more intense on the left side, as well as bilateral knee pain. He had spasms in his legs and lumbar spine when he attempted to walk normally rather than with a shuffle gait.

- [101] Mr. Moffitt treated the plaintiff with moist heat, pulse magnetic therapy and gait re-education to optimize his safe ambulation. He treated the patient frequently, both at home and in his clinic, between late 2008 and the present. He has used a variety of treatments to increase blood flow, relax muscles and avoid lactic acid build up to cut down on spasticity.
- [102] Mr. Moffitt saw some improvement in January and early February 2009 but on February 11 the plaintiff was back to using his walker and exhibited significant tremors in his legs and spasticity of gait.
- [103] Mr. Moffitt administered standardized testing of the plaintiff's balance and mobility in July 2010. In 2010, the plaintiff scored 25 out of 56, which indicated compromised mobility and balance. A score of 56 indicates a person is fully functional; 41-56 is independent; 0-20 is wheelchair bound.
- [104] On testing, the plaintiff's left hand grip strength was less than 50% of his right hand even though he is left hand dominant. Leg testing was difficult as exertion would cause muscle spasms. He did very poorly with the finger dexterity test. He was supposed to screw nuts and bolts together but kept dropping the nuts. The left side of the plaintiff's body was weaker on limb rotation tests. A "Wii fit" program to test his balance reflected he was taking 68% of his body weight on the left and 32% on the right versus a normal range of close to 50/50.
- [105] The plaintiff could sit to stand but had to use his hands. To go from stand to sit the plaintiff needed assistance. He performed poorly when he had to stand without support with his eyes closed. He could not bring his feet together with heels touching. He could bend over and stand and look over his shoulders but needed supervision. He could stand on a step and lift the other foot four times but could not stand on one foot.
- [106] When Mr. Moffitt administered the same standardized tests in May 2013, the plaintiff's score declined to 18. He could not complete many of the tests due to poor balance.
- [107] Mr. Moffitt monitored the plaintiff to see if he could carry out activities, such as touching his toes, when distracted. He did not observe this with the plaintiff.
- [108] Mr. Moffitt reported to the ICBC adjuster in May 2013 that the plaintiff had severe dystonia, a speech issue, myoclonus in his lower extremities, a high degree of pain, decreased cervical range of motion, decreased lumbar flexion and restricted movement generally in his spine. Nothing has changed to the date of trial.

- [109] Mr. Moffitt agreed on cross-examination that he did not know the plaintiff before the accident so could not compare speech patterns. He was never told the plaintiff might be somatizing. Mr. Moffitt agreed that compared to the initial acute phase there was some improvement in the plaintiff's symptoms. He acknowledged the usual pattern in most cases is for treatment to decline in favour of self-guided exercise.
9. Occupational therapists - Scott Myles and Abdollah Rezazadeh
- [110] Mr. Myles was involved with the plaintiff's file through ICBC between March 2009 and August 2010. His role as an occupational therapist is to assess a person's function and assist them with a return to normal daily living through a variety of methods. His first report to ICBC about the plaintiff noted his tremors, his gait, his difficulty with walking and his "wild" presentation of convulsing, tremors and spasms. Mr. Myles said this did not change over the time he dealt with the plaintiff.
- [111] Mr. Myles observed the plaintiff to have limitations in showering safely, walking without falling, grocery shopping, cleaning his house and endurance while carrying out tasks. Mr. Myles encouraged the plaintiff to use his energy to his best advantage and manage his activities within the limits of his fatigue. He was aware the plaintiff was getting assistance for cleaning, laundry, transportation, grocery shopping and some meal preparation. He assisted the plaintiff with obtaining a scooter and a lift for his truck.
- [112] Mr. Myles assessed the plaintiff's mental state to determine his motivation and determination to succeed. He was concerned about depression. He noted that fatigue was a big factor as the plaintiff slept about 16 hours per day and it took great effort for him to control his spasms. The plaintiff had periods where he was active and motivated and periods where he was frustrated. They worked together to identify a realistic sustained effort level. The plaintiff was determined but not always realistic. Mr. Myles noted some improvement during his time with the plaintiff. His left arm tremors improved, he regained independence with personal care, and he learned to suppress the leg tremors by pressing his heels into the ground.
- [113] Mr. Myles made recommendations to help the plaintiff such as using the community pool and hot tub, using a TENS machine for pain management, doing physiotherapy and increasing his access to the community by using a scooter. He tried to get the plaintiff out doing things, such as crabbing and archery, but the plaintiff tended to exhibit insecurities and low self-confidence, describing himself as a "gimp" and "fucked" on occasions. He was also concerned about his personal security. He wanted a big metal door on his townhouse and had a spike put on the end of his cane for self-defence.

- [114] The plaintiff became frustrated with the number of different people coming into his home to clean and provide home care and decided to make his own arrangements for that through an agency. He made some inquiries about working again but did not take it beyond that. He struggled with fatigue and pain for the entire time Mr. Myles dealt with him. He had falls in the shower and once knocked the glass door off.
- [115] Initially the plaintiff had 29 hours of home support per week but by August 2009 was down to 10 hours and then to seven by November. Mr. Myles reported improvement in the course of treatment and room for optimism. Mr. Myles left his job for another and passed the file on to Mr. Rezazadeh.
- [116] Abdollah Rezazadeh took over from Mr. Myles in late October 2010. His mandate was to work towards getting the plaintiff out and about and engaged in the community. He conducted a home visit on November 10. The plaintiff had marked difficulty with mobility. He held onto rails when walking. He had a wide gait pattern. He used his arms to stand up and sit down. He had marked difficulty with balance. The plaintiff reported difficulty with pain, activity tolerance, balance, falling and going out. He tended to stay home but went to physiotherapy twice a week and swam for exercise. The plaintiff was using a scooter. He had difficulty carrying objects because he had his cane in one hand and held onto rails or furniture with the other. He said he felt trapped, frustrated and fatigued.
- [117] Mr. Rezazadeh noticed spasticity in the plaintiff's lower legs and "claw toes" caused by the plaintiff's toes curling under and rubbing against his shoes, causing calluses. Mr. Rezazadeh looked into supportive shoes made of softer material or a device in the shoe to stretch out the toe area. He tried orthotics but the plaintiff said they created a burning feeling in his feet.
- [118] Mr. Rezazadeh saw the plaintiff about 18 times over the course of a year. The visits were not productive. Mr. Rezazadeh did not see any changes in the plaintiff's condition over time and concluded he could not help the plaintiff. The plaintiff was not unwilling to do things but seemed unable. He had a tendency to cave in, avoid people and close the curtains. It was difficult to drag him out of his "cave" and get him involved in activities. He would not always respond to phone calls so Mr. Rezazadeh went to his house and knocked on the door. There were days when he knew the plaintiff was home but did not answer the door. He reported constant pain and fatigue. The one exception was following a cortisone injection which seemed to help.
- [119] Mr. Rezazadeh encouraged the plaintiff to walk and swim. He would only walk about a half block until he leaned against a support and had shaking in his lower extremities. He could not carry a coffee cup from the counter to the dining table. He had poor balance, and shaking hands and legs. Weather was a factor in his pain and fatigue. The worse it was outside, the worse the plaintiff felt. He responded well to heat and after time in a sauna his mobility improved. Mr. Rezazadeh said the leg tremors disappeared when the plaintiff was relaxed or in the water or sauna. Mr. Rezazadeh concluded his involvement with the

plaintiff with a report to ICBC on November 20, 2011.

10. Assessments by experts for court

[120] As Dr. Ho observed, the plaintiff presented as a puzzling case. Following the accident he was assessed and treated by a battery of doctors and other health care providers. Ultimately, he was assessed by specialists in preparation for this litigation, including his own expert, Dr. Hurwitz, and ICBC's experts, Dr. O'Shaughnessy and Dr. Woolfenden.

[121] The experts all seem to agree that the plaintiff's current condition is unlikely to change significantly, although they each suggested various treatments. The experts differ in opinion on whether there is a neurological cause for some of the plaintiff's symptoms, in particular the myoclonus.

i. Dr. Trevor Hurwitz - neuropsychiatrist

[122] Dr. Hurwitz conducted an exhaustive review of the plaintiff's medical records and interviewed the plaintiff and his mother in July 2013. He found the plaintiff to be a poor historian who has given different information to different doctors which has caused difficulties diagnosing him. He gave as an example the plaintiff's assessment by the UBC Movement Disorder Clinic which was clouded by the plaintiff's failure to describe some of his symptoms or difficulties. Dr. Hurwitz said the plaintiff genuinely misreports, a common issue for patients on narcotics and other drugs.

[123] The plaintiff exhibits unequivocal symptoms of post-traumatic stress disorder characterized by flashbacks to the accident. The doctor found ongoing evidence the plaintiff suffers from a depressive illness but holds firm to his opinion that psychiatric symptoms affect the plaintiff's test results.

[124] The plaintiff had a pattern of somatization before his accident. Dr. Hurwitz concluded the plaintiff's psychiatric distress has been somatized and accounts for some of his symptoms which are difficult to explain on an organic basis. Specifically, the plaintiff has developed a chronic severe whole-body pain syndrome. The pain should have resolved over three to six months following spinal surgery. The failure to resolve and the fact that it has worsened and become more generalized beyond the site of his original injury suggests the emergence of a psychiatric illness that has become somatized.

[125] Five years post-accident, his pain, both in severity and location, cannot be explained on the basis of soft tissue injury or myelopathy. The myelopathy would only account for the shooting electrical component he describes. His high dose of narcotic analgesics probably masks his depression but without them he would be more depressed. The high dose of medications also makes the plaintiff's complaint about headaches puzzling. Interestingly, while Dr. Hurwitz suspected the plaintiff had compromised control of his left hand on a finger tapping exercise, an objective measurement by a machine indicated he could tap his fingers together at a normal rate.

[126] Dr. Hurwitz summarized his findings:

Mr. Best, as a result of his motorcycle accident, sustained musculoskeletal injuries including an injury to his neck destabilizing his C5/6 intervertebral disc then underwent delayed rupture with progressive prolapse causing cervical spinal cord compression. This presented as a typical compressive myelopathy with typical symptoms of spinal cord compromise but also atypically with propriospinal myoclonus.

The pain from his soft tissue injuries, the psychological impact of the accident itself (reflected by persistent flashbacks) and the psychological impact of function compromising and devastating neurological disability have precipitated a depressive illness in addition to a posttraumatic stress disorder. This depressive illness is not only manifesting with typical signs of depression but is also being somatized to account for neurological signs that cannot be explained on an organic basis (so called functional overlay) and the development of a severe and medically unexplained chronic pain syndrome. Premorbidly Mr. Best had shown this pattern of coping response namely to somatize psychiatric distress.

Lastly his persistent cognitive intellectual difficulties are also due to his ongoing depressive illness via compromised attention and cognitive slowing both of which are part of the symptom complex of depressive illness.

[127] Dr. Hurwitz's opinion is that the plaintiff's myoclonus is a bona fide symptom of spinal cord compression known as propriospinal myoclonus, a very rare diagnosis. The connection between the symptoms and a physical cause was contaminated in earlier assessments because the plaintiff is a known somatizer, meaning he elaborates symptoms when under psychological stress. This confuses those trying to diagnose him, who end up referring him to a psychiatrist. Evidence of intrinsic spinal cord disease continues to the present and is consistent with propriospinal myoclonus.

[128] Dr. Hurwitz's final diagnoses of the plaintiff were:

1. Cervical myelopathy presenting with propriospinal myoclonus (currently much settled) with a residual spastic ataxic gait, left hand weakness and reduced sexual functioning.
2. Major depressive disorder and posttraumatic stress disorder presenting with varying levels of depression, flashbacks, anxiety, pain and cognitive-intellectual difficulties. To a greater or lesser extent his psychological distress is being somatized and is contributing to some of his physical symptoms (neurological and pain) that cannot be adequately explained on an organic basis-conversion symptoms and or functional overlay.

[129] Counsel for ICBC cross-examined Dr. Hurwitz extensively on his findings of depression, post-traumatic stress disorder and propriospinal myoclonus. Dr. Hurwitz maintained that while the plaintiff did not have symptoms from every category in the DSM IV list of symptoms for post-traumatic stress disorder, a "full house" of symptoms was not necessary to make the diagnosis.

[130] Regarding propriospinal myoclonus, Dr. Hurwitz agreed it is a very rare and somewhat controversial diagnosis because psychiatric conditions can present in the same way as propriospinal myoclonus, leading to false diagnoses of the latter. However, Dr. Hurwitz confirmed his view that the plaintiff genuinely suffers from propriospinal myoclonus as his symptoms were impossible to fake and they originated and were worse on his left side, which is where the injury occurred.

ii. Dr. Andrew Woolfenden - neurologist

[131] ICBC's neurologist, Dr. Woolfenden, authored an opinion dated July 26, 2012. He reviewed the plaintiff's medical history and questioned whether some of the neurological symptoms found by other doctors were truly neurological. In particular, he questioned whether the plaintiff exhibited true sustained clonus. He found, on examination, that the plaintiff presented with significantly variable leg tremors which were not indicative of neurological compromise. Similarly, the pain described by the plaintiff as being throughout his whole body, apart from his ears and hair, is not indicative of a neurologic source of pain.

[132] Dr. Woolfenden acknowledged some of the plaintiff's pain could be related to the spinal injury but it was difficult to determine to what degree because of his significant functional non-neurologic problems. He recommended a reduction in narcotic medication through a pain specialist and active rehabilitation. He deferred to a psychologist and a psychiatrist for suggestions about improving the plaintiff's limitations.

[133] Counsel for the plaintiff cross-examined Dr. Woolfenden extensively. He challenged Dr. Woolfenden's view that the neurological findings of previous doctors might have been inaccurate. Dr. Woolfenden explained that in his view, some of these neurological indicators may have been misconstrued by previous doctors and some of them were within the normal range.

[134] Dr. Woolfenden agreed he had considered propriospinal myoclonus as the cause of the plaintiff's difficulties. He did research on it but did not mention it in his report because he ultimately rejected that as a diagnosis. Instead he came to the conclusion that most of the plaintiff's difficulties, in particular the tremors, were functional or non-neurological.

iii. Dr. Roy O'Shaughnessy - psychiatrist

[135] Dr. O'Shaughnessy's opinion was that the primary cause of the plaintiff's condition was psychiatric. He deferred to the neurologists' opinions about the relevance of some of the plaintiff's symptoms but concluded:

Pulling the material together, I would conclude that this man likely does have medically unexplained symptoms that more likely than not are due to underlying psychiatric difficulties and in particular to a somatoform illness, i.e. Conversion Disorder. By definition, Conversion Disorders are psychiatric illnesses in which a person may present with what appear to be medical or neurologically-based symptoms but in which there is no adequate medical or neurological explanation. By definition, these individuals truly believe themselves to be ill and disabled and

act accordingly at all times; i.e. the only time you will see improvement is when they are sleeping or when they are taking medications that reduce anxiety in functioning. Individuals presenting with somatoform illnesses of this type are often highly resistant to perceiving their difficulties as being anything but medical or physical in nature and they tend to reject psychological or psychiatric explanations for their symptoms and difficulties.

[136] Dr. O'Shaughnessy opined that while post-traumatic stress disorder and depression could have been present at some point, he believed they were not present, or at best they were in remission at the time he evaluated the plaintiff. He did not think the plaintiff had post-traumatic stress disorder because he denied flashbacks, nightmares, intrusive memories or any other clear symptoms of depression. He did not think the plaintiff was either malingering (a conscious elaboration of symptoms for specific external gain) or suffering from factitious disorder (conscious elaboration of symptoms primarily to assume a patient role with its secondary gain issues). He suggested a referral to the neuropsychiatry services at UBC; however, as counsel for the plaintiff noted, that had been done prior to this report (Dr. Tham) and following it (Dr. Hurwitz).

[137] Among other things, counsel for the plaintiff challenged the sufficiency of the material Dr. O'Shaughnessy had access to, and the significance of the plaintiff's denial of depressive symptoms to previous doctors. Dr. O'Shaughnessy maintained that while the plaintiff might have been depressed and have suffered from post-traumatic stress disorder, those conditions were in remission at the time of his examination.

11. Conclusion on the medical cause of the plaintiff's condition

[138] As counsel for ICBC said in written closing submissions:

Much time in this case has been spent on the actual diagnosis. It is submitted there is very little distinction between the diagnoses of the various medical practitioners. In fact, it really all turns on a label: is the plaintiff somatizing depression and post-traumatic disorder or does he have conversion disorder? All of the experts, including Dr. Hurwitz, note a non-anatomical presentation. In fact, the most significant symptoms are non-anatomic. Indeed, Dr. Ho likely summarized the distinctions between his opinion and Dr. Hurwitz's opinion, "Where I may differ somewhat from Dr. Hurwitz's opinion may be in the relative contribution of a functional overlay component versus a component of neurological dysfunction related to the structural injury of the spinal cord."

[139] I find on a balance of probabilities that the main cause of the plaintiff's current condition, including the myoclonus, is conversion disorder. I come to this conclusion because of the relative rarity of propriospinal myoclonus and how it can be mistaken for psychiatric problems. The non-anatomical presentation was also persuasive. As early as Dr. Ho's involvement, a strange kicking motion was noted, which was inconsistent with a neurological cause. Some of the plaintiff's pain may well be as a result of the surgery on his C5/6 disc; however, the vast majority of his symptoms, in my view, are not organic or structural in cause.

[140] Diagnosis of cause aside, what I glean from the experts is that nobody predicts anything close to a full recovery for the plaintiff. Dr. Hurwitz posited a 14% possibility of some recovery, though in light of the fact that the plaintiff has already been treated with a wide variety of anti-depressant drugs, this is a very optimistic prognosis. The other experts recommended various interventions in an effort to assist the plaintiff.

12. Barbara Baptiste - the plaintiff's cost of future care expert

[141] Ms. Baptiste was qualified to give expert opinion evidence in rehabilitation science and life care planning, a sub-specialty of rehabilitation practice focussed on planning the future needs and costs of people with complex and catastrophic disabling conditions.

[142] Ms. Baptiste reviewed the available medical evidence and the results of questionnaires administered to the plaintiff. She conducted a home visit on November 16, 2010. Ms. Baptiste spoke with the plaintiff and his brother Jason to make observations and collect information relevant to her recommendations. Her initial report is dated March 28, 2010 and an updated report was completed on November 20, 2013.

[143] Ms. Baptiste set out a list of facts and assumptions made in the preparation of her report. One of the assumptions she made was that a brain injury was likely; however, this diagnosis was ruled out after the report was prepared. Ms. Baptiste said in evidence it did not change the scope of her recommendations for the plaintiff.

[144] Ms. Baptiste noted Mr. Best has a wide-spread combination of persistent problems, with the associated limitations and restrictions, which call for a variety of external supports. He experiences profound pain, fatigue, and motor deficits. The plaintiff told Ms. Baptiste he has had several falls since his accident resulting from his legs giving out and that he is in constant pain from the moment he wakes up until the time he goes to bed. He also complained of arthritis in his ankles, knees, hips, back, elbow and wrist, though I note this appears to be a self-diagnosis as none of the medical experts diagnosed arthritis before or after 2010.

[145] Ms. Baptiste recommended services directed towards "compensatory strategies and enabling the evaluatee to have options in life and a quality of life that resemble what he would have had, but for the motor vehicle collision". Specifically, she recommended:

- a case manager to assist the plaintiff in managing his varied needs so he is not overwhelmed by support services and decisions on aids and devices and so that services are properly paced and accessed over the years;
- ongoing medication funding;
- physiotherapy treatment;
- occupational therapy to assist the plaintiff with mobility evaluations and mobility assistance as he ages;

- two visits with a speech language therapist based on observations that the plaintiff has an unusual speech pattern;
- assessments with a dietician/nutritionist to assist the plaintiff with changing nutritional needs;
- a pain management program administered through Dr. Hyams;
- rehabilitation support services to get the plaintiff out and integrated into the community;
- a full time, live-in caregiver for the rest of his life or in the alternative, a personal support worker full time for three years then reduced to four hours per day of assistance;
- an attendant to travel with the plaintiff;
- mobility equipment including a specialized wheelchair for accessing all types of terrain; an ATV for hunting or fishing or spending time in the woods; ergonomic aids and equipment for the kitchen; sporting equipment for new activities like sledge hockey; a specialized walker; an iPad; pain management tools such as a TENS machine; and medication to assist with his sexual functioning;
- education and vocational support services to assist the plaintiff with engaging in meaningful volunteer work;
- homemaking, home maintenance and handyman services;
- transportation aids, such as a BCCA membership, winter tires, and the cost of a wheelchair accessible vehicle over time; and
- funding for a home assessment to determine what modifications need to be made to the plaintiff's home in the future or if he seeks to purchase a wheelchair accessible home.

[146] Ms. Baptiste provided an estimate of the cost of care items in her report, based on hourly rates. The defence expert in this area, Mr. Worthington-White, provided updated hourly rates. Based on these updated rates, the range of the recommended cost of care items is between \$2,631,351 and \$3,974,425. The difference in these projections is largely contingent on whether the plaintiff has established that he needs a full time caregiver.

[147] Counsel for ICBC cross-examined Ms. Baptiste extensively on the scope of her recommendations. She acknowledged the plaintiff had been diagnosed by some of the medical practitioners with conversion disorder, which she understood to mean unconscious sick role behaviour. Ms. Baptiste also acknowledged she had that information but did not mention it in her report. She said the majority of the information about conversion disorder was sent to her in 2013 and it did not change her recommendations because, regardless of whether the cause is physical or psychiatric, the plaintiff's problem is still the persistent impairment of functional issues.

- [148] Ms. Baptiste agreed she did not conduct a physical examination of the plaintiff, such as testing his sitting tolerance or having him carry things for her. Ms. Baptiste said his distress level was such that she did not ask him to carry anything. She did not ask him to demonstrate his ability to get in and out of the shower, do laundry or prepare meals since he said he was at risk of cutting himself and had not been carrying out such a task.
- [149] Ms. Baptiste was not aware the plaintiff had lived on his own for some time prior to his brother Jason moving in with him. She agreed the information gathered from Jason established that the plaintiff was independent with banking and money, dressing, feeding, toileting, bathing with adaptations, shampooing, shaving with some assistance, tooth brushing and nail grooming, getting in and out of bed, getting in and out of his car, sitting with limited tolerance, driving with distance limitations due to fatigue, and getting around without his scooter. He described arthritis to her but it is not in the medical reports. She also agreed Dr. Hurwitz's report indicates pain that cannot be explained on the basis of soft tissue injury or myelopathy and it seems to be non-organic pain. She agreed that he can grocery shop but needs help with heavy items, and that he can do laundry with assistance on a good day but not a bad day. He did not complain to her about his mattress.
- [150] Ms. Baptiste did not test the plaintiff's grip strength as he was not complaining of problems with it. The problem was more with the myoclonic responses. She agreed it was possible there may have been improvement in the 35 months between the time the report was prepared in November 2010 and the time of trial. She also agreed that Mr. Myles, the occupational therapist, did not have a case manager working with him.
- [151] When it was suggested that the plaintiff did not need personal support within the home, Ms. Baptiste said she was aware the plaintiff was home alone most of the day and could run personal errands and could feed himself basic meals, but she said in her opinion he was quite isolated. She stood by her recommendation of a live-in personal support worker but agreed a live-in "nanny" with training or experience in nursing might be more cost-effective. She recognized that under her recommendations, on some days the plaintiff would have more than 24 hours of care or attention in a day during an intensive period. Ms. Baptiste acknowledged the plaintiff expressed frustration with a lot of different people coming into his home but she felt he would get over it with proper support.

13. Cost of care critique

- [152] The defence expert, Gary Worthington-White, was retained by ICBC to provide a critique of Ms. Baptiste's report. It was evident during cross-examination that Mr. Worthington-White had not been provided with all of the information that might have assisted him with his critique. His mandate appears to have been to "chisel down" the projected cost of future care as much as possible, although there were some areas where he was in agreement with Ms. Baptiste. Overall I did not find his evidence of much assistance in reaching a conclusion on the appropriate amount of damages to award for the cost of future care.

E. Conclusion on the plaintiff's current condition, abilities and prognosis for the future

1. Credibility and Reliability of Evidence

[153] I found the plaintiff credible but acknowledge he had problems with reliability in terms of to whom and when he reported symptoms. For example, he did not consistently report hearing the ringing doorbell sound he says he heard as he fell asleep. Further, as counsel for ICBC noted, the first time Mr. Best reported shaking in his whole body was during his direct examination. The plaintiff's frequent visits to Dr. Milewski and to Mr. Moffitt, and the early intervention by the occupational therapists, are of assistance as they document the plaintiff's real-time complaints and provide confirmatory observations by medical professionals.

[154] The other witnesses for the plaintiff were credible and reliable. His family obviously cares very deeply for him and wants the best care possible for him. I find they gave their evidence in a balanced way and did not exaggerate the plaintiff's condition, past or present.

[155] ICBC maintains I should draw an adverse inference against the plaintiff as he did not testify first. While it is often preferable to call the plaintiff first to present a coherent case, this is a matter of effective advocacy and not law, evidence or civil procedure. Thus, unless the plaintiff can tailor his evidence as a result, no adverse inference should be drawn: *Gustafson v. Davis*, 2012 BCSC 1576; *Ram v. Rai*, 2012 BCSC 1718. I acknowledge in the vast majority of personal injury cases the plaintiff will testify first; however, this plaintiff was not in the courtroom when the first few witnesses testified. He did not have any ability to tailor his evidence to match with theirs, nor do I find he would have the necessary wherewithal to do so. As I noted above, there are issues with the reliability of his recall but there is also significant supporting evidence available which allays many concerns in this regard. I decline to draw an adverse inference against the plaintiff in this case.

III. Liability

[156] I find the defendant April Thomas is 100% liable for the accident.

IV. Causation

[157] I find the accident is the sole cause of the plaintiff's current condition. ICBC did not allege a "crumbling skull" scenario.

V. Damages

A. Non-Pecuniary Damages

[158] The plaintiff seeks an award of non-pecuniary damages at the upper end of the range prescribed by the trilogy of cases from the Supreme Court of Canada. Adjusted to current day inflation, a maximum award would be \$351,000. The plaintiff relies on the following cases as guidelines:

· *Scoates v. Dermott*, 2012 BCSC 485, where the court awarded \$250,000 in non-pecuniary damages to a 30 year-old man who sustained orthopaedic injuries as well as cognitive, emotional and behavioural problems.

· *Grewal v. Brar*, 2004 BCSC 1157, where the court awarded \$294,000 in non-pecuniary damages to a woman who suffered a C2-3 fracture with spinal cord injury, orthopedic injuries, brain injury and sexual dysfunction.

[159] ICBC advocates for a substantially smaller award of between \$100,000 and \$125,000 and relies on the following:

· *Samuel v. Levi*, 2008 BCSC 1447, with a \$100,000 award to a young female plaintiff who was found to be totally disabled from work due to depression and conversion disorder.

· *Engel v. Engel*, 2000 BCSC 1330, where a female plaintiff in her late fifties with a lifelong history of depressive episodes, borderline personality traits and a somatization disorder was awarded \$50,000; however, the third party acknowledged it is not on all fours with this case because of the significant pre-existing problems.

· *Hussack v. Chilliwack School District No. 33*, 2009 BCSC 852, where a teenaged male who suffered a mild traumatic brain injury while playing field hockey at school and ended up with a significant, disabling somatization disorder was awarded \$125,000.

· *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (B.C.C.A.) - the plaintiff, who was 53 at the time of the accident, suffered a somatoform disorder as a result of a motor vehicle accident. She spent most of her time in a wheelchair and would not leave the house alone. The Court of Appeal reduced the trial judge's award for non-pecuniary damages to \$75,000, which the third party adjusts to \$105,000 to account for inflation since 1996.

[160] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering and loss of enjoyment of life. *Stapley v. Hejslet*, 2006 BCCA 34, 236 D.L.R. (4th) 19, provides guidance with respect to determining an award for non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris* (2004), 237 D.L.R. (4th) 193] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life.

I would add the following factors, although they may arguably be subsumed in the above list:

- (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 speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[161] The plaintiff was almost 32 when the accident happened. The original injury was to his C5-6 disc. I find the following facts about the plaintiff's condition have been established on a balance of probabilities.

[162] Since the accident, the plaintiff has been in constant pain, notwithstanding an aggressive regime of pain treatment through medication and other therapies. He is disabled from competitive employment. While he can drive and walk, with some difficulty and with the assistance of a cane, he cannot engage in the activities he enjoyed before the accident. In terms of physical activity, he can do little more than walk very short distances and swim. He can no longer work at a job he enjoyed. His emotional suffering is extreme. He has given up hope of being a father and had a vasectomy as he would be unable to engage in play or chase a child. His enjoyment of sexual activity is significantly diminished as he has lost sensation in his penis during intercourse. His family and friends attest to the fact that he is not the same person as before the accident. He no longer laughs and jokes around. He is constantly fatigued. His family and two close friends remain engaged with him but his world has shrunk considerably from his pre-accident social activities and he has essentially lost a healthy, active, social lifestyle. He is not as mentally sharp as he was, whether by virtue of the injury or the associated medications he takes to manage his condition. None of the experts predicted anything remotely approaching a full recovery.

[163] Taking into account all of the foregoing, as well as the range of cases provided by counsel, I award the plaintiff \$225,000 in non-pecuniary damages.

B. Past Wage Loss

[164] The third party does not take issue with past wage loss of \$211,480, which the plaintiff's expert Mr. Taunton calculated with regard to tax and payroll deductions as mandated under the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, ss. 94, 98.

C. Loss of Future Earning Capacity

[165] A claim for loss of future earning capacity engages two questions: (1) has the plaintiff's earning capacity been impaired by his injuries; and if so, (2) what compensation should be awarded for the resulting financial harm that will add up over time?

- [166] Counsel agree the approach to take to loss of future earning capacity in this case is the "earnings approach" as the plaintiff's loss is easily measurable: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach involves a certain degree of mathematical calculation but the assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [167] The plaintiff was employed by the District of Maple Ridge when the accident occurred. He started as a building service worker and moved over to the parks department. He liked the parks job for its proximity to his home and for the regular hours and days of work. In order to attain his initial employment with the District, the plaintiff took some courses at BCIT and other post-secondary institutions. While employed in the parks department he trained in the use of equipment.
- [168] I am satisfied that the plaintiff would have continued to work for the parks department within the District of Maple Ridge at least into his early sixties, perhaps to 65. Given that he took courses in the past to better his qualifications, I am satisfied he would likely have taken further courses in the time after the accident to move up the pay scale in the parks department. But for the accident, by the time of trial he would likely have moved up at least one pay grade and between the time of trial and his retirement he would likely move up at least another pay grade.
- [169] The wage projections calculated by the plaintiff's expert, Mr. Taunton, provide a helpful guide to assessing what the plaintiff would likely earn up until various ages of retirement. He provided calculations based on the plaintiff's continued employment as a labourer and an alternative scenario where the plaintiff progressed up the pay scale to the Foreman 2 category. If the plaintiff worked to 65 as a labourer the current value of his future income loss would be \$939,298 and his pension losses would be \$63,217 for a total loss of \$1,002,515. If, but for the collision, the plaintiff had worked as a labourer until the day the trial began and was promoted to Foreman 2 and worked to 65, his pre-retirement loss would be \$1,128,395 and his pension loss \$104,244 for a total loss of \$1,232,639. The average of the two losses to age 65 is \$1,117, 577.
- [170] Counsel for ICBC submits that Mr. Taunton's calculations of future wage loss benefits includes earnings to age 65, yet the contingency adjusted wage loss projections for ages 62-65 is \$31,184.00, indicating an overlap between the calculations for pension and for earnings. I am satisfied there should be a reduction to account for this and I deduct \$31,184.00 from the average noted above for a total of \$1,086,393.00.
- [171] Finally, ICBC urges me to find the plaintiff has some residual employability, for example as an accommodated worker within the District of Maple Ridge capable of doing short shifts several days a week as a cashier at one of the pool facilities. There is no evidence the plaintiff will ever be competitively employable again but I agree there should be a negative contingency built in to an award for loss of future earning capacity to account for the

possibility of part time work in the future. ICBC seeks a 30% deduction but I find this is an overly optimistic view of what the plaintiff is capable of doing by way of paid work. I would deduct 5% from the total amount to account for residual employability. The sum for loss of future earning capacity is fixed at \$1,032,073.35.

D. Cost of Future Care

[172] This was by far the most contentious issue at trial. The plaintiff's position, based on the report of Ms. Baptiste, is in favour of a 24 hour care worker for the rest of his life, in addition to a variety of other costs for items and services. ICBC disputes the need for a care worker at all and concedes very few of the services Ms. Baptiste says are necessary.

[173] In *Giczi v. Kandola*, 2014 BCSC 508 Sigurdson J. neatly summarized the principles applicable to an award for cost of future care:

[221] As Smith J. noted in *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735 at para. 163, aff'd 2004 BCCA 124:

the claim [for cost of future care] must be supported by evidence that establishes the proposed care is what a reasonable person of ample means would provide in order to meet what the plaintiff "reasonably needs to expend for the purpose of making good the loss" It must also be based on an objective test of what is moderate and fair to both parties

[Citations omitted.]

[222] McLachlin J. (as she then was), put it this way in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at para. 198 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.):

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

[223] The test in *Milina* has been interpreted to mean that the care must relate to health needs, and not simply enjoyment of life; however, the test does not require that a medical doctor provide the evidence of the specific care that is required by the plaintiff: *Jacobsen v. Nike Canada Ltd.* (1996), 133 D.L.R. (4th) 377 at paras. 181-182 (B.C.S.C.).

[174] Ms. Baptiste's report was very thorough and carefully prepared and provided for the best case scenario for Mr. Best; however, in respect of some of the items she recommended there was no evidence they were medically necessary in the legal sense. On the other hand, ICBC's position, supported by Mr. Worthington-White's critique and recommendations, would result in an award for cost of future care that is unduly low and require the plaintiff to rely on his family to provide ongoing assistance far beyond what should reasonably be expected of them.

[175] After considering Ms. Baptiste's report, Mr. Worthington-White's critique and the medical evidence in this case, I find some of the items set out by Ms. Baptiste to be medically necessary and some not. Where the items I allow were calculated to start at the plaintiff's

age at the time of the accident, I have adjusted them to reflect costs going forward from his current age. Other items have been adjusted to reflect what I view as less need for the goods or services than Ms. Baptiste set out in her report. The numbers are taken from the table of costs provided by Mr. Taunton with the necessary adjustments:

- a case manager - \$55,750;
- medication (predicated on no MSP) - \$50,000. This is substantially lower than recommended, however, all the experts agreed that a reduction in the amount of medication should be the goal for the plaintiff;
- psychological services for both the plaintiff and his family - \$51,019;
- ongoing physical therapy - \$50,699;
- occupational therapy - \$33,610;
- a dietician/nutritionist to address his changed nutritional needs - \$1,420;
- a pain management program through Dr. Hyams' pain clinic - \$2,133;
- rehabilitation support services - \$98,700;
- personal care services - 4 hours/day for a home support worker for a total of \$594,422;
- a vacation attendant at \$94,459. I have adjusted the amount suggested as I do not find the plaintiff needs constant care while on vacation;
- I am not satisfied on the evidence that the plaintiff will require a power wheelchair in 10 years, nor am I satisfied an ATV is an appropriate subject for a damages award. I do, however, include an amount for the replacement and maintenance of the plaintiff's scooter (\$5,000) and for the replacement of his cane (\$500);
- I award an amount for general devices to assist with the activities of daily living (\$336) and for a specialized chair as the plaintiff has difficulty sitting for long periods of time (\$1680) but I heard no evidence he requires a special mattress;
- I do not award an amount for sporting goods or an iPad as those are ordinary expenditures not caused by the accident;
- a TENS machine to alleviate pain and discomfort is appropriate and I award \$2,318 for the machine and its fittings;
- a hot tub is not an appropriate subject for a cost of future care award and, in any event, the occupational therapists who have interacted with the plaintiff emphasize the importance of his access to community centres and swimming pool facilities to keep him involved in the community;

- vocational support services in the amount of \$3,500 to assist the plaintiff with a modified return to either volunteer or accommodated paid work;
- housekeeping and handyman services are awarded but I have reduced the amount to \$65,000 to take into account the plaintiff currently lives in a rental property and the strata property he owns has a very small yard;
- I decline to award an amount for a BCAA membership or winter tires as those are ordinary expenditures not caused by the accident;
- I decline to award an amount for a wheelchair accessible van and related equipment as I heard no evidence a wheelchair was going to be required;
- I decline to award an amount for mileage costs for community appointments as Ms. Baptiste's evidence seemed predicated on a belief there are no resources in the community where the plaintiff lives;
- a home assessment in the amount of \$6,635 is awarded so any future home the plaintiff has can be adjusted to accommodate his needs;
- I decline to award an amount for a speech/language therapist because the plaintiff's unusual speech patterns predated the accident, according to his family doctor.

[176] Total award for cost of future care is \$1,117,181.00.

E. Special Damages

[177] The plaintiff has incurred a total of \$117,546.31 in rehabilitation costs to date. ICBC agrees with an award for special damages in principle but provides slightly different calculations. The exact amount can be clarified by further submissions of counsel.

F. Past in trust claim for special damages

[178] At the commencement of the trial I allowed the plaintiff to amend his pleadings to include past in trust claims for special damages arising from care he was given by some of his family members. While ICBC objected to the amendment, citing amongst other things an inability to conduct examinations for discovery concerning these claims, I determined that the timing of the application did not prejudice the third party's ability to conduct its defence. The rules give judges a wide discretion to allow the amendment of pleadings and I determined there was no prejudice to ICBC in the circumstances of this case.

[179] The principles governing in trust claims were articulated by Smith J. (as she then was) in *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124:

[180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

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

[180] ICBC's position is that no award should be given for the assistance Aliesha Best gave the plaintiff because she is simply a giving person. In the alternative, it is submitted that an award of \$3,500 would be fit or approximately half of four hours per day for 90 days at \$19 per hour. As to the assistance provided by Brenda Spafford, ICBC maintains no award is justified but in the alternative, half of the claimed 600 hours at \$19 per hour or approximately \$5,500. Finally, regarding Jason Best, ICBC submits his living arrangement with the plaintiff is a significant benefit to him and no award should be given but in the alternative, submits half an hour per day for about three and a half years or approximately \$12,000 at \$19 per hour.

[181] The plaintiff comes from a very supportive family. Some of the support he received after the accident, in particular immediately after the surgery, was what would be expected from the family relationship, but some of it was over and above what would be expected, particularly in the case of his sister-in-law, Aliesha Best.

[182] I find that 50% of the time Aliesha Best spent caring for the plaintiff is compensable under the Bystedt analysis. Had she not offered the plaintiff her support between the accident and a few months after the surgery, he would have required a much higher degree of paid assistance than he received.

[183] I find that 50% of Brenda Spafford's time spent caring for the plaintiff is compensable. She spent some time commuting back and forth between her previous home in Penticton to care for her son and while some of the things she did for him fell within the scope of what a mother would do for an injured adult child, half of what she did was over and above what would be expected.

[184] Finally, I find 25% of Jason Best's time estimate relates to caring for his brother, over and above both their familial relationship and their mutually beneficial arrangements as roommates.

[185] Plaintiff's counsel provided me with three pay scales relevant to what caregivers earn, ranging from \$19 to \$29.45 per hour. I find that the assistance provided by the family members falls at the low end of that scale. Based on my findings above and the pay scale, the total past in trust award for special damages is \$32,537.50.

G. Summary

Non-pecuniary award

\$225,000.00

Past wage loss

211,480.00

Loss of earning capacity

1,032,073.35

Cost of future care

1,117,181.00

In trust special damages claim

32,537.50

Special damages

117,546.31

TOTAL AWARD:

\$2,735,818.16

VI. Costs

[186] The parties may arrange a time to appear before me to deal with costs, taxation, management fee and updated discount rate calculation issues.

"Duncan J."

The Honourable Madam Justice Duncan

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/10/2014BCSC1033.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/best-v-thomas-2014-bcsc-1033>

Prepared on 29 October 2026 · Esheria