
CANADA / JUDGMENT

Eggleston v. Watson

2010 BCSC 890

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 890 Eggleston v. Watson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eggleston v. Watson,

2010 BCSC 890

Date: 20100624

Docket: 40073

Registry: Vernon

Between:

Harvey Kendal Eggleston

Plaintiff

And

Gary John Watson

Defendant

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Plaintiff:

G.P. Weatherill, Q.C.

W.S. Dick

Counsel for the Defendant:

J.D. Jevning

Counsel for the Third Party:

R.C. Brun, Q.C.

Place and Date of Trial:

Vernon, B.C.

November 30, December 1-4, 7-11 and December 14-17, 2009

Vancouver, B.C.

February 1 and 2, 2010

Place and Date of Judgment:

Vernon, B.C.

June 24, 2010

INTRODUCTION

- [1] June 8, 2006, was a terrible day that saw a disastrous sequence of events befall the plaintiff Harvey Eggleston and his family.
- [2] Mr. Eggleston's brother-in-law succumbed to cancer that afternoon in the Kelowna General Hospital.
- [3] Later that day and into the evening, a large group of Mr. Eggleston's family who had come to Kelowna to see their dying relative, grieved his loss by visiting with one another. They did so in the pool area of the Comfort Inn in Westbank, near Kelowna, where many were staying.
- [4] When the pool area closed at about 10:00 p.m., approximately 17 family members decided to go to a local pub. They did not want to lose contact with one another while there was still time available to share memories of the deceased. On the way to the pub they walked along the shoulder of busy Highway 97 which joins Westbank and Kelowna.
- [5] The group stayed at the pub until near closing time. They left at about one o'clock on June 9, 2006, to walk the short distance to the Comfort Inn. This time, they decided to go by way of Ross Road, a semi-rural street rather than along Highway 97.
- [6] In the direction in which they were walking there is no street lighting on the left side of Ross Road. There is some street lighting, albeit poor, on the right.

- [7] The 17 pedestrians walked along the right-hand side of Ross Road in groups separated from one another at varying distances. Mr. Eggleston and his niece, Jackie Larsen, formed the last group.
- [8] The defendant Gary Watson also left the pub shortly after it closed.
- [9] He drove his vehicle from the parking lot of the pub, turned onto Ross Road, and accelerated in the direction of the pedestrians.
- [10] While Mr. Watson was driving towards them, Mr. Eggleston and his niece were walking arm-in-arm in the travelled portion of the right lane of the road near its right fog line.
- [11] They were struck by Mr. Watson's vehicle which hit them at speed throwing Ms. Larsen to the left and Mr. Eggleston to the right.
- [12] In that collision Mr. Eggleston suffered very serious injuries that are the subject of this litigation.
- [13] I have no evidence of the extent of any injuries suffered by Ms. Larsen since she is pursuing her claims in different proceedings and did not testify at this trial.
- [14] Mr. Watson testified that he did not see any of the pedestrians walking along Ross Road that night before his vehicle struck Mr. Eggleston and Ms. Larsen.
- [15] He did not apply his brakes before the collision.
- [16] In related criminal proceedings, Mr. Watson was convicted on April 23, 2009, under s. 253(1) (b) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code], of the offence of operating a motor vehicle while having consumed alcohol in such a quantity that the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

ISSUES

- [17] Mr. Watson denies any liability for the injuries suffered by Mr. Eggleston in the collision.
- [18] In the alternative, he alleges that Mr. Eggleston was himself negligent, in failing to walk on the left-hand side of Ross Road, and in walking in the travelled portion of the road while being somewhat impaired. In those alternative submissions, Mr. Watson seeks an apportionment of liability in his favour of up to 90% against Mr. Eggleston, pursuant to the provisions of the Negligence Act, R.S.B.C. 1996, c. 333 [Negligence Act].
- [19] The third party, Insurance Corporation of British Columbia ("ICBC"), generally supports Mr. Watson in his contributory negligence assertions.
- [20] Those positions and Mr. Eggleston's claims for compensation for the injuries he suffered in the collision require determination of the following issues:
 - 1) Is Mr. Watson liable in negligence for the damages suffered by Mr. Eggleston?

- 2) If so, was Mr. Eggleston also negligent in the circumstances?
- 3) If so, what apportionment of liability should be made under the provisions of the Negligence Act?
- 4) To what amount of compensation, if any, is Mr. Eggleston entitled for the injuries he suffered under the following heads of damage:
 - a) Non-pecuniary loss;
 - b) Past earnings loss;
 - c) Future loss of earning capacity;
 - d) Future care costs;
 - e) "In-trust" claims advanced on behalf of his wife and other family members; and
 - f) Loss of home-making capacity.

LIABILITY

- [21] The first issue to be addressed concerning liability in this case is whether Mr. Eggleston has established on a balance of probabilities that Mr. Watson negligently caused or contributed to Mr. Eggleston's injuries.

Is the defendant liable for the damages suffered by the plaintiff?

- [22] Mr. Watson denies any liability for the collision and the injuries suffered by Mr. Eggleston, notwithstanding his conviction under s. 253(1)(b) of the Criminal Code.
- [23] That conviction was based upon a certificate of analysis (the "Certificate") of a qualified breathalyser technician filed in the criminal proceedings. The Certificate was also filed in this proceeding without any direct challenge to its accuracy.
- [24] The Certificate recorded that Mr. Watson's blood alcohol content was 210 milligrams of alcohol in 100 millilitres of blood at both 2:20 a.m. and 2:41 a.m. on June 9, 2006, when breathalyser samples were obtained from him at the Kelowna detachment of the Royal Canadian Mounted Police ("RCMP").
- [25] At this trial Mr. Eggleston adduced the expert evidence of Ms. Carolyn Kirkwood who extrapolated from the RCMP breathalyser readings to offer the opinion that at the time of the collision the alcohol content in Mr. Watson's blood was 230 milligrams per 100 millilitres.
- [26] In making the submission that he is not liable for the collision, Mr. Watson submitted that the symptoms exhibited by him at the scene of the accident "belie" the blood alcohol readings that led to his conviction, as well as Ms. Kirkwood's calculations.

- [27] In challenging those breathalyser readings and Ms. Kirkwood's opinion, Mr. Watson relied on his own testimony and that of Mr. Kenyon Wertman, who was drinking with him at the pub and who was a passenger in the vehicle at the time of the collision.
- [28] Both testified that they had shared only two jugs of beer at the pub before leaving, and that Mr. Watson had not had anything to drink before arriving at the pub at about 10:30 p.m. that evening. Mr. Watson also relied upon a receipt from the pub which he submitted supports the amount of consumption at the pub.
- [29] Mr. Watson argued further that observations of his conduct at the scene of the accident are so inconsistent with the breathalyser readings that the validity of those readings must be questioned.
- [30] In making that argument, Mr. Watson relied on the evidence of Ms. Kirkwood that the blood alcohol content she extrapolated from the breathalyser readings the RCMP had recorded would be very inconsistent with Mr. Watson and Mr. Wertman's testimony as to the amount of beer they say they consumed.
- [31] Concerning the blood alcohol content readings of 230 milligrams of alcohol in 100 millilitres of blood at the time of the collision, calculated from the RCMP readings taken post-collision, Ms. Kirkwood testified that a man of Mr. Watson's size would have had to have consumed a minimum of 20, and as many as 30 to 40 glasses of beer in order to reach that blood alcohol level. She also acknowledged in cross-examination that with that level of blood alcohol content, 75-80% of the population would exhibit gross signs of impairment including: staggering, loss of balance, loss of fine motor control, loss of comprehension and an inability to understand simple instructions.
- [32] Mr. Watson submitted that the totality of the evidence concerning his condition at the scene of the accident did not establish such indicia of gross impairment. Specifically, he relied upon the investigating officer's evidence from the criminal trial (adduced as transcript evidence in this trial by consent due to the inability of the witness to testify) that Mr. Watson "swayed a little while walking," but could execute "good" turns while doing so.
- [33] Mr. Watson also relied on evidence that after the collision he followed the instructions of the plaintiff's sister-in-law, Doris Cloutier, to remain in his vehicle with his hands on the steering wheel. He further relied on evidence that Mr. Watson was assaulted by at least one family member at the scene while sitting in his vehicle, as well as the fact that Mr. Watson has a naturally flushed complexion.
- [34] Ms. Kirkwood testified in cross-examination that there were three possible explanations for the apparent inconsistency of impairment indicia attributed to Mr. Watson at the scene, as opposed to those which her blood alcohol calculations would have led her to expect. Those possibilities were:
- 1) Computer error or malfunction in the breathalyser instrument;

- 2) Human error in the operation of the breathalyser instrument;
- 3) An inaccurate drinking pattern report.

[35] Although Ms. Kirkwood acknowledged on cross-examination that she could not rule out either the first or second possibilities, she also testified that while the individual indicia of impairment that were suggested to her as being inconsistent with Mr. Watson being grossly impaired or could offer innocent explanations for his condition, she also testified that the conditions should be considered cumulatively rather than separately. She also testified that an experienced drinker might demonstrate fewer indicia of impairment than a social drinker.

[36] Having considered all of the evidence, I have concluded that the breathalyser readings of the RCMP upon which Mr. Watson's criminal conviction were based, were not erroneous. I reach that conclusion for the following reasons:

- 1) In my view, the arguments now raised by Mr. Watson are not only a collateral attack upon a determination of his guilt, but are not supported by any evidence adduced at this trial that is not speculative.
 - 2) Ms. Kirkwood only agreed with a suggestion by Mr. Watson's counsel that the breathalyser readings could have resulted from either computer error or malfunction in the breathalyser instrument or from human error in its operation.
 - 3) Her opinions concerning the extent to which the consumption of alcohol sufficient to result in the blood alcohol content she extrapolated from the RCMP breathalyser readings would cause symptoms of gross impairment, were given in relation to 75-80% of the population.
 - 4) When cross-examined about the indicia of impairment observed by the investigating police officer and other evidence about the extent of Mr. Watson's impairment, Ms. Kirkwood agreed that while individually they might be considered to cause doubt about gross impairment, they still had to be considered collectively.
 - 5) Mr. Watson was previously convicted of driving with a concentration of alcohol in his blood in excess of 80 milligrams of alcohol in 100 millilitres of blood in Canmore, Alberta, in 2000, was fined and had his driver's licence suspended for one year. He also received a 24 hour roadside suspension in 2003 and subsequently had his driver's licence suspended for three months, which leads me to conclude that at least in the years prior to this collision and his conviction for that, he was more than a "social drinker," which would tend to account for any lack of indicia of gross impairment.
- [37] I have also concluded that since Mr. Watson's evidence and that of Mr. Wertman concerning the amount of alcohol consumed by Mr. Watson before the collision is entirely inconsistent with the breathalyser evidence, I cannot accept the evidence of either concerning the amount of alcohol Mr. Watson consumed before the collision.

- [38] In the result, I am satisfied that Mr. Eggleston has proven on a balance of probabilities that Mr. Watson's ability to operate a motor vehicle at the time he struck Mr. Eggleston and Ms. Larsen was so impaired by his consumption of alcohol that his actions in so doing were not only negligent, but grossly so.
- [39] I also reject Mr. Watson's submissions that the collision with Mr. Eggleston was "inevitable" due to Mr. Eggleston's own negligence. That submission is rooted in the notion that if Mr. Eggleston had not been walking on the right-hand side of the road, approximately one foot into the travelled portion of the roadway, either the collision would not have occurred or alternatively Mr. Eggleston would have been able to avoid the impact.
- [40] In my view it was far more "inevitable" that when Mr. Watson got behind the wheel of his vehicle in the highly impaired condition established by the evidence, he would not operate his vehicle safely and would not react as a sober driver would in any situation that might arise. That occurred when he both failed to see either Mr. Eggleston or Ms. Larsen in the roadway, and also failed to brake to avoid colliding with them.
- [41] I find that Mr. Watson was at fault in the collision, and is accordingly liable to compensate Mr. Eggleston for the injuries he suffered as a consequence of that negligence.

Was the plaintiff also negligent in the circumstances?

- [42] Mr. Watson's counsel submitted that because of Mr. Eggleston's own negligence "all or the majority of fault should be laid at the feet of the plaintiff."
- [43] In my opinion, that submission not only seeks to minimize the blameworthiness of Mr. Watson's negligence in driving while his ability to safely do so was grossly impaired, but also seeks to attribute liability based upon no longer valid principles of apportionment of fault.
- [44] Both Mr. Watson and ICBC submitted that in walking on the right side of the road, walking on the travelled portion of the road, and walking while being at least somewhat intoxicated, Mr. Eggleston was himself negligent so that liability for the collision must be apportioned pursuant to the provisions of the Negligence Act.
- [45] In making those submissions, Mr. Watson and ICBC rely upon s. 4(1) of the Negligence Act and s. 182 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [Motor Vehicle Act].

[46] Section 4 of the Negligence Act provides:

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

Section 182 of the Motor Vehicle Act provides:

182 (1) If there is a sidewalk that is reasonably passable on either or both sides of a highway, a pedestrian must not walk on a roadway.

(2) If there is no sidewalk, a pedestrian walking along or on a highway must walk only on the extreme left side of the roadway or the shoulder of the highway, facing traffic approaching from the opposite direction.

[47] For the purposes of s. 182(2) of the Motor Vehicle Act, by virtue of the provisions of s. 1 of the Motor Vehicle Act, Ross Road is a "highway."

[48] Further, the relevant provisions of s. 119 of the Motor Vehicle Act define a "roadway" as meaning:

the portion of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder ...

[49] The evidence as to what occurred immediately prior to and at the time of the collision is not surprisingly inconsistent given: the time of night; the lack of good street lighting; the location of the various witnesses at the time of the collision; their differing abilities to observe what occurred; the speed at which the events unfolded; the passage of time before they testified; and, the intervening criminal proceedings.

[50] After assessing the testimony of all of the witnesses who testified I have determined that:

- 1) The evidence of Mr. Eggleston's brother-in-law, Roger Cloutier, about Mr. Eggleston walking on the shoulder of Ross Road at the time of impact, is generally unreliable due to its inconsistency with his testimony at the criminal trial.
- 2) Although I generally accept the evidence of Mr. Eggleston's wife, Dian Eggleston, on other issues I am satisfied that she was not in a position to accurately observe Mr. Eggleston's location at the time of the collision.
- 3) The evidence of Mr. Eggleston's sister-in law, Doris Cloutier, is most consistent with the physical evidence and affords the most reliable testimonial evidence as to what occurred. Ms. Cloutier testified that:
 - a) the group of family members who had been at the pub left at about 1:00 a.m. to walk along Ross Road toward the Comfort Inn where the majority of the group were staying;
 - b) while walking along Ross Road, the group broke into approximately three groups comprised of faster, medium and slower walkers;
 - c) she was in the middle group approximately 75 feet behind the first group and had no difficulty seeing either the first group or Mr. Eggleston and Ms. Larsen, who were walking behind her;
 - d) she walked along the right side of the road rather than on the left because it was better lit along the right side where the street lights were located than on the left-hand side;

- e) she turned and saw a car turning right onto Ross Road, and saw it heading towards the pedestrians, and yelled out that a car was coming. At that time Mr. Eggleston and Ms. Larsen were about 75 feet behind her where she could see them walking between the yellow mid-line and the right-hand white fog line. Mr. Eggleston was about four feet to the left of the fog line and was walking arm-in-arm with Ms. Larsen, who was on his left;
 - f) she turned back and yelled a second time, saw Mr. Eggleston start toward the right-hand fog line, and saw Ms. Larson move toward the center yellow line;
 - g) when the vehicle struck the two pedestrians, Mr. Eggleston was about 50 feet behind her and one foot to the left of the right-hand fog line;
 - h) the headlights of the vehicle were on and its speed did not change before impact. She did not see or hear any braking before the collision;
 - i) she saw Mr. Eggleston fly up in the air, saw his head strike the windshield of the vehicle, and saw him thrown to the right;
 - j) after he was struck, Mr. Eggleston ended up about 15 feet behind her, and the vehicle ended up about 10 feet behind her when it came to a stop.
- [51] In reaching the conclusion that Ms. Cloutier's testimony as to how the collision occurred is the most reliable evidence, I do not ignore the possibility that before the collision, Mr. Eggleston may have either initially followed Ms. Larsen to the left side of the road, before then attempting to avoid the oncoming vehicle by moving to his right toward the gravel shoulder of the road.
- [52] However, I do not (though counsel for Mr. Watson submitted I should) draw an adverse inference in relation to the failure of the plaintiff to call Ms. Larsen as a witness, and reach the conclusion that Mr. Eggleston did initially follow Ms. Larsen.
- [53] Although she is also pursuing her own claims against Mr. Watson and ICBC, Ms. Larsen could still have been subject to a defence subpoena. She was also a witness in the criminal proceedings against Mr. Watson, so that it could not be said that Mr. Watson's counsel Mr. Jevning never had an opportunity to examine her as to what she says occurred.
- [54] In all of the circumstances, I do not find, on a balance of probabilities, that Mr. Eggleston initially moved to the left with Ms. Larsen, before attempting to reach the right-hand side of the road to avoid being struck by the oncoming vehicle.
- [55] In summary, the totality of the evidence that I do accept satisfies me that:
- 1) At the time of the collision, Mr. Eggleston was in breach of s. 182(2) of the Motor Vehicle Act by walking on the right rather than the left-hand side of the road.

- 2) Immediately prior to the collision, Mr. Eggleston and Ms. Larsen were both walking in the travelled portion of the roadway to the left of the right-hand fog line and to the right of the yellow centre line, with Ms. Larsen closer to the center line and Mr. Eggleston approximately four to five feet from the right fog line.
 - 3) At the time of the collision, after a shoulder check and the taking of steps to avoid being struck by the oncoming car, Mr. Eggleston was approximately one to two feet to the left of the right fog line.
- [56] My determination that Mr. Eggleston was in breach of s. 182(2) of the Motor Vehicle Act is not, however, determinative of whether, in all of the circumstances, he was negligent.
- [57] In *Christie (Guardian ad litem of) v. Insurance Corporation of British Columbia* (1993), 79 B.C.L.R. (2d) 370 (C.A.) at paras. 20 and 21, Wood J.A. stated:
20. From the balance of his reasons, I draw the conclusion the trial judge equated breach of the statute with negligence, apparently because s. 184(2) of the Motor Vehicle Act is cast in what he described as mandatory terms. That, of course, was an error. In *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 Dickson, J. (as he then was) concludes at pp. 225-26 of the report:

Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e. principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant.

21. In order to establish fault on the part of the appellant, the respondent was required to show on a balance of probabilities that his failure to take care, by wearing dark clothing and failing to comply with s. 184(2) of the Motor Vehicle Act, caused or contributed to the cause of the accident. Causation is not to be assumed merely because a breach of the statute has been established or because there is other evidence suggesting a failure to take care.
- [58] Mr. Watson's counsel has submitted that Mr. Eggleston failed to exercise the care and attention required of him on June 9, 2009, not only by walking on the right side of Ross Road with his back to oncoming traffic but also by walking in the travelled portion of the highway arm-in-arm with Ms. Larsen who was further into the roadway which impeded his ability to get out of the way of Mr. Watson's vehicle. He also submitted that the evidence of Mr. Eggleston's consumption of alcohol that night before arriving at, while at, and after leaving the pub, should be considered as a factor in concluding that in all of the circumstances, Mr. Eggleston's own negligence contributed to his injuries.

- [59] Mr. Eggleston's counsel submitted that the decision taken by all family members to walk along the right-hand side of Ross Road that night was reasonable in all of the circumstances because of the better visibility on the right-hand side which would make the large group of pedestrians more visible to oncoming traffic.
- [60] If it were not for the fact that Mr. Eggleston was walking on the travelled portion of the roadway rather than on its shoulder while at least somewhat intoxicated, I would have agreed with his counsel's submission.
- [61] In the totality of the circumstances, however, I find that by walking in the travelled portion of the road at that time of night while being himself somewhat intoxicated, Mr. Eggleston did (on a causation analysis) put himself at some risk of being struck by a vehicle whose driver might not be able to apply its brakes in time to avoid a collision.
- [62] I must accordingly now determine whether in all of the circumstances placing himself in such a position of risk should result in a finding of contributory negligence against Mr. Eggleston under the provisions of the Negligence Act.

What apportionment of liability should be made under the provisions of the Negligence Act?

- [63] As previously noted, Mr. Watson submitted that because of Mr. Eggleston's own negligence "all or the majority of fault should be laid at the feet of the plaintiff."
- [64] I rejected that submission which, in my opinion, sought not only to minimize the blameworthiness of Mr. Watson's negligence in driving while his ability to safely do so was seriously impaired, but also sought to attribute liability based upon no longer valid principles of apportionment of fault.
- [65] Counsel for Mr. Eggleston submitted that in all of the circumstances I should find that Mr. Eggleston's conduct was not contributorily negligent, and that I should apportion 100% of responsibility for the injuries suffered by Mr. Eggleston against Mr. Watson.
- [66] In making that submission, Mr. Eggleston relied upon the decision of Kirkpatrick J. (as she then was) in *Laface v. McWilliams*, 2005 BCSC 291, 14 M.V.R. (5th) 162, aff'd 2006 BCCA 227 [Laface], which in turn relied upon the decision of our Court of Appeal in *Giuliani v. Saville*, 1999 BCCA 768, 72 B.C.L.R. (3d) 346 [Giuliani].
- [67] In *Laface*, Justice Kirkpatrick dealt with a situation in which an impaired driver ran into a group of pedestrians (at least some of whom were also impaired) situated on a roadway between the sidewalk and a parked vehicle. The impaired driver, whose blood alcohol samples registered 180 mg. of alcohol in 80 ml. of blood, did not see any of the pedestrians before striking them. Kirkpatrick J. found that with that level of alcohol in his blood, there was no doubt that the driver was "grossly" impaired. At para. 110, she also observed:
- [110] It is, of course, extremely significant that in the circumstances at bar there were between 15 and 40 pedestrians in the vicinity of the corner of Chatham Street and First Avenue. Mr. Hafiz testified that the sidewalk was so packed with people that it was difficult to move back

onto the sidewalk from the road. Only a grossly intoxicated driver would fail to see what was there to be seen: a horde of young people making so much noise that it awakened Mr. Laface's wife in their apartment. Ms. Strang saw the pedestrians and exercised the caution required of her under s. 181 of the Act. There can be no excuse for Mr. McWilliams' failure to do the same.

[168] Mr. Eggleston also specifically relies upon the findings made by Kirkpatrick J. at paras. 164-168 as being so similar to the facts of this case that I should find that in these circumstances Mr. Eggleston was also not contributorily negligent. In those paragraphs Kirkpatrick J. stated:

[164] I will now address the first and second arguments of the hotel concerning the alleged contributory negligence of the plaintiffs. The hotel asserts that, by being present in the road rather than in a position of safety on the sidewalk or in the truck, the plaintiffs contributed to the cause of the accident. In this regard, the decision in *Giuliani v. Saville* (1999), 72 B.C.L.R. (3d) 346 (C.A.) is of assistance. Giuliani concerned an appeal of a trial judge's finding that the plaintiff was contributorily negligent with respect to injuries he had suffered. On the night of the accident, the plaintiff and two friends had been drinking and were driving around the neighbourhood looking for other places to party. They saw the defendant with a young woman whom they recognized. The defendant made a rude gesture to the plaintiff and his friends and seemed to be interested in picking a fight. The plaintiff got out of the car and approached the defendant, but there was no physical encounter.

[165] The defendant and the young woman jumped into a car and sped off in reverse, backing up over a curb and causing damage to a property. The plaintiff, knowing that the defendant would have to drive around the block to reach an arterial road, decided to go to an intersection around the corner in order to try to determine the defendant's license plate number as he drove by. The plaintiff initially stood near the centre of the roadway, then moved "some distance to the south of the centreline." The Court of Appeal noted that the street was a typical residential street, wide enough for cars to park on both sides with room for cars to pass each other in the middle. The plaintiff continued to stand in the roadway as the defendant's car approached. As the car approached the plaintiff, it sped up and collided with the plaintiff. There was some dispute as to when the plaintiff had attempted to get out of the way of the defendant's vehicle, and as to whether the defendant had swerved to hit the plaintiff or had merely driven in a straight line.

[166] The trial judge concluded that the defendant had driven in a straight line, and found the plaintiff contributorily negligent to the extent of 30 percent of his injuries. The trial judge concluded that the plaintiff had ample opportunity to see the vehicle and had ample time to remove himself from the road. He also concluded that it was not necessary for the plaintiff to continue standing where he did, and that "in waiting to the last moment to back up out of the path of the vehicle, the plaintiff omitted to act reasonably" and to exercise the requisite degree of care for his own personal safety.

[167] Esson J.A., speaking for the Court, stated that the trial judge had erred in finding the plaintiff contributorily negligent in the circumstances, and that this conclusion had been reached "without regard for the flagrant and almost unforeseeable conduct of the defendant and without regard for the fact that the defendant had ample room to steer clear of the plaintiff" (¶ 10). At ¶ 11-12, Esson J.A. observed:

In this case, there is no doubt that the plaintiff could see the defendant coming but it was not reasonably foreseeable that the defendant, who could see him equally well, would continue to drive towards him at an accelerated speed. Mr. James submits that, having regard to the previous exchange following the one finger salute, the plaintiff should have known that he would be in great danger if he stood in the road while the defendant approached. That to me is not a reasonable proposition. As I have said, this is a case of negligence on the part of the defendant of a kind and degree which is so great as to render it not reasonably foreseeable to the plaintiff that he was at risk until the car had got too close to him for him to take effective evasive action. The defendant's conduct was flagrant and deliberately reckless.

I would, therefore, hold that no contributory negligence should have been found. I will add that, if I had not reached that conclusion, I would have assessed the fault of the plaintiff to be no more than 5%. There was in my view an error in principle in the approach to the allocation of fault in that it was not put on the basis which this Court held in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 should be employed. That basis is that the apportionment should be based on the degrees of fault rather than assessing relative degrees of causation as between the parties. [My emphasis.]

In the result, the defendant was found 100 percent liable for the accident.

[168] The facts in *Giuliani* bear more than a passing resemblance to the facts in the case at bar. I note that in both cases, the plaintiff(s) had been drinking and in both cases, the defendant driver had engaged in conduct which can only be described as reckless. By analogy, the reasoning in *Giuliani* supports the conclusion that where, as here, the defendant driver's behaviour was so unforeseeable and the risk of injury from the plaintiffs' failure to take care was so unlikely in the circumstances, it is simply not appropriate to find that the plaintiffs were contributorily negligent.

[69] After considering the totality of the evidence in this case, I am satisfied that counsel for Mr. Eggleston is correct in asserting that Mr. Watson's conduct in driving while so impaired was at least as egregious as that of Mr. McWilliams in *Laface*.

[70] The question is whether Mr. Eggleston's own conduct in placing himself at some risk that a severely impaired driver would not see him in time to apply his vehicle's brakes or otherwise avoid a collision requires an apportionment of some liability to him for his injuries.

- [71] In all of the circumstances I find, as did Kirkpatrick J. in *Laface*, that Mr. Watson's conduct was so unforeseeable, and the risk of injury from Mr. Eggleston's failure to take more care so unlikely that "it is simply not appropriate" to find that Mr. Eggleston was contributorily negligent.
- [72] If I am wrong in that conclusion, based upon the analysis and conclusions of Esson J.A. in *Giuliani*, I would assess Mr. Eggleston's fault in failing to avoid the collision to be no more than 5%.
- [73] In reaching those conclusions, I have also considered the decision of this court in *Kilby v. Insurance Corporation of British Columbia*, [1990] B.C.J. No. 2223 (S.C.) [*Kilby*], relied upon by counsel for ICBC.
- [74] In *Kilby*, the plaintiff was struck by an unidentified motorist while walking: not facing the flow of traffic; wearing comparatively dark clothing; and, walking on or near the fog line, without making any effort to obtain a proper lookout, and relying on drivers to see him.
- [75] Lamperson J. determined that in those circumstances the plaintiff was "50 percent to blame."
- [76] I have concluded that *Kilby* has no application to the facts in this case because:
- 1) the defendant in *Kilby* was not severely impaired; and
 - 2) *Kilby* was decided before the decision in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (B.C.C.A.) [*Cempel*].
- [77] While it might be argued, as counsel for the defendant and ICBC submitted, that at the time of impact Mr. Eggleston's position on the roadway prevented him from escaping being hit and therefore was a significant cause of his injuries, that causation analysis as a basis for apportioning fault is precluded by *Cempel*.
- [78] In addressing the issue of causation in the apportionment analysis required by the provisions of the Negligence Act, the court in *Cempel* stated, at para. 19:

The Negligence Act requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

[Emphasis in original]

- [79] I have applied that analysis in determining that Mr. Watson is 100% liable for the injuries suffered by Mr. Eggleston in the collision.

DAMAGES

[80] My conclusions concerning Mr. Watson's liability require that I now assess the losses suffered by Mr. Eggleston as a consequence of the collision, under the following heads of damages:

- 1) Non-pecuniary loss;
- 2) Past earnings loss;
- 3) Future loss of earning capacity;
- 4) Future care costs;
- 5) "In-trust" claims advanced on behalf of his wife and other family members; and
- 6) Loss of housekeeping capacity.

[81] Before turning to the quantification of Mr. Eggleston's losses under the specific heads of damages claimed I will first record the background facts that are necessary to that assessment and also allude to the relevant medical evidence concerning the extent of the injuries suffered by Mr. Eggleston and issues of causation that arise from the evidence.

BACKGROUND AND MEDICAL EVIDENCE

[82] Mr. Eggleston was 47 years old at the time of the collision on June 9, 2006, and was in good health. The totality of the medical evidence as well as Mr. Eggleston's evidence and that of his wife Dian Eggleston, concerning the very hard work he had done in the summer, fall, and winter of 2005 satisfy me that some issues he had with a back injury suffered in a work-related incident in the mid-2000's and a clavicle injury he had suffered earlier in a roping incident had resolved by June of 2006.

[83] At the time of the collision, Mr. Eggleston and Dian Eggleston, to whom he had been married for 16 years, had a very full and happy marriage and were looking forward to the continuation of a ranching business with the Cheslatta First Nation near Burns Lake, British Columbia, that they had commenced the year earlier.

[84] Although that ranching business opportunity failed to materialize in 2006 after the accident for reasons unrelated to Mr. Eggleston's injuries, the circumstances out of which the opportunity arose in 2005, the commitment and efforts of Mr. and Mrs. Eggleston to it, and the steps they took to make it successful are all important to my determination of the appropriate award that should be made to compensate Mr. Eggleston for his non-pecuniary loss arising from pain and suffering and loss of enjoyment of life.

- [85] Mr. Eggleston has been a farmer or rancher for most of his adult life, and prior to June of 2006 his and Mrs. Eggleston's social and recreational life revolved around their shared love of owning, breeding, raising, training, caring for and riding horses in and around Dawson Creek in northern British Columbia.
- [86] I accept Mr. and Mrs. Eggleston's testimony concerning their continued happiness with their ranching life and the opportunities it provided for social activity, enjoyment of their horses and the outdoors, and the company of one another while doing things they both enjoyed.
- [87] It is, however, also fair to say that prior to 2005, while Mr. Eggleston was devoted to ranching as a career and enjoyed the lifestyle it offered him and his family, it was never a career that was particularly financially rewarding. Indeed, he had over the years almost always been required to at least supplement and at times support his ranching and farming efforts by working as a logging truck driver or as a mechanic. In addition, from 1994 to 2005, Mrs. Eggleston worked steadily as a school bus driver.
- [88] Accordingly, the evidence as a whole establishes that even though the Eggleston family enjoyed their ranching lifestyle and tried hard to make their ranching and related business activities successful, those efforts often failed by reason of bad weather, crop failure, bad timing and at times some bad business decisions. In addition, as I have noted above, Mr. Eggleston had suffered some work-related injuries in the mid-2000s that had caused some additional stress and other health-related concerns.
- [89] It was against that background of financial loss and stress that Mr. and Mrs. Eggleston seized upon the opportunity to "start over" in 2005 by accepting the unique opportunity offered by the Cheslatta First Nation of creating a working cattle ranch for the First Nation and especially its youth whom they would train to eventually operate it, both as a cattle ranch and an eco-tourism facility. At the outset the project contemplated a five year plan which would include in its first stages the clearing, fencing, repair and refurbishment of an old ranch property on the Cheslatta First Nation's lands with the help of some of the Cheslatta First Nation's youth.
- [90] As part of the decision to relocate from Dawson Creek to the Cheslatta Ranch property with all of their horses, the Egglestons eventually sold their ranch in Dawson Creek which, after re-payment of accumulated debt, saw them basically break even financially. They were in the truest of senses "starting over" with a new life, in a new part of the province with a very challenging but also invigorating project.
- [91] I have no reason to doubt that the move to the Cheslatta Ranch and their work on the ranch in 2005 and into the winter of 2006 was very beneficial for both Mr. and Mrs. Eggleston. They enjoyed the hard work, gained the confidence of Chief Corrina Leween of the Cheslatta First Nation, and enjoyed considerable success working with and helping some of the Cheslatta First Nation's youth in repairing fences and other ranch buildings, while also teaching horsemanship and enjoying riding.

- [92] The pictorial evidence adduced at trial as well as the evidence of both Mr. and Mrs. Eggleston, convinces me that Mr. Eggleston was able to and did work long hours doing hard physical labour without difficulty. When fall ended and winter came, he was strong and physically fit.
- [93] The payment received from their work on the Cheslatta Ranch was not, however, sufficient to allow Mr. Eggleston to rely solely upon it to meet all of the family's financial needs. Although Mr. Eggleston received \$50,000 for that first season of work that ended in October of 2005, they had many expenses for which they were contractually liable. They also, however, received accommodation for themselves and their horses even after the first contract ended, since they stayed on at the ranch to care for it during the winter. In addition, prior to the end of that first contract, they were provided with some of their own food as a consequence of separate funding for the care and feeding of the Cheslatta youth who worked on the ranch with them that first season. Also during that first season, Mrs. Eggleston received a salary for her work as a cook on the ranch.
- [94] From December 15, 2005, to March 31, 2006, while still residing at the Cheslatta Ranch, Mr. Eggleston went to work as a sub-contracting logging truck driver, mechanic and welder for Northern Lights Ranch in Burns Lake, British Columbia. In that three and one half month period he received remuneration of \$19,459.51.
- [95] Mr. Eggleston's work for Northern Lights Ranch came to an end at the end of March 2006 because of the spring break shutdown, and it was anticipated that start-up would commence on June 26, 2006.
- [96] I accept Mr. Eggleston's evidence that the work for Northern Lights Ranch included hard, physically demanding labour in the securing of logging loads, in addition to driving logging trucks. The location of the work also required long hours in getting to and from the Cheslatta Ranch each working day, and at the same time he was responsible for many chores around the Cheslatta Ranch including cutting firewood, hauling water and manoeuvring heavy hay bales to feed the horses. Those chores continued after his work at Northern Lights Ranch ended due to the spring break-up.
- [97] I also accept Mr. Eggleston's evidence that he did the work for Northern Lights Ranch and the chores at the Cheslatta Ranch without physical discomfort.
- [98] The five year plan for the Cheslatta Ranch failed to come to fruition due to lack of funding. Although Mr. and Mrs. Eggleston, as well as Chief Leween remained hopeful and optimistic that some funding to continue the work started in 2005 would become available in 2006 and in future years, the totality of the evidence establishes that their hopes were not realistic.

- [99] Accordingly, when Mr. and Mrs. Eggleston travelled to Kelowna in June of 2006 to visit Mrs. Eggleston's dying brother, Mr. Eggleston's working prospects were unsettled. Although the Egglestons could continue residing on the Cheslatta Ranch property at least temporarily and also keep their horses there, the lack of funding for the project would have made it necessary for Mr. Eggleston to obtain employment elsewhere.
- [100] Although the collision on June 9, 2006, intervened to prevent Mr. Eggleston from taking up other employment, I accept his evidence that if funding for the Cheslatta project did not materialize he would have moved the horses to his brother-in-law Roger Cloutier's property that was relatively nearby, and again gone to work for Northern Lights Ranch doing the same work he had done in 2006 prior to the spring break-up.
- [101] There is no evidence to suggest that he would not have been able to re-obtain that employment if he had not been injured in the collision.
- [102] I also accept Dian Eggleston's evidence that if they were ultimately unable to continue to work on the Cheslatta Ranch project, they had the option of returning to the Dawson Creek area where Mr. Eggleston could seek employment with his son-in-law Rick Palfi's water trucking company since he had worked previously as a truck driver for companies operated by Mr. Palfi and his brothers.
- [103] Evidence that I will later discuss establishes that the Egglestons did return to Dawson Creek in the fall of 2006, and in March of 2008, Mr. Eggleston did eventually go to work for Mr. Palfi's company.
- [104] The very serious injuries that Mr. Eggleston suffered in the collision not only prevented his return to work in June of 2006, but also for many months thereafter.
- [105] As I will later discuss in some detail, the central medical issue in this case over which there is controversy is whether Mr. Eggleston suffered a brain injury in the collision.
- [106] The totality of the evidence does, however, unquestionably establish not only that the collision had a profound and disastrous impact upon his life and his continued ability to enjoy the life he had previously enjoyed, but also that which the effects of the collision have required him to endure.
- [107] Leaving aside for the moment the determination of whether the evidence establishes on a balance of probabilities that he suffered a brain injury, the evidence establishes that:
- 1) After the collision Mr. Eggleston was taken by ambulance to the Kelowna General Hospital.
 - 2) The attending ambulance paramedic report noted "no loss of consciousness" and "ambulatory at scene." It also reported lower back pain and occipital pain.

- 3) The Emergency Record from the Kelowna General Hospital for June 9, 2006, and nurses' notes for that same attendance record that Mr. Eggleston complained of low back, occipital, right shoulder, right shin and side pain as well as headaches. There is no report of any loss of consciousness. After physical examination and X-rays were taken, he was released with pain medication and advised to "return if worse."
 - 4) Dian Eggleston's evidence, which I accept as reliable, also establishes that while in the Kelowna General Hospital on June 9, 2006, Mr. Eggleston was confused about why he, rather than his then deceased brother-in-law whom he had recently been visiting in the same hospital, was in a bed. She also testified that Mr. Eggleston refused to stay in the hospital overnight.
 - 5) After leaving the hospital, Mr. Eggleston went back to the Comfort Inn because he was in too much pain to stay in the motor home in which he and Mrs. Eggleston had travelled to Westbank and in which they had stayed before the collision. During that night he suffered severe headaches and was spitting up blood.
 - 6) Photographs in evidence taken after the collision show severe bruising of Mr. Eggleston's buttocks, legs, and feet caused by the collision.
 - 7) On June 11, 2006, Dian Eggleston insisted that Mr. Eggleston go back to the Kelowna General Hospital for further attention. She testified that he remained confused and that she had to force him to go back.
 - 8) The Emergency Record from the Kelowna General Hospital for June 11, 2006, and nurses' notes for that attendance record that Mr. Eggleston was expectorating blood-tinged sputum; was pale, was suffering from nausea and vomiting and still suffered from pain in his back, shoulders and left clavicle as well as "severe and constant" headache. There was also a recorded emergency room diagnosis of a "Closed Head Injury Grade I." Mr. Eggleston was discharged with a narcotic pain medication.
- [108] The evidence also establishes that for the period immediately after the accident until mid-September 2006:
- 1) Two or three days after her brother's funeral, Dian Eggleston drove the family motor home back to the Cheslatta Ranch while Mr. Eggleston remained in bed in bed in severe and continuous pain.
 - 2) After their return to the Cheslatta Ranch, Mr. Eggleston spent almost the whole of his time recuperating in bed or sitting down, and was unable to assist with any household or ranching chores.

- 3) On June 20, 2006, Mr. and Mrs. Eggleston attended upon Mr. Tom Esperson, an ICBC adjuster in Smithers, British Columbia, for an interview upon which ICBC and Mr. Watson rely in support of their submission that Mr. Eggleston did not suffer a brain injury in the collision. I will discuss the contents of that interview later in these reasons when addressing that issue.
- 4) On June 20, 2006, Mr. Eggleston also saw his family doctor, Dr. Peter Morry of Houston, British Columbia. Among other things, Dr. Morry noted in his clinical record of that visit that Mr. Eggleston's back was still sore. There are also some notes relating to "mood" and "bruising."
- 5) On June 30, 2006, Mr. Eggleston attended the Bulkley Valley District Hospital at 3:45 in the morning. The outpatient report of the attending nurses records that Mr. Eggleston complained of frequent headaches, mood changes and memory loss that was increasing since the collision, and said he was very forgetful. It noted that he was to see Dr. Morry in Houston in the morning. The attending physician's report records that Mr. Eggleston's behaviour had changed, he was slow to respond, and that his memory was poor. The attending physician noted indications of head injury and ordered a CT Scan "tomorrow if possible."
- 6) Dr. Morry's clinical records for June 30, 2006, indicate that Mr. Eggleston's appointment for that date was re-booked.
- 7) On July 5, 2006, Mr. Eggleston saw Dr. Morry in Houston. Dr. Morry's clinical records indicate that Mr. Eggleston complained that his back was still sore, that he could not sit, and that his headaches were still severe. Dr. Morry reported to ICBC that, among other things, Mr. Eggleston had noted: a personality change, mood swings, depression, poor concentration, poor balance and forgetfulness.
- 8) On July 14, 2006, an MRI scan of Mr. Eggleston's brain was performed, the radiologist's report of which stated:

FINDINGS: Minor amount of opacification within posterior ethmoid air cells is noted bilaterally, of dubious clinical significance.

On FLAIR images, there are a few small foci of increased signal noted within the right centrum semiovale as well as at the junction of the left centrum semiovale and coronal radiata. These would not relate to a history of trauma. These are non-specific and not uncommonly seen in asymptomatic patients.

I do not see evidence for blooming artifact on gradient echo images to suggest intracranial hemorrhage. I do not see evidence for masses or findings of clinical significance otherwise.

OPINION: Examination is essentially unremarkable with minimal posterior ethmoid air cell opacification thought to not likely be of clinical significance. I specifically do not see evidence for post-traumatic sequelae.

- 9) On July 24, 2006, Mr. Eggleston was seen by another physician in Dr. Morry's office. The clinical record of that visit indicates that Mr. Eggleston complained of neck pain, memory loss gaps in recent past, forgetfulness and difficulty with words, speech impediment with some slurring, mood swings that were quite pronounced, and balance being off especially in buildings with fluorescent lighting. The physician also recorded "his speech is slow and rambling and he seems to wander in and out of a topic." Mr. Eggleston also reported that he had begun physiotherapy that week.
- 10) Over the balance of the summer of 2006, Mr. and Mrs. Eggleston continued to reside at the Cheslatta Ranch. His recuperation was very slow and he still did none of the household or ranch chores. Trips to Dr. Morry's office and to physiotherapy which took three hours were very uncomfortable for Mr. Eggleston, and he continued to suffer from severe pain.
- 11) I accept Dian Eggleston's testimony that Mr. Eggleston was having excruciating headaches, his mobility was poor, he was confused and did not seem to be able to hold conversations or focus enough to have other people in the room, as well as her observations that he seemed "lost" and that his face was "empty."
- 12) In September of 2006 the Egglestons left the Cheslatta Ranch and moved to Dawson Creek to live with their daughter Katrina Palfi, her husband Rick Palfi, and their children.
- [109] Dian Eggleston testified that the move from the Cheslatta Ranch to Dawson Creek was necessary because of the pain and discomfort of the many long trips to Houston for medical attention as well as the lack of any real improvement in Mr. Eggleston's conditions.
- [110] I accept her testimony that they both needed help, and agree with her observation that they were fortunate that Mr. and Mrs. Palfi generously opened their home to them. As it turned out, what was intended as a short stay became a long one as Mr. and Mrs. Eggleston remained in the Palfi home for three years before leaving in September 2009, three months before this trial started.
- [111] From September of 2006 until March of 2008, Mrs. Eggleston went back to work in Dawson Creek, holding down two jobs. Mr. Eggleston did not do any work during that period but commencing in March of 2008 he did begin to do some work for Mr. Palfi's company which had contracts for hauling water to sour gas drilling operations near Dawson Creek.
- [112] Concerning the period from September 2006 to March of 2008 before Mr. Eggleston returned to work, the evidence of Mr. and Mrs. Eggleston as well as that of Katrina and Rick Palfi and the medical evidence adduced at trial establishes that:
 - 1) Mr. Eggleston's recovery to the extent that he was able to start doing some work was very slow and frustrating for all concerned.

- 2) He was very dependent upon both Katrina Palfi and Dian Eggleston for all of his needs, including the need for them to remind him to take his medications and ensure he did not "double dose." Because Dian Eggleston was working two jobs, Katrina Palfi became not only a mother to her own young children but also in many respects the daily caregiver for her father. She also did his banking for him.
- 3) During this period Mr. Eggleston was quiet and liked to be by himself. His lack of interaction with family members was inconsistent with his pre-accident behaviour. He suffered from headaches and lack of sleep and Ms. Palfi observed "delayed reactions" in his interaction with others including in his speech. She testified that unlike his pre-accident condition he would speak slowly, seemed unsure of himself and not sure of his answers. She observed that there has been little improvement in this area through to the trial. Her observations are consistent with my own assessment of Mr. Eggleston's present speech patterns and responses to questioning. He at times appeared confused and lacking in focus, and unsure of his answers, and was visibly tired at the end of each day of testimony.
- 4) Mr. Eggleston continued to suffer some balance and dizziness problems during the period before returning to work. He purchased a bicycle for exercise but only rode it once before becoming dizzy and nauseated. He was then and is now still afraid of falling off a horse and has not ridden since the collision.
- 5) Ms. Palfi observed that Mr. Eggleston was light sensitive and would darken a bright room. He was noise sensitive to the extent that she tried to keep her children quiet around him. She also observed him stagger while walking at times as if impaired, and that his hand-eye coordination was at times off, to the extent that she saw him drop utensils while trying to cut food.
- 6) During this period Mr. Eggleston continued to receive significant medical attention, all of which I find was necessitated by the collision, the various injuries he suffered in it, and the need for rehabilitation. He underwent physiotherapy, acupuncture treatments, massage therapy, pool therapy, mental health counselling and family counselling. He also saw a psychiatrist regularly until at least mid-February of 2007 for his mood disorders and depression. He was prescribed a number of drugs, including the narcotic Dilaudid for pain management and other medications for mood control. He continued to take most of those drugs until the time of trial but has recently weaned himself off of the narcotic Dilaudid.
- 7) In November of 2006 Mr. Eggleston saw Dr. Matt Fletcher, an orthopaedic surgeon who diagnosed a "proximal long head of biceps rupture of Mr. Eggleston's s right shoulder" and noted that an ultrasound confirmed a "partial articular sided rotator cuff tear." He also diagnosed Mr. Eggleston as suffering from multiple soft tissue injuries and post-traumatic stress.

- 8) Mr. Eggleston also saw a number of other medical specialists both for treatment and for medical-legal opinions. Those included Dr. Andrew Travlos, a specialist in physical medicine and rehabilitation (seen in January of 2007) and Dr. Donald Cameron, a neurologist (also first seen in January of 2007).

- 9) Among other things, in his report of January 12, 2007 Dr. Travlos stated:

The absence of MRI changes on the scan done at Image One MRI does not exclude the presence of an underlying mild traumatic brain injury as the changes are often beyond the resolution capabilities of the scanner. There are much high powered scanners available of up to 3 Tesla that may well go on to show such changes. It is my opinion that the majority of Mr. Eggleston's current cognitive symptoms are due to his mental health. He certainly showed reasonable insight, appropriate judgment, and was readily able to interpret fairly high level proverbs that would indicate that overall his executive functioning is reasonable and not out of keeping with the slowness of his presentation. This does not mean that he is still not having cognitive changes from the head injury. For example, the simple task of doing digit span forwards and backwards definitely caused him challenges and caused him to become overwhelmed, an activity that is relatively simple and should not have invoked any stress or difficulty for an otherwise healthy individual.

Once greater strides have been made to increase Mr. Eggleston's mental health, then the residual cognitive difficulties that he still has will likely be due to the head injury and may benefit from treatment interventions. Such therapy could be provided by an occupational therapist and neuropsychologist. The goal of such therapy will be to assist in establishing a treatment program to help him to begin to use his cognitive functioning more. The brain is no different to a muscle in that if it is not used, its function deteriorates. Therefore, re-establishing a progressive pattern of activation would benefit his cognition overall. He can also be shown strategies to improve his memory and overall thinking processes. He will need strategies set up to improve his cognition such as regular reading, cognitive tasks and puzzles and activities that require him to maintain good memory.

Mr. Eggleston's headache pains are post-concussive pains. There is likely a component of cervicogenic pain contributing to the pain, but it is quite clear that increased stress and concentration makes the headaches a lot worse. These headache pains do improve over the course of the first year and there is reasonable expectation of further recovery. He may well be left with headache pains, but it is too early at this point to determine if this will be the case. They have improved over time and the expectation is that they should continue to do so.

- 10) In his report of June 11, 2007, relating to his neurological evaluation of Mr. Eggleston on January 11, 2007, Dr. Cameron stated:

23. Following the motor vehicle accident, Mr. Eggleston was documented by the emergency physician at Buckley Memorial Hospital three weeks later, as well as his family physician, Dr. Mori, that he was suffering with problems with concentration, memory dysfunction, irritability, sleep disturbance pattern, mood swings, and problems with balance, as documented in Dr. Mori's note of July 5, 2006.
24. Mr. Eggleston underwent an MRI brain scan on July 14, 2006 because of these ongoing cognitive problems. The MRI scan of the brain was essentially normal. It is my opinion that these symptoms are diagnostic of Mr. Eggleston suffering a post traumatic brain injury syndrome or post concussion syndrome following the accident of June 9, 2006. Patients who suffer a mild traumatic brain injury or concussion usually have normal MRI brain scans or normal CT scans following such injury. The damage that occurs at the time of a concussion or mild traumatic brain injury is microscopic in nature and involves axonal disruption diffusely in the brain. This results in an altered state of consciousness or brief loss of consciousness and subsequently may be followed by symptoms diagnostic of post traumatic brain injury syndrome or post concussion syndrome. This is the case with Mr. Eggleston, in my opinion, as I have outlined above in this report.
25. Mr. Eggleston also has suffered soft tissue and musculoskeletal injuries including significant injury to his right shoulder area. He has ruptured the long head of his biceps tendon which will result in a permanent decrease in strength and stamina involving the right upper extremity. These physical injuries combined with his cognitive problems have resulted in Mr. Eggleston developing symptoms of depression following the accident. It is my opinion that any ongoing cognitive problems at the time of my neurological assessment of Mr. Eggleston are probably due to combined residual effects of the mild traumatic brain injury, the pain and discomfort as a result of soft tissue and musculoskeletal injuries that he sustained at the time of the accident, and psychological dysfunction which has developed following the accident.
- 11) On May 29, 2007 Mr. Eggleston underwent surgery to repair an umbilical hernia a condition which Dr. Travlos had identified as having been caused by the collision which is the subject of this proceeding.
- 12) On December 5, 2007, Dr. Fletcher performed surgery on Mr. Eggleston's right shoulder but left the long head of the biceps medially displaced and did not treat the translated biceps tendon. He also "debrided a bursal side partial rotator cuff tear."
- 13) Expert opinion evidence of Dr. Jordan Leith, an orthopaedic surgeon, commissioned by the counsel for the third party ICBC but filed by Mr. Eggleston without cross-examination by the defendant or third party, leads to the conclusion that Mr. Eggleston's right shoulder was not properly treated in the December 2007 surgery.
- 14) Dr. Leith examined Mr. Eggleston in March of 2009 and in his report dated June 2, 2009, stated:

Based on this evaluation and review of the records provided, it is my opinion that Mr. Eggleston sustained a right rotator cuff injury and a right biceps translocation as a result of the subject motor vehicle accident. He also sustained soft tissue injuries as a result of the subject MVA that have mostly settled. He still has some generalized body aches that I would attribute responsibility to the subject MVA. Lastly, the subject MVA most likely aggravated his low back condition and the right clavicle condition which both predated this MVA.

The prognosis for Mr. Eggleston at the time of this evaluation is guarded from an Orthopaedic point of view. This is based on the physical symptoms that he is experiencing that have been documented in the records that are the result of the subject MVA.

The right shoulder has not been adequately treated if the operative report is accurate. The biceps tendon is not ruptured but is dislocated out of the groove in which it normally lies. The operative report did not indicate that this was addressed appropriately. For this reason alone, it is my opinion that Mr. Eggleston would potentially be improved with an arthroscopic biceps tenodesis/tenotomy and repair of the rotator cuff if deemed at the time a necessity. This should be done by a sub-specialist Shoulder Arthroscopist.

As for the low back condition and the sensitivity about the previous right clavicle surgery I do not anticipate that these will improve further. The natural history of these two problems has not been altered as a result of the subject MVA. They were likely only aggravated following the subject MVA and have since returned to baseline levels present prior to the subject MVA.

This evaluation revealed significant weakness, pain and disability as it relates to the right shoulder. Therefore, Mr. Eggleston is not fit to return to his pre-accident employment as a Cowboy/Rancher. I would defer further comments regarding any of the non-physical complaints to the Specialists dealing with this for Mr. Eggleston.

[113] Mr. Eggleston has not yet undergone the remedial shoulder surgery recommended by Dr. Leith.

[114] From March of 2008 when Mr. Eggleston began to work for Rick Palfi and until September of 2009, he and Mrs. Eggleston continued to reside with Mr. and Mrs. Palfi. During that period he also continued to attend upon his family doctor, Dr. Newman, who has been his doctor since 1995, with ongoing concerns related to the pain he was suffering in his back and shoulder, mood and sleep disorders, and balance issues. Dr. Newman continued to prescribe Dilaudid and Prozac.

[115] In addition, during that period as well as in the three months after moving from the Palfi residence before trial, Mr. Eggleston continued to see other medical specialists for both treatment and medical-legal purposes.

[116] As a consequence of that, a number of expert opinions of qualified medical specialists were entered into evidence at trial. Specifically:

- 1) On June 16, 2008, Mr. Eggleston saw Dr. Carole Bishop, a neuropsychologist. In her report dated December 20, 2008 (quoted as amended by her at trial to delete erroneous reference to some of the evidence upon which it was based). Dr. Bishop stated:
 1. Mr. Eggleston presented for neuropsychological assessment on June 16, 2008 during which time he underwent extensive clinical interview and psychometric testing. With regard to the validity of the test results, there was no indication of dissimulation and effort during testing was deemed to be satisfactory. Test results are therefore viewed as a valid reflection of Mr. Eggleston's current neuropsychological and neurobehavioural profile.
 2. It is my opinion that Mr. Eggleston suffered definite head trauma resulting in brain damage as a result of the June 6, 2006 MVA regardless of apparent lack of loss of consciousness. Mr. Eggle[s]ton's report of post-confusional state after being struck, diagnosis by medical caregivers of closed head injury, concussion and mild traumatic brain injury are all consistent with trauma to the brain directly attributable to the June 9, 2006 MVA.
 3. With regard to the severity of the head trauma, the mechanics of the accident where Mr. Eggleston's head struck the windshield and ended up about 50 feet from the car suggest a far more than mild initial impact, despite lack of loss of consciousness. What have been apparent from the time of the MVA are the marked cognitive and behavioral changes in this previously high functioning man. Now at over two years post-MVA, his family is still providing monitoring and assistance with decision-making. His memory remains poor. From a physical standpoint, he is much weaker, his stamina is restricted, and he is anywhere as capable as in the past. It took almost a year and a half for him to be able to engage in even limited, family monitored work had fatigued remains a limiting factor for him.
- 2) She also observed:
 6. For neuropsychological functions, his cognitive profile is suppressed for memory, complex attentional capacity and mental processing speed by comparison with his general intellect. Otherwise he has relatively solid cognitive reserve for visual spatial functions, problem-solving and reasoning and cognitive flexibility. He has variable difficulty with complex attentional commands, at least for verbally-mediated challenges. Despite good effort, he is unable to count on his attention, particularly for mental processing tasks. Mr. Eggleston has the most difficulty on tasks where the opportunity to use visual or motor (e.g., hands-on approach) components is restricted. That is, he has trouble with mental manipulation of information unless he can also record or see task components at the same time.

Verbal memory and learning are weaker than expected for contextual and incidentally presented information at both immediate and delayed recall conditions. He fares much better with the opportunity for formal, structured practice and given those conditions his performance is within the average range. He has trouble with encoding of information, but generally retains what he originally learns. Recognition memory is intact for both verbal and visual elements, also suggesting weak retrieval ability.

Cognitive flexibility is variable; he has difficulty inhibiting irrelevant information but he does become more efficient if given ample practice trials. Left-hand fine motor coordination is weaker by comparison to his dominant hand, probably related to peripheral (shoulder) weakness and injury. Speech-language difficulties were not apparent clinically but language functions were not assessed as part of this evaluation. Neurobehavioural deficits/limitations were not grossly evident but I suspect that some frontal lobe functions may have been affected for ready irritability, verbal fluency, and selected reduced insight.

For other complications, Mr. Eggleston developed depression after the MVA: this mood disorder was probably at least partially related to organic causes from his neurological insult. The pattern of his cognitive performances is not explained by a history of post-MVA depression. I did not view him as clinically depressed at this assessment. There were comments and other reports about obsessive-compulsive tendencies. I did not see any obsessive-compulsive features that suggest a disorder in this man at this time. On questioning of his wife, I am of the opinion that the perseverative tendencies/ rumination first presenting post-MVA were probably associated with neurobehavioural (frontal lobe) changes. Family concerns about limited insight and judgment at least for the first year probably also reflect mild dysexecutive functioning limitations.

- 3) In addition, Dr. Bishop stated:
10. Since the MVA, Mr. Eggleston has experienced chronic, headache pain, as well as chronic pain associated with bilateral knee and back pain. Headache pain is experienced as severe at times, pain interferes with daily functioning and is associated with affective distress. Medical caregivers are in the best position to comment on etiology of these pain factors, but cervicogenic headache pain from the MVA-related head trauma is likely according to records. Such pain can be resistant to spontaneous resolution and can be debilitating without adequate management. Chronic pain can have negative impact on cognition, particularly for memory and attention according to the pain literature. In Mr. Eggleston's case, pain is not deemed to exert significant impact; neurological factors are probably much more potent.
11. Mr. Eggleston has been on a narcotic for headache pain management since the MVA; that medication may have mild effects on his memory, but again, it is not considered the main factor for cognitive weakness. By definition, he is dependent on this agent; other medications may be more suitable for headache pain management.
12. Mr. Eggleston does not have the energy, strength or stamina he had pre-accident. Fatigue is probably at least partially related to the extra mental effort needed to complete tasks of a higher-order cognitive nature. The literature indicates that under functional MRI (fMRI), individuals with lesions of varying types can at times perform reasonably similar to those without brain damage in terms of behaviour (task performance). However, increased brain activation is required through involvement of areas of the brain compared with individuals without brain damage to compensate for areas of damage, and may account for fatigue, as in

his case. Fatigue is likely to be a limiting factor in the longterm; over time, some improvement should occur but he will always need to pace himself appropriately for energy conservation.

- 4) On June 18, 2008, Mr. Eggleston again saw Dr. Cameron for an updated neurological consultation and evaluation. In his report dated June 25, 2008, Dr. Cameron stated:
16. Following my repeat neurological assessment of Mr. Eggleston and following my review of the clinical records and medical documents, my opinions that I outlined in my previous report dated June 11, 2007 remain unchanged.
17. It remains my opinion that Mr. Eggleston sustained a mild traumatic brain injury and suffered initial cognitive dysfunction in the form of short-term memory problems following the pedestrian-motor vehicle accident of June 9, 2006. The hospital records following the accident document Mr. Eggleston as suffering with cognitive problems onset very shortly after this accident. I agree with the opinions that Dr. Travlos has provided in his medical-legal report of January 12, 2007 with respect to the diagnosis of mild traumatic brain injury and the residual cognitive problems following the accident.
18. I also agree with Dr. Travlos, and it is my opinion that Mr. Eggleston developed psychological problems in the form of depression following this accident. It is my opinion that the main long-term residual effects causing cognitive problems are psychological problems in the form of depression.
19. It is also my opinion that Mr. Eggleston has developed a chronic pain condition which also has improved prior to my follow-up neurological assessment of Mr. Eggleston in June of 2008. This chronic pain and discomfort would also have contributed to Mr. Eggleston suffering with cognitive problems in the form of decreased attention span, decreased concentration, and decrease in short-term memory over the last two years.
- 5) Dr. Cameron also referred Mr. Eggleston for a second MRI that was performed on July 24, 2008. The radiologist who interpreted that MRI stated:

MRI Scan: Head

History: Pedestrian hit by a car from behind June 2006. Fell backwards and hit windshield per patient. Clinically post traumatic brain injury syndrome.

Technique: Sag SE T1, Sag Flair T2, Ax TSE T2, Ax DWI, 2 mm Ax Gr T2*, 2 mm Cor Gr T2*, 1.6 mm Ax SWI, 16 mm mIP Ax SWI, Cor Ref SWI.

Findings: The ventricles and sulci are normally maintained for this patients age. The midline structures including the corpus callosum appear unremarkable.

There are approximately 25 T2 hyperintense lesions in the frontal and parietal lobes bilaterally. Most of the larger lesions can be identified on the previous MRI examination from Kelowna dated July 14, 2006. Several of the smaller lesions cannot be identified. However, the lack of visualization is likely due to a poor signal-to-noise ratio on the previous examination rather than interval development of additional lesions.

The largest lesions are demonstrated in the right centrum semiovale with two lesions measuring nearly 9 mm in size. The smallest lesions measure only 1 or 2 mm in size. There is a clustering of lesions in the left corona radiata and about the posterior aspect of the body of the right lateral ventricle. Many of the lesions are in deep white matter structures, but there are few lesions at the grey/white matter junction, see for example a 3 mm lesion in the right precentral gyrus (image 22/28 from series #5). None of the lesions demonstrate loss of signal intensity on gradient T2* or SWI sequences to suggest calcification or hemosiderin. None of the lesions have a convincing linear configuration.

Overall the ventricles and sulci are within normal limits for this patient's age.

The remaining portions of the examination are unremarkable.

Impression: Approximately 25 white matter lesions demonstrated in the frontal and parietal lobes bilaterally. Their distribution, morphology and signal intensity characteristics are non-specific, and the differential diagnosis includes changes of chronic small vessel white matter ischemic disease, nonhemorrhagic shear injury, vasculitis or demyelination.

Electronically signed by: Jason Clement B.A.Sc., MD, FRCPC (Jul 28, 2008 23:55:19)

- 6) Also in July of 2008, at the request of the third party ICBC, Mr. Eggleston was seen by Dr. Kevin Solomons, a psychiatrist. In his medical-legal report dated July 25, 2008, Dr. Solomons stated:

It is my opinion that he did not sustain a traumatic brain injury as a result of the accident, based on these facts and an alternate explanation for any anterograde amnesia that followed the accident.

The earlier cognitive symptoms have now cleared up and he no longer experiences any cognitive impediments. This improvement over time would be compatible with both a post concussive syndrome in the event that he did sustain a traumatic brain injury, which I don't think he did, and with an alcohol and medication induced temporary impairment of cognitive function, which I think he did.

- 7) In that same report, Dr. Solomons also stated:

Any lingering emotional symptoms at this stage are mild and not clinically significant. They will likely improve further with further resolution of his physical state and even more so, with his return to more satisfying activities including work. He ought to remain on his Prozac for the present with a view to dose reduction and discontinuation once his life is more settled,

particularly once the litigation is settled and his lifestyle has resumed something of its pre-accident state. It should be noted that he has recently begun working again, driving trucks for his son in law. This is clearly a very good prognostic development.

- 8) On July 25, 2008, also at the request of the third party ICBC, Mr. Eggleston was seen by Dr. Jeff Beckman, a neurologist. In his medical-legal report dated August 14, 2008, Dr. Beckman stated:

Although this patient may have had a mild concussion at the time of the accident, I do not feel that his ongoing symptoms of progressive memory difficulty, concentration, and mood are on the basis of a traumatic brain injury. He appeared to have been suffering from depressive symptoms and anxiety and I will leave further diagnosis to the psychiatrists who are better qualified than myself. His headaches would be classified as post-traumatic headaches. There is a physio account of them improving a few months following the accident although the patient states they were fairly constant for at least a year and had improved at the time of my interview although still present but mild. I would not classify them as disabling at this point in time.

The patient currently feels his mood is much improved and is gradually tapering off anti-depressants and will also taper off his analgesics. My neurological examination today was normal. I do not find evidence of a lumbar radiculopathy. Indeed follow-up to the CT scan of lumbar spine shows resolution of the disc herniation which was present in 2003 which had been unrelated to the motor vehicle accident, i.e. predated it.

At this time, I would classify his soft tissue injuries as mild and improved. He is deconditioned and overweight. In the last few months he is feeling much better. I would suspect as he exercises more and gets back into better shape, he will be able to return back to his work at the ranch. The patient himself feels it could take another year before he is back in full shape since this type of work is quite heavy. As mentioned in Dr. Solomons report, he is currently helping his son-in-law driving truck which is an encouraging sign.

I do not feel that this patient will incur any neurologic complications as a result of his motor vehicle accident.

- 9) On January 19, 2009, Mr. Eggleston's neurologist, Dr. Cameron, reviewed the July 24, 2008, MRI that he had ordered after assessing and evaluating Mr. Eggleston on June 18, 2008. In his report dated January 19, 2009, Dr. Cameron stated:
1. I have reviewed the MRI brain scan of Mr. Harve Eggleston performed on July 24, 2008. The radiologist has documented that there are 25 focal abnormalities within the white matter of the frontal and parietal lobes bilaterally. The radiologist, Dr. J. Clement, has documented in the MRI brain scan report that these lesions are nonspecific and that the differential diagnosis would include small vessel ischemic disease, non-hemorrhagic shear injury, vasculitis or demyelination.

2. Following my neurological assessments of Mr. Eggleston and following my review of the medical records and clinical documents, it is my opinion that Mr. Eggleston probably has not suffered with multiple sclerosis. It is my opinion that Mr. Eggleston probably does not suffer with vasculitis involving the blood vessels diffusely within the brain. This is based on his past and present clinical condition.
3. Mr. Eggleston is 50 years of age. It is my opinion that a significant number of these foci of abnormalities particularly the areas deep within the white matter of the brain are probably areas of small vessel ischemia. This involves diffuse multifocal very small areas of ischemia or cerebrovascular accident or stroke in patients. This is not uncommon in patients in their 50s and 60s and beyond. This is due to atherosclerosis or hardening of the arteries and the distal segments of the small arteries close off, resulting in very small areas of ischemia or stroke. These patients often do not remember a distinct date that they had "a stroke". Patients may not notice any symptoms related to these lesions or they may have noticed a particular day where they did not feel well in a nonspecific way. They may have felt dizzy or complained of other nonspecific symptoms which were transient or disappeared. Patients usually have no evidence of neurological deficit on formal neurological examination related to these lesions.
4. As it is my opinion that some of these areas of foci of abnormalities deep within the white matter of Mr. Eggleston's brain are probably due to small vessel ischemic disease related to atherosclerosis, I would recommend that Mr. Eggleston be reassessed by a neurologist and have an echocardiogram, a transesophageal echocardiogram, a CT angiogram of carotids and circle of Willis and bloodwork to investigate this probable cerebrovascular ischemic disease further.
5. It is my opinion that the abnormal foci particularly at the gray-white interface are equally probable residual changes of non-hemorrhagic shear injury as a result of previous traumatic brain injury. In my opinion the only traumatic brain injury that Mr. Eggleston sustained is the mild traumatic brain injury that he suffered at the time of the June 9, 2006 motor vehicle accident. It is therefore my opinion that a few of these foci of abnormalities as I have described above in this report are residual changes of previous non-hemorrhagic shear injury or shearing of the tissues of the brain associated with a mild traumatic brain injury.
6. The majority of patients who have suffered a mild traumatic brain injury have normal MRI brain scans and normal CT brain scans following such injury. A smaller percentage of patients may have residual focal abnormalities due to preexisting contusion, hemorrhagic shear injury or non-hemorrhagic shear injury which would have been associated with or occurred at the time of the mild traumatic brain injury. This is the case with Mr. Eggleston, in my opinion.
7. Therefore some of these abnormal findings on the MRI brain scan correlate with Mr. Eggleston having sustained a mild traumatic brain injury at the time of the June 9, 2006 motor vehicle accident.

- 10) As I indicated above, in March of 2009, Mr. Eggleston attended upon Dr. Jordan Leith, an orthopaedic surgeon, at the request of counsel for the third party. In his report dated June 2, 2009, to which I referred in detail above, Dr. Leith opined that Mr. Eggleston's right shoulder was not properly treated in the December 2007 shoulder surgery and recommended new surgery to repair the right shoulder injuries caused by the collision.
- 11) In July of 2009, at the request of his counsel, Mr. Eggleston saw Dr. Derryck Smith, a psychiatrist, for a further medical-legal psychiatric evaluation. In his report dated July 31, 2009, Dr. Smith stated:

The day after the accident, while walking back from a pub with 17 family members, he was struck by a car. He does consistently report a period of amnesia. The only inconsistency is a record from the emergency room of June 11th which states that there was no amnesia. It is uncertain whether there was any witnessed loss of consciousness but hospital records state there was no loss of consciousness. The ambulance record recorded a normal Glasgow Coma Scale score of 15. He was alert and oriented but he had pain in his back and head. It is my opinion that based on all of this data it is probable that this man suffered a mild traumatic brain injury based primarily on his report of significant amnesia. If he was observed to be unconscious, it is certain that he suffered a mild traumatic brain injury.

The issue of a complicated mild traumatic brain injury as raised by Dr. Cameron is interesting. Complicated brain injuries are mild traumatic brain injuries that show structural damage on neuroimaging. They are typically considered to be more like moderately severe brain injury than mild brain injury. It is uncertain as to whether the MRIs of his brain are compatible with structural damage due to brain injury. The radiologist Dr. Clement gave a differential diagnosis that included shear injuries to the brain. Dr. Cameron is of the opinion that there is definite evidence of shear tears in the brain. If his opinion is correct, this man has therefore suffered a complicated mild traumatic brain injury.

By far the most debilitating aspect of this accident, however, was the significant physical injuries suffered by Mr. Eggleston, including multiple soft tissue injuries, severe headaches and injuries to his back and shoulder. Because of the remoteness of the location he did not ever have a proper rehabilitative program. He also developed an addiction to narcotic analgesics which were being prescribed by various physicians. The result of all of these conditions is that he is massively deconditioned and has gained 55 pounds of weight. This man who was previously a superb athlete is not doing anything physically currently.

I note that he has had surgery to repair an exacerbation of an umbilical hernia and right shoulder surgery, both of which added to his burden of pain, without giving him any particular relief. His right shoulder is still dysfunctional and needs another surgery.

From a psychiatric point of view Mr. Eggleston appears to be suffering from Obsessive/Compulsive Disorder, specifically a number of compulsions. It is likely although not certain that this is why Dr. Garbett prescribed Prozac for this man. Since he did not have these symptoms before, I am attributing the obsessive/compulsive symptoms to his traumatic brain injury. There is a significant risk of developing Obsessive/Compulsive Disorder following brain injury.

- 12) In August of 2009, Dr. Smith reviewed additional clinical records that he had not seen at the time of July 31, 2009, report. Those documents included the clinical records of Mr. Eggleston's treating psychologist, Dr. Sally Garbett, from late 2006 to March 2007; clinical records from Dr. Morry he had not seen before and clinical records of Mr. Eggleston's family physician Dr. Newman, from years before the accident and well after it (up to November 4, 2008). In a report dated October 31, 2009, based upon those additional records, he concluded:

In summary, it would appear to me that this man probably developed a significant problem with depression in the immediate aftermath of the motor vehicle accident. It is probable that he had some difficulties with Post-Traumatic Stress Disorder. Both of these conditions appeared to resolve with the use of antidepressant medication and perhaps some low-grade psychotherapy. At the time I saw this man he did not qualify for a diagnosis of depression or Post-Traumatic Stress Disorder, but he did have significant symptoms of Obsessive/Compulsive Disorder. These symptoms did not appear to be causing any significant impairment, however. Mr. Eggleston was in the process of again trying to discontinue his Prozac and was down to 10mg when I saw him.

In summary, these new records cause me to somewhat alter my opinion in that it would now appear that this man suffered from a number of psychiatric disorders following the motor vehicle accident, specifically:

1. Major Depression -- currently in remission
2. Post-Traumatic Stress Disorder currently in remission
3. Obsessive/Compulsive Disorder
4. Cognitive Disorder NOS, secondary to brain injury
5. Opioid Dependence -- currently in remission

I repeat my recommendation that this man requires careful follow-up, particularly as he carries on with his plans to eliminate the use of Prozac. I should note that the treatment for Obsessive/Compulsive Disorder is relatively high doses of medication like Prozac in doses from 40 to 80mg. It is possible that the use of Prozac was masking the symptoms of Obsessive/Compulsive Disorder, which now are emerging as there are attempts underway to reduce and eliminate his use of medication.

- 13) At trial, Dr. Smith testified that notwithstanding the possible diagnosis of a "complicated mild traumatic brain injury" referred to in the quotation from his report of July 31, 2009, he remained of the opinion that Mr. Eggleston had suffered a mild traumatic brain injury and that whether he had suffered a "complicated" mild traumatic brain injury was questionable.
- 14) On August 7, 2009, at the request of counsel for the third party ICBC, Mr. Eggleston was seen by Dr. Eytan David, an otolaryngologist in relation to his ongoing balance issues. In a report dated August 7, 2009, in summarizing his opinion, Dr. David stated:

H.E. [Harve Eggleston] presented with subtle complaints of imbalance following pedestrian MVA. There is no documented abnormality on neurological examination pertaining to the balance system. There is a paucity of documentation of imbalance despite close clinical followup within the context of normal objective findings. This is not suggestive of post-traumatic inner ear injury.

There is no indication of central (brain) or peripheral (inner ear) post-traumatic vestibular dysfunction.

- 15) Subsequent to the delivery of Dr. David's report, on October 28, 2009, at the request of his counsel, Mr. Eggleston was seen by Dr. Neil Longridge, also an otolaryngologist, for the purpose of providing a medical-legal opinion "with respect to tinnitus, hearing loss and dizziness subsequent to an accident in which he was hit as a pedestrian on June 9, 2009." In his report dated November 18, 2009, Dr. Longridge stated:

Onset of this balance difficulty subsequent to the accident and its absence prior to the accident in the absence of any other satisfactory explanation means, in my opinion, that the accident is the probable cause.

Sensation induced during the caloric part of the Video-Oculography (VOG) test was stronger than but the same feeling as the dizziness he complains of, with spinning nausea and a sensation of seasickness. Similarity of this sensation to his feeling, in my opinion, is supportive of its origin in the balance system, probably of the inner ear.

Patients with episodes of dizziness or imbalance are at risk. I specifically recommend that he avoids activities which put him at hazard if he has an episode which would cause him to fall. He should avoid being at height, up ladders or on scaffolding. Changing light bulbs and curtains should be done with caution. He should not be around dangerous equipment. From the recreational point of view he should avoid sports which put him at hazard of falling such as ice skating and line skating where he could injure himself. With respect to skiing, it is important that he avoids skiing on icy surfaces where falling could result in an injury. It is probably safe to ski on fresh powder snow where the speed of skiing is slower and the fall is into soft material so that injury is highly unlikely. He should not ride a bicycle in a situation where, should he fall, he could be injured by a following vehicle. Any other sporting activity where a fall onto a hard surface is likely to occur should be avoided. If he is going to undertake any activity where this is a possible risk then he should wear appropriate protective materials for the sport.

This patient has a disturbance of his balance system. As he ages it is probable that he is more likely to run into difficulties with balance and unsteadiness than someone who has not had the insult to his balance system which he has incurred. Clearly this is something which is only going to occur in significant old age, but should be kept in mind. Potentially there is an increased likelihood of falls and for this reason osteoporosis management has to be optimized.

This patient's balance system has been injured and should he incur a further injury he would be more vulnerable to damage than somebody who had not had a previous injury.

16) On September 25, 2009, at the request of counsel for ICBC, Dr. Jocelyne Lapointe, a neuroradiologist, reviewed the reports of the MRIs of Mr. Eggleston's skull that were performed on July 14, 2006, shortly after the collision of June 9, 2006, and two years later on July 24, 2008, at the request of Dr. Cameron "in order to comment on the report of Dr. Cameron [dated January 19, 2009]. In her report of September 25, 2009, Dr. Lapointe stated:

Dr Cameron reviewed the 2008 MRI and concurred with Dr Clement that most of the lesions were likely due to small vessel ischemic disease and that a further medical work-up was indicated (evaluation by a neurologist, echocardiogram, trans-esophageal echocardiogram (to rule cardiac problems causing mini-strokes), a CT angiograms (to look for narrowing of the cerebral vessels, causing reduced brain circulation) and laboratory studies (to check blood sugar and fats). Conditions affecting blood vessels such as hypertension, diabetes, abnormal cholesterol, migraine, just to name a few of the most common in the population, can result in the type of lesion seen in Mr Eggleston.

Dr Cameron was of the opinion that the subcortical lesion(s) described by Dr Clement was the result of a head injury and the sign of a non hemorrhagic shear injury. No clinical data to support this assertion was included in his report (i.e. no information on the absence of the above mentioned conditions).

The experimental evidence on shear injuries suggests that more rotational force on the brain is needed to cause posterior lesions compared to anterior lesions. As all Mr Eggleston's lesions are in the portion of the brain at or above the roof of the lateral ventricles (i.e. closer to the top of the head), a head injury of sufficient magnitude to cause significant loss of consciousness would have been required to cause shear lesions in these locations.

It is also difficult to understand how an 8mm shear injury lesion would not have bled, considering the richness of the capillary vessels in this volume of tissue.

The MRI findings are consistent with small vessel ischemic disease. An underlying cause should be sought, in order to prevent further deterioration and possibly a major cerebral infarction (aka stroke).

In the presence of two dozen non hemorrhagic white matter lesions it is not possible to ascribe one or two lesions to trauma and the rest to ischemic disease.

- 17) At the request of counsel for ICBC, Dr. Beckman also reviewed the July 24, 2008, MRI of Mr. Eggleston's skull and in his opinion of September 29, 2009, wrote:

I had the opportunity of reviewing Mr. Eggleston's recent MRI scan of July 24, 2008. The MRI scan shows 25 T2 hyperintense lesions in the frontal and parietal lobes. SWI sequences did not suggest any calcification or hemosiderin. These are nonspecific in nature and most likely related to small vessel ischemia.

Dr. Cameron's note of January 19, 2009 comments that the deep white matter changes are likely related to small vessel ischemia. However, the gray-white interface lesions are equally probable residual changes of non-hemorrhagic shear injury as a result of the previous traumatic brain injury.

It is my opinion that all the changes noted on this gentleman's MRI scan are compatible with small vessel ischemia, even the gray-white junction lesions noted. This MRI scan report does not change my opinion from my medical legal report of August 14, 2008.

- [117] In March of 2008 Rick Palfi's trucking business was prospering to the point where he needed assistance. Coincidentally, although Mr. Eggleston was still suffering from pain, headaches, mood disorders and was still being prescribed both Dilaudid and Prozac, he was also becoming physically more active than he had been.
- [118] Mrs. Palfi testified that Mr. Eggleston seemed to be feeling "useless" and unlike before the collision, was still short-tempered, was easily agitated and frustrated so that the family had to "walk on eggshells" because of fear that he would become angry. Still, Mr. Eggleston wanted to help out more. Given Mr. Palfi's needs for help in his business and despite his concerns about Mr. Eggleston's medications, he encouraged Mr. Eggleston to start work on one of his company's water trucks.
- [119] Mr. Palfi testified that he went with Mr. Eggleston on "a couple of loads" and that Mr. Eggleston seemed to cope well enough but seemed to tire easily. Mr. Palfi decided to continue employing Mr. Eggleston and testified that he was so busy that he likely worked Mr. Eggleston more that he should have. Mr. Eggleston did, however, seem to derive a sense of purpose from his work and Mr. Palfi was able to pay good wages. Mr. Palfi also testified, however, that he could see that the work was physically draining upon Mr. Eggleston, that he was tired and grouchy. It was also apparent that his back was not good, and he was complaining of headaches.
- [120] Mrs. Palfi, Mr. Eggleston, and Dian Eggleston all testified to similar effect and I am satisfied that while the return to work was good for Mr. Eggleston's recovery from a "self-worth" perspective and allowed him to contribute financially to his family for the first time in almost two years, it was also physically, emotionally, and mentally draining as his life centered upon coping with pain while working and being exhausted in the non-working hours.

- [121] Although Mr. Eggleston was able to work productively for Mr. Palfi, it is also clear to me that if it were not for their family relationship and Mr. Palfi's desire to see Mr. and Mrs. Eggleston become more productive and less dependent upon him and Mrs. Palfi, so that they could eventually leave the Palfi's home, the employment would likely not have continued.
- [122] Mr. Palfi testified that Mr. Eggleston continued to have difficulty with his memory which led to his going to the wrong gas plant and forgetfulness about assignments he was required to perform. Mr. Eggleston also displayed frustration and hot-headedness with customers that had the potential to harm the company's business. On one occasion, Mr. Eggleston forgot to dislodge a "power take off" on a truck before leaving a gas plant, which resulted in an unnecessary \$5,000 repair bill. At times also Mr. Eggleston was unable to do work that Mr. Palfi wanted to assign because he was just too tired. Mr. Palfi also testified that he gave Mr. Eggleston the easier jobs to protect him as best he could from the difficulties associated with physical work that he knows Mr. Eggleston cannot do as other drivers can.
- [123] Mr. Palfi testified that there were times when he wished he could have fired Mr. Eggleston, but could not because "he is my father-in-law." On cross-examination he testified that he would continue to employ Mr. Eggleston in future for that same reason.
- [124] The evidence establishes that in nine months in 2008, Mr. Eggleston earned approximately \$52,000 in working for Mr. Palfi's company, and that between January 1, 2009, and November 15, 2009, he had earned approximately \$45,000. It also establishes that Mr. Eggleston worked some days with shifts of up to 16 hours.
- [125] Mr. Palfi also testified that if Mr. Eggleston had been able to do so, he could have earned much more money in both 2008 and 2009. He testified that Mr. Eggleston is, however, not capable of working long hours daily for protracted periods of time as is common in the north and in the oil and gas fields that Mr. Palfi's company services. He testified and provided confirmatory accounting evidence that one driver whose employment commenced in April of 2008 earned over \$72,000 in the eight months of 2008 that he worked for Mr. Palfi's company. He further testified that it would be "pretty easy" for one of his drivers to earn \$100,000 per year working for his company if the driver was healthy and capable of working the hours they are legally able to work.
- [126] Against those background facts and the medical evidence adduced in this trial, I now turn to my determination and quantification of the damages suffered by Mr. Eggleston in the collision as a consequence of the negligence of the defendant.

Non-Pecuniary Loss

- [127] I have found that prior to the collision, problems concerning Mr. Eggleston's back and its impact upon his work and enjoyment of life had largely resolved. In the fall and winter prior to the collision he had been able to do all of the difficult physical work required of him in working on the repair of the Cheslatta Ranch and had also successfully undertaken and endured hard physical labour requiring strength and dexterity in driving a logging truck over rough roads and ensuring the safety of the loads his vehicle transported.
- [128] I find that before the collision Mr. Eggleston was physically very strong, socially gregarious, mentally decisive and emotionally stable. He was optimistic in the face of adversity and brought energy and resolve to the solution of the financial and other problems that faced him and his family in the years prior to the collision - not always with success but without complaint.
- [129] I also accept the evidence of his close family members Dian Eggleston, Katrina Palfi, Rick Palfi; his friends Erin Hennigar and Chief Corrina Leween as well as his family physician Dr. Robert Newman, that Mr. Eggleston is now physically, socially, emotionally and cognitively a very different person than he was before the collision.
- [130] Physically Mr. Eggleston still suffers from lack of strength in his right shoulder that will require more surgery, and tires from physical work that is far less physically demanding than that which he was formerly able to do without either exhaustion or complaint. He now suffers from balance issues to such an extent that he is unable to ride a horse, which causes both him and his wife great distress since horses and the rancher's lifestyle were the focus of their pre-accident years. He also still suffers from debilitating headaches which, since he has tried to wean himself off narcotics for pain killing, he now tries to manage with non-prescription drugs .
- [131] Socially, Mr. Eggleston is now reticent, un-spontaneous and somewhat reclusive. All of that has taken a serious toll on his relationships with both his wife and family. He sees himself as a burden rather than a source of strength.
- [132] Emotionally, Mr. Eggleston is now easily frustrated, short-tempered and subject to mood swings and depression that still require medication.
- [133] Cognitively, Mr. Eggleston is now slower in his speech and thought processes than he was before the collision.
- [134] While the defendant and third party do not dispute that Mr. Eggleston suffered some debilitating injuries in the collision, they assert that the evidence does not establish that all of the injuries of which he has complained and from which he now still suffers are as serious as the plaintiff's medical experts have stated or that all were caused by the collision of June 9, 2006.

- [135] As I indicated earlier in these reasons, the primary focus of the submissions of the third party which were adopted by the defendant, concerns whether Mr. Eggleston suffered a brain injury in the collision.
- [136] While ICBC and the defendant do not deny that he suffered physical trauma and has endured great pain that has manifested in some personality change, they submit that some of his losses are attributable to his pre-accident work-related back injuries and that his past and present social, emotional, and cognitive difficulties are psychological or related to withdrawal from Dilaudid as opposed to neurological in origin. As such, ICBC and the defendant submit they can be expected to resolve with a physical fitness regime and psychological counselling.
- [137] Alternatively, ICBC and the defendant submit that if the emotional and cognitive issues are neurological in origin, they have resulted from post-accident small vessel ischemic disease or "mini-strokes" that were not caused by the collision.
- [138] ICBC and the defendant also take issue with whether Mr. Eggleston's balance issues are attributable to any brain insult caused by the collision. They submit that Mr. Eggleston should be able to return to horseback riding because there is no physical impediment to him doing so. They say that his failure to do so emanates from Dian Eggleston's unfounded fears for his safety rather than balance or other issues.
- [139] In addition, ICBC and the defendant submit that the only remaining serious physical impediment which Mr. Eggleston now suffers from is the injury to his right shoulder that can be surgically repaired. They submit that if that is done, Mr. Eggleston will be able to work with more endurance and less pain and that damages for his pain and suffering as well as any issues of future loss of capacity should be assessed from the perspective of successful shoulder surgery in accordance with Dr. Leith's recommendations.
- [140] Based upon those submissions Mr. Brun, counsel for ICBC, submits that Mr. Eggleston's recovery for non-pecuniary damages should be in the range of \$100,000 to \$125,000. Mr. Jevning did not make an independent submission on this issue on behalf of Mr. Watson.
- [141] On behalf of the plaintiff, Mr. Weatherill submits that Mr. Eggleston has proven on a balance of probabilities that he suffered a mild traumatic brain injury in the collision which is the cause of his ongoing social, emotional, and cognitive dysfunction and that his physical injuries, especially those related to headaches, have not resolved to the extent asserted by ICBC and the defendant.
- [142] Mr. Weatherill acknowledges that while shoulder surgery may assist with that injury, the ongoing problems with headache pain, chronic pain arising from the injuries Mr. Eggleston suffered as well as the social, emotional, and cognitive issues I have identified, will continue to affect his future ability to enjoy life.

- [143] Based upon those submissions, the plaintiff submits that Mr. Eggleston should be awarded non-pecuniary damages for his past, present and future pain and suffering, and loss of enjoyment of life of \$200,000.
- [144] As I have previously indicated and as the range of non-pecuniary damages suggested by ICBC implicitly acknowledges, the evidence unquestionably establishes that the collision and its effects upon him had a profound and disastrous impact upon Mr. Eggleston's life and his continued ability to enjoy the life he previously enjoyed. That loss will also continue into the future.
- [145] After considering the totality of the evidence in this trial including the medical evidence adduced by the parties, I have concluded that Mr. Eggleston has proven that it is more likely than not that he suffered a mild traumatic brain injury in the collision of June 9, 2009.
- [146] I also find that the mild traumatic brain injury he suffered is the primary cause of the emotional, social and cognitive difficulties he has exhibited and endured over the more than three years between the date of the accident and the start of the trial, and which will continue to impact his future suffering and enjoyment of life.
- [147] I have reached these conclusions for the following reasons:
- 1) The submissions of ICBC and the defendant and much of the medical evidence adduced by ICBC is founded upon the supposition that Mr. Eggleston did not suffer a loss of consciousness on June 9, 2006, when he hit his head on the windshield in the collision and the theory that if he did not suffer a loss of consciousness he could not have suffered a brain injury.
 - 2) I find both that the supposition and theory are unsupported by the totality of the evidence at trial including those medical opinions that I accept.
 - 3) Concerning the evidence related to loss of consciousness, I do not agree, as asserted by Mr. Brun on behalf of ICBC, that the June 20, 2006, statement given by Mr. Eggleston to the ICBC adjuster Tom Esperson, establishes that Mr. Eggleston did not suffer a loss of consciousness from the impact of the collision.
 - 4) Mr. Brun argued that in that statement to ICBC, Mr. Eggleston provided a clearer recollection of events at the time of the collision than on subsequent occasions which should be read as confirming that he suffered no loss of consciousness.
 - 5) The difficulty with that submission is that while the statement is capable of that reading it is also obvious, as Mr. Eggleston stated in cross-examination that in the interview he was not asked to provide only his own personal recollection of events. The evidence establishes that Mr. Eggleston had considerable interaction with not only Dian Eggleston but also other family members after the accident and attended the interview with Dian Eggleston.
 - 6) Also, as Mr. Eggleston said in that interview:

I got hit and I remember flying through the air. And I remember landing, and I don't think that I lost consciousness. Everybody's been asking me that, my doctors and stuff, and I - I said I didn't believe so but how did you know.

(My emphasis)

- 7) I find that the statement is not conclusive of Mr. Eggleston not having suffered a loss of consciousness. It must, in my view, be read in the context of the evidence of Dr. Cameron and Dr. Bishop who both stated that one has to be very careful in determining whether a brain injured person's recollection of events are his own or whether he or she is filling in gaps in personal recollection by reference to the influence or recollection of others.
- 8) That same point was made by counsel for the defendant in a different but still relevant context when addressing Mr. Eggleston's evidence about what had happened that night in relation to the question of Mr. Watson's liability for the collision and the issue of Mr. Eggleston's alleged contributory negligence. In his written argument, Mr. Jevning stated:

It is respectfully submitted that the evidence of the Plaintiff in this regard is unreliable as well. The various versions of his recollection of the events immediately preceding the accident lead to the inescapable conclusion that it would be unsafe to regard any of them as untainted by subsequent interaction with others present at the scene. It would be impossible to ascertain which is the Plaintiff's actual memory as opposed to one formed by the recollections of others.

- 9) I agree with that observation.
- 10) There was also evidence at trial from Mr. Roger Cloutier that I accept that Mr. Eggleston appeared dazed and confused immediately after the collision.
- 11) Although the Kelowna General Hospital Emergency Records of the attending physician record "no loss of consciousness" they also diagnose a "Closed Head Injury."
- 12) Significantly of all of the medical specialists who provided opinions in this case, only Dr. Solomons opined that Mr. Eggleston did not suffer some brain insult in the collision. Dr. Beckman, who was also called by ICBC, acknowledged that Mr. Eggleston may have had a mild concussion but was of the view that a brain injury was not the cause of his subsequent symptoms.
- 13) Dr. Solomons' opinion that an individual must have experienced a loss of consciousness and a Glasgow Coma score of less than 15 at the time of the collision in order to have suffered a traumatic brain injury is also at odds with the evidence of all of the other medical experts who testified about that opinion.

[148] In his written submissions, Mr. Brun stated on behalf of ICBC:

If one accepts unconditionally the Plaintiff's account of disorientation, poor recall of the events at the time of the accident and immediately following, as well as the nature of his subsequent symptoms, including cognitive and emotional symptoms and his sensitivity to noise and light then a brain injury might be proven.

- [149] The totality of the evidence satisfies me that I can safely accept Mr. Eggleston's evidence on all of those points in finding that as opined by Drs. Travlos, Cameron, Smith and Bishop, it is more likely than not that Mr. Eggleston did suffer a mild traumatic brain injury in the collision.
- [150] In reaching those conclusions, I have also considered the submissions of ICBC and the defendant regarding the possibility that Mr. Eggleston's cognitive, social and emotional problems were caused by small vessel ischemia as opposed to a traumatic brain injury suffered in the collision of June 9, 2006. I have determined that such a finding would be contrary to the totality of the evidence and most specifically the timing of the documented onset of the symptoms which manifested in the period following the collision.
- [151] While I respect the medical opinions offered by Drs. Beckman and Lapointe, they are in many respects speculative when compared to the proven progression of Mr. Eggleston's condition in the aftermath of the collision. Their opinions do not satisfy me that the second MRI obtained two years after the accident is sufficiently probative of the proposition that mini-strokes caused Mr. Eggleston's symptoms to displace my finding that those symptoms were caused by brain insult suffered in the collision.
- [152] I am also satisfied that Mr. Eggleston's problems with balance are attributable to the collision and in making that finding do not accept Dr. David's opinion to the contrary.
- [153] Dr. David stated that there was no complaint of imbalance by Mr. Eggleston until December of 2006. He then offered the opinion that: "There is a paucity of documentation of imbalance despite close clinical follow-up within the context of normal objective findings. This is not suggestive a post- traumatic inner ear injury."
- [154] The clinical records in evidence do not support Dr. David's assessment of the onset of imbalance symptoms. Mr. Eggleston complained of balance being off "especially in building like this with fluorescent lighting" as early as June 24, 2006, and also of "poor balance" on July 5, 2005.
- [155] Given those evidentiary deficiencies in Dr. David's analysis, I prefer and accept Dr. Longridge's opinion that the collision was the probable cause of Mr. Eggleston's balance difficulties.
- [156] I also find that those balance difficulties have persisted throughout the period of his recovery, and that although Mrs. Eggleston may in the past have been somewhat over-protective of Mr. Eggleston in discouraging him from attempting to ride, her concerns are valid if what is contemplated by her is an attempt to return to his pre-accident level of riding and horsemanship. It may well be, however, that he can and should begin to make

rehabilitative efforts at less advanced riding, provided his doctors agree that the risks in doing so are not too great.

[157] In addition to the mild traumatic brain injury that I find has been the primary cause of Mr. Eggleston's past social, emotional, and cognitive problems as well as his continuing problems with serious headaches, all of which will likely continue to impact his future, as well as the balance difficulties that I find were caused by the collision, I also find that the evidence establishes on a balance of probabilities that Mr. Watson's negligence caused the following physical injuries which Mr. Eggleston has suffered and from some of which continues to suffer:

- 1) Significant soft tissue injuries and bruising which were ongoing until at least January of 2007 when he was seen by Dr. Travlos.
- 2) A traumatic umbilical hernia which was successfully operated upon on May 29, 2007.
- 3) Injuries to his right shoulder including a torn biceps tendon, impingement syndrome and a rotator cuff tear which were operated on without success on December 5, 2007, and which in the opinion of Dr. Leith, require further surgery.
- 4) Injuries to his lower back which aggravated existing back problems from which he had largely recovered prior to the collision. Those lower back injuries have impacted on his ability to drive the water truck in his work for Mr. Palfi and in respect of which I accept Dr. Leith's opinion of June 2, 2009.

[158] In addition to those specific physical injuries, I accept the evidence of Dr. Travlos, Dr. Cameron, Dr. Smith and Dr. Bishop that Mr. Eggleston has suffered and continues to suffer from psychological problems arising from his brain injuries and the pain associated with the physical injuries suffered in the collision. That pain was chronic until at least June of 2009 but was relieved to a large extent by narcotic and other medications thereafter until Mr. Eggleston determined to wean himself off Dilaudid. He now again has more pain and is also likely suffering the continuing effects of withdrawal. However, his present work history convinces me that within the neurological and cognitive limits that may still compromise his recovery, his future suffering from chronic pain will likely be capable of amelioration with psychological counselling and pain management assistance without narcotic intervention.

[159] In determining the appropriate award to compensate Mr. Eggleston for the injuries suffered in the collision, I have considered all of the injuries suffered by him that were caused by Mr. Watson's negligence, their devastating effect upon his ability to enjoy the active life involving horses and his relationship with friends and family surrounding that lifestyle that he formerly enjoyed.

- [160] I have also considered the pain Mr. Eggleston has endured and will likely continue to endure at least at some level, the compromise of his role as the leader of his family and the loss of his self-esteem, the length of time over which he has already suffered those losses, the prospect of the continuation of those losses into the future, albeit at a less intense level than in the past, and the fact that he will again have to undergo surgery in an attempt to repair his shoulder injuries.
- [161] In addition, I have considered the situation that has existed since March of 2008 when Mr. Eggleston returned to work, in that the work he does drains him of energy so that his life has become somewhat one-dimensional, centering upon work and recovery from its daily effects upon him to the continued detriment of his ability to enjoy life.
- [162] Finally, I have considered all of the authorities which have been provided to me by counsel and which offer some guidance as to the appropriate range of damages for injuries such as those suffered by Mr. Eggleston but which are of course dependent on their unique fact situations.
- [163] I have concluded that in the totality of the circumstances an award of non-pecuniary damages in the amount of \$170,000 will appropriately compensate Mr. Eggleston for his pain and suffering and loss of enjoyment of life caused by Mr. Watson's negligence.

Past Loss of Earnings

- [164] The evidence establishes that from December 15, 2005, to March 31, 2006, while still residing at the Cheslatta Ranch, Mr. Eggleston went to work as a sub-contracting logging truck driver, mechanic and welder for Northern Lights Ranch in Burns Lake, British Columbia.
- [165] In that three and one half months' period he received remuneration of \$19,459.51 and his work for Northern Lights Ranch came to an end at the end of March 2006 because of the spring break shutdown.
- [166] It was anticipated that start-up would commence on June 26, 2006.
- [167] I have also found that:
- 1) When Mr. and Mrs. Eggleston travelled to Kelowna in June of 2006, Mr. Eggleston's working prospects were unsettled. While the Egglestons were able to continue residing on the Cheslatta Ranch at least temporarily and also keep their horses there, the lack of funding for the ranch project made it necessary for Mr. Eggleston to obtain employment elsewhere.
 - 2) Although the collision of June 9, 2006, intervened to prevent Mr. Eggleston from taking up other employment, if funding for the Cheslatta project did not materialize, he would have moved the horses to his brother-in-law Roger Cloutier's property, and again gone to work for Northern Lights Ranch doing the same work he had done in 2006 prior to the spring break-up.

- 3) There is no evidence to suggest that Mr. Eggleston would not have been able to re-obtain that employment if he had not been injured in the collision.
 - 4) If Mr. and Mrs. Eggleston were ultimately unable to continue to work on the Cheslatta Ranch project, they had the option of returning to the Dawson Creek area where Mr. Eggleston could seek employment with Mr. Palfi's trucking company since he had worked previously as a driver for companies operated by Mr. Palfi and his brothers.
 - 5) The Egglestons did return to Dawson Creek in the fall of 2006, and Mr. Eggleston did eventually go to work for Mr. Palfi's company in March of 2008.
 - 6) In the nine months' period from March 8, 2008, until the end of December that year, Mr. Eggleston earned approximately \$52,000 working for Mr. Palfi and in the 10 and one half months that he worked in 2009 before this trial commenced, earned approximately \$45,000.
 - 7) According to Mr. Palfi, whose evidence I accept, if Mr. Eggleston had been able to do so, he could have earned much more money in both 2008 and 2009. He could not do so because he is incapable of working long hours daily for protracted periods of time as is common in the north and in the oil and gas fields.
 - 8) The evidence also establishes that one driver whose employment commenced in April of 2008 earned over \$72,000 in the eight months of 2008 that he worked for Mr. Palfi's company.
 - 9) According to Mr. Palfi, it would be "pretty easy" for one of his drivers to earn \$100,000 per year working for his company, if the driver was healthy and capable of working the hours they are legally able to work.
- [168] The time period for which Mr. Eggleston is obviously entitled to compensation for past earning loss is the approximately 20 month period during which he was unable to work at all from June 26, 2006, to March 8, 2008.
- [169] In addition, however, he claims entitlement to compensation for past income loss for reduced earning capacity from March 8, 2008, until the end of November 2009, on the basis that if he was fully able to do so he could have earned much more money during that period.
- [170] Counsel for Mr. Eggleston has submitted that Mr. Eggleston's past income loss for the period June 26, 2006, until March 8, 2008, should be calculated at \$5,000 per month (totalling \$100,000), and that for the period March 8, 2008, until the end of November 2009 (the start of trial) it should be calculated at \$1,000 per month for 21 months (being \$21,000), for a gross total past wage loss of approximately \$121,000. To that gross amount the agreed upon deduction of 20% for taxes must be applied which could result in a net claim of \$98,800, plus court order interest.
- [171] In making those submissions, Mr. Weatherill says that his calculations appropriately and conservatively reflect:

- 1) Mr. Eggleston's demonstrated pre-accident income earnings of approximately \$6,000 per month with Northern Lights Ranch while driving a logging truck.
 - 2) The unchallenged evidence that a fully able-bodied driver who worked for Mr. Palfi for eight months in 2008 earned almost \$72,000.
 - 3) Mr. Palfi's evidence that a healthy driver doing the same work that Mr. Eggleston did for his company in 2008 and 2009 could "pretty easily" earn \$100,000 per year.
- [172] In response, ICBC and the defendant submit that the amounts suggested by Mr. Eggleston do not accord with his past earning performance and reflect an exaggerated and unrealistic claim of lost earnings. They submit that a more appropriate assessment of past earning losses should be based upon Mr. Eggleston's historical earnings rather than those immediately before the collision and projections of earning capacity based upon Mr. Palfi's evidence.
- [173] In calculating what he says should be the appropriate award for Mr. Eggleston's past earning losses, Mr. Brun submits on behalf of ICBC that "In a good year he would earn something in the range of \$40,000" and "In bad years, his income would be closer to \$20,000."
- [174] Based upon those historical ranges, ICBC and the defendant submit that "in assessing past loss of income, a reasonable figure to be used for the period between the accident and his return to work would be in the range of \$30,000 per year." In Mr. Brun's submission, since \$30,000 per year would equate to \$2,500 per month, for the 20 months he was unable to work, Mr. Eggleston would therefore have suffered a gross loss of past earnings of \$50,000 (to which the agreed upon 20% reduction for taxes (\$10,000) must be applied) which should result in a net award of \$40,000.
- [175] Based also on Mr. Eggleston's historical earnings, ICBC submits that since from March of 2008 until trial Mr. Eggleston earned more than \$40,000 per year (more than in a "good year" in the past) he should not receive any additional compensation for any reduced capacity in that period.
- [176] After considering all of those submissions, I have concluded that the appropriate award to compensate Mr. Eggleston for his past loss of income between the date of the collision and the date of trial is \$83,200.
- [177] I have reached that conclusion for the following reasons:
- 1) ICBC and the defendant's submissions, based upon Mr. Eggleston's historical earnings, are flawed to the extent that they fail to reflect the time and energy that Mr. Eggleston historically devoted to attempting to run successful ranching operations. As of the date of the collision, the negative impact of those efforts upon Mr. Eggleston's earning capacity had ceased by reason of events unrelated to the accident. The Cheslatta Ranch project was no longer a viable opportunity because of a lack of funding over which Mr. Eggleston had no

control. In those circumstances, at the time of the collision, Mr. Eggleston had an increased capacity to earn money from regular employment.

- 2) Mr. Eggleston's submissions are also, however, flawed to the extent that they fail to recognize that he had not historically worked the types of hours for the lengthy periods of time that Mr. Palfi suggested were available to him in 2008 and 2009. I find that while that was, in part, due to the time he expended on his financially unrewarding ranching ventures, it was also, at least in part, due to the fact that he did not seek to earn the monetary fruits of the one-dimensional work-related lifestyle that the type of working hours postulated by Mr. Palfi would require.
- 3) In my opinion it is as equally unrealistic to suggest that given that Mr. Eggleston would not be involved in ranching he would not avail himself of more wage paid work in his free time as it is to suggest that he would devote all of his new-found time to paid work. Neither suggestion fully reconciles Mr. Eggleston's past history as a very hard worker who did what he could to earn money for his and his family's financial needs and his history as a persistent rancher who enjoyed that lifestyle which afforded him the opportunity to enjoy the outdoors and his love of horses, but was never particularly financially rewarding.
- 4) In balancing those two opposing aspects of Mr. Eggleston's historical earning endeavours with the fact that at the time of the collision he no longer had either a ranch or ranch project to devote significant amount of time to, I find that:
 - (a) For the 20 months' period in which he could not work at all, it is reasonable to assess Mr. Eggleston's past earning losses based upon his proven earnings at Northern Lights Ranch in the three and one half months from December 15, 2005, to March 31, 2006, of approximately \$19,500 (being approximately \$5,600 per month). I do, however, reduce that amount by 25% to \$4,200 per month, to accord with the fact that he either would not work a full year each year due to his lifestyle preferences or, alternatively would be subject to a yearly lay off for "spring break up." In result, I award Mr. Eggleston \$84,000 for gross loss of earnings for the period from the date of the collision until March 8, 2008.
 - (b) For the 21 months' period from March 8, 2008, to the date of trial it is reasonable to compensate Mr. Eggleston for losses due to his reduced earning capacity based upon his proven earnings with Mr. Palfi's company totalling approximately \$97,000 for that period (being approximately \$4,600 per month) adjusted upwards by \$20,000 to reflect my assessment of what Mr. Eggleston would likely have earned in that period if he had been capable of working more hours than he did but reflecting also his historic lifestyle patterns.
 - (c) That total award of \$104,000 for Mr. Eggleston's gross past loss earnings must be reduced by 20% (\$20,800) as the amount agreed upon by the parties for income taxes for a net award of \$83,200 plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Future Loss of Earning Capacity

- [178] The submissions of the parties relating to this head of damages were made before the decision of our Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 [Perren], was delivered.
- [179] In *Perren*, the Court of Appeal considered whether the trial judge had erred in awarding damages for loss of future earning capacity when he also had found that the plaintiff had not demonstrated any substantial possibility that she would suffer a loss.
- [180] After considering the decided cases in relation to that issue and also considering whether the authorities were in conflict, Garson J.A. stated (for the Court) at paras. 30-33:
- [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [Athey at para. 27], and
 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [Andrews at 251].
- [31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
- [33] On the facts of this case, the trial judge found that there was no substantial possibility of a future event leading to an income loss. That should have been the end of the enquiry. That was a reasonable conclusion on the evidence because there was no evidence that she was limited in performing any realistic alternative occupation.

[Emphasis in original]

- [181] Given that the evidence in this case establishes that Mr. Eggleston now earns more as a water truck driver for Mr. Palfi than he did in former years as a rancher and logging truck driver, and given also the submissions that I had already received based upon Mr. Eggleston's diminished earning capacity, I invited the parties to make further written submissions concerning the potential applicability of Perren to Mr. Eggleston's claims.
- [182] I have now received those further submissions and have considered them in conjunction with counsel's previous submissions in determining whether Mr. Eggleston has established entitlement to an award for loss of future earning capacity.
- [183] In both his original submissions and those made after Perren was decided, Mr. Weatherill submitted on behalf of Mr. Eggleston that an award of \$250,000 is necessary and appropriate to compensate him for this loss of future earning capacity. He based that submission on the present value of a diminished earning capacity of \$20,000 per year from the present (Mr. Eggleston was 52 years old at the start of this trial) until he reaches between 65 and 70 years of age.
- [184] Those submissions have as their starting point Mr. Palfi's evidence that Mr. Eggleston could earn much more (up to \$100,000 per year) than he now does if he was not injured and therefore able to work many more hours per year than he now does. Mr. Weatherill suggests that a conservative estimate of that difference in earning capacity is at least \$20,000 more per year than he now earns and that the difference is directly attributable to the injuries suffered by Mr. Eggleston in the collision.
- [185] As I understand his submissions concerning Perren, Mr. Weatherill submits that the evidence establishes at least five real and substantial possibilities that could lead to Mr. Eggleston's future income loss. In his submissions those are:
- 1) The medical evidence that proves that substantial improvement of Mr. Eggleston either physically or cognitively is unlikely with a demonstrated continuing impact upon his earning capacity;
 - 2) The likelihood that at least in the short term Mr. Eggleston will have to continue working for Mr. Palfi with a diminished income because of his inability to work all available hours;
 - 3) If Mr. Palfi does continue to tolerate Mr. Eggleston's idiosyncrasies and mistakes, it is also likely that Mr. Eggleston will continue working for him in the long term (also with diminished income because of his inability to work longer hours) and if Mr. Palfi does not continue his present toleration, Mr. Eggleston's ability to earn income will be drastically reduced by his injuries and their continuing physical and cognitive impacts upon his ability to work;
 - 4) Mr. Eggleston will not be able to return to driving a logging truck to earn similar money as he did in the past because he is physically and cognitively incapacitated and unable to perform that arduous and physically demanding work;

- 5) Mr. Eggleston will not return to any work involving heights or upper body strength due to his physical shoulder limitations and balance issues.

[186] In their initial joint submissions, Mr. Brun on behalf of ICBC and Mr. Jevning on behalf of Mr. Watson submitted with respect to Mr. Eggleston's entitlement to damages for loss of future income earning capacity, that the only real and substantial possibility that Mr. Eggleston would suffer future income loss arises from the need for further shoulder surgery as recommended by Dr. Leith. They submitted that "Hopefully with that surgery, he would have a more or less complete recovery of his right shoulder complaints."

[187] ICBC and the defendant also submitted that:

If the surgical procedure on the right shoulder goes well, the Plaintiff for the most part should be returned to his pre-accident earning capacity. If the procedure is not entirely successful then he would likely be left with some residual difficulties.

[188] In their original submissions, based upon the previous unsuccessful shoulder surgery on December 5, 2007, and Mr. Eggleston's commencement of work for Mr. Palfi on March 8, 2008, ICBC and the defendant postulated a further three months' period of loss of earnings for the second surgery and recovery from it followed by a subsequent return to full employment. They also submitted:

if the shoulder surgery is unsuccessful, then the Plaintiff may from time to time miss work because of his right shoulder injury. It is submitted that a reasonable quantification of his loss of capacity would be to adopt the approach utilized by the court of appeal in *Pallos v. ICBC*. In *Pallos*, the plaintiff sustained permanent injury in the accident. At paragraph 24, the court relied on the decision of *Brown v. Gola* regarding the considerations to be taken into account in determining whether there is a loss of capacity, in the sense the plaintiff had been devalued as an asset capable of earning income. Mr. Justice Finch speaking for the majority, observed at paragraph 43:

43. The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be sum of \$40,000.00.

123. A review of the Reasons for Judgment shows that in 1988, the year of the accident, the plaintiff had earned about \$17,000.00 in the five months leading up to the collision. In the years following the accident, he returned to work earning between \$40,000.00 and \$50,000.00 in 1989 and 1990. Thus the assessment of \$40,000.00 appears to be approximately one year's loss of income.
124. The Plaintiff is currently earning somewhere between \$45,000.00 and \$50,000.00 per year. On this basis, it is submitted that a reasonable assessment of his future loss of income earning capacity, in circumstances where he now earns more than he did before the accident, would be \$50,000.00.

[189] In their written submissions subsequent to the decision in Perren, ICBC and the defendant submitted:

16. It is not enough to only prove that a person's capacity to do various types of employment has been impaired by the injury. It is necessary to also demonstrate that there is a substantial possibility of a future event leading to an income loss. In determining if there is a loss, it is appropriate, in honouring the restitution in integrum principle, to consider what the Plaintiff likely would have earned in the future, or the type of work he would have performed, had the injury not occurred. In the case at bar, the Plaintiff is now earning an amount equal to or more than he likely would have been earning had the accident not occurred.
17. Intuitively it makes sense there is no significant loss of future income in this case. If one accepts that the Plaintiff would have earned \$30,000 a year for the next seven or eight years, but for the accident, based on his established pre-accident lifestyle, that would suggest he would have earned something in the vicinity of \$200,000 in the future. The Plaintiff claims that notwithstanding that he is now earning more money than he would have earned absent the accident, an award for future income earning capacity of \$250,000 is reasonable. On the face of it, this claim for loss of capacity is more than he likely would have earned in the without accident scenario.
18. Given the Plaintiff is currently earning something in the range of \$50,000 per annum, it is not reasonable to assume that in his without accident situation, he would be earning something in the vicinity of \$70,000 a year. This is inconsistent with his pre-accident earnings history.

[190] They further submitted:

20. At the heart of the Perren decision is the basic principle articulated in *Athey v Leonati*, [1996] 3 SCR 458 and *Andrews v Grand and Toy Alberta Limited*, [1978] 2 SCR 229 which provides that a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.

21. The Plaintiff's number of \$20,000 a year future loss is illusory and has been plucked out of the air. In considering where Mr. Eggleston would have been, but for the accident, the Plaintiff's argument is not realistic.
22. In the Third Party's written argument, that an award of \$50,000 would reasonably compensate the Plaintiff for any loss of future income earning capacity. This was premised on the theory that the Plaintiff should have the further operation which had been recommended by Dr. Leith to seek to correct the defect in the Plaintiff's right shoulder. It was conceded that if the Plaintiff had the surgery he would miss some time off work and therefore it would be expected he would suffer a loss of future income.
23. Additionally, it was argued by the Third Party that on a Pallos v ICBC approach it would be appropriate to quantify the overall loss of capacity and future income at \$50,000, including the time off for surgery. The Perren decision suggests that the Third Party may have erred in arguing that a Pallos approach was applicable on these facts, given that the Plaintiff is currently earning more than he likely would have earned absent the accident. Nonetheless, the Plaintiff would still be entitled to some loss of future income on the basis that he should take time off to have the recommended surgical procedure.
24. It is submitted that on a Perren analysis, there is not a "substantial" possibility that the Plaintiff will suffer a loss of earning capacity in the future, as compared to his without accident earning position. Put simply, to restore the Plaintiff to where he would have been, but for the accident, no award is necessary since the Plaintiff is already earning more than he would have absent the accident. To the extent he has any loss in this scenario, as noted in Gosselin, [Gosselin v. Neal, 2010 BCSC 456] this sounds more under the heading of non pecuniary damages than as a loss of capacity. The Plaintiff is entitled to some award for loss of future income on the basis that he may require a surgical procedure for his arm.

[Emphasis in original]

[191] After having considered all of the submissions by all counsel, I have concluded that Mr. Eggleston has established the very real and substantial possibility of the occurrence of future events that will impact on his earning capacity.

[192] I also reject the submissions of ICBC and the defendant that because Mr. Eggleston is now making more than he had in the past, he will suffer no future income loss except that related to further shoulder surgery.

[193] In Perren, Garson J.A. distinguished the Court of Appeal's decision in Pallos, stating at para. 21:

[21] I observe first that on its facts, Pallos is distinguishable from the case at bar. While it is true that, like Ms. Perren, Mr. Pallos continued to earn the same income from the same employer as he did before the accident, he was disabled from his previous duties. His employer had assigned him to lighter duties. He was disabled from his usual duties and had proven a loss of income earning capacity. Second, I observe that Finch J.A. found that the error of the

Pallos trial judge was in following the Steenblok approach or test where it was clearly inapplicable. Pallos is not authority for the proposition that, in the absence of any real possibility of a future loss, a plaintiff is nevertheless entitled to an award for loss of earning capacity. It must be remembered that there was no dispute that Mr. Pallos had proven a real possibility of future loss.

- [194] I find that, like Mr. Pallos, Mr. Eggleston has been substantially disabled from carrying out his previous duties as a logging truck driver. He has also proven a loss of earning capacity in his present role as Mr. Palfi's employee because he cannot do work that would otherwise be available to him.
- [195] I do not, however, find that his diminished capacity to do the work that Mr. Palfi could otherwise make available to him should amount to an award based upon the \$20,000 per year diminution of income submitted by Mr. Weatherill.
- [196] Such a finding would be inconsistent with my previous findings relating to the evidence which I have considered in relation to Mr. Eggleston's claim for past loss of income, and more specifically my finding that Mr. Eggleston's past lifestyle choices must be considered in determining the extent to which, but for the collision, he would have continued (and will in future continue) to balance his need to provide income for himself and his family with his less than profitable enjoyment of that ranching lifestyle.
- [197] In all of the circumstances, I am satisfied that a loss of future earning capacity based upon a loss of \$10,000 per year until he is 65 years old is a far more realistic assessment of the loss of future earnings that Mr. Eggleston will likely suffer as a consequence of Mr. Watson's negligence and the injuries caused by the collision than the amount postulated by his counsel.
- [198] Based upon the evidence of the present value of money, a loss of \$10,000 per year for 13 years would result in an award of \$113,500.
- [199] I am not, however, satisfied that the evidence at trial is capable only of supporting an award of compensation for loss of future income based upon mathematical calculation.
- [200] In my view, compensation for Mr. Eggleston's future income loss attributable to the collision can and should also be assessed on the basis of Mr. Eggleston having suffered a very real loss of his future earning capacity.
- [201] In Perren, at paras. 10-12, in considering alternate approaches to the assessment of loss of income earning capacity, Garson J.A. stated:
- [10] In Steenblok, [Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 (C.A.)] the plaintiff, aged 47, had been employed as a raker on a paving crew (before he was injured). He returned to that work three months after he was injured, but eventually (because of his injuries) sought alternative, less strenuous employment. He worked briefly as a security guard but gave that up because he did not like the work. The trial judge dismissed the claim for loss of future

earning capacity. In doing so, the trial judge held that the plaintiff had failed to show on a balance of probabilities that his chronic pain was irreversible. On appeal, the judgment turned on the question of the appropriate onus of proof for the assessment of damages for future losses. Mr. Justice Hutcheon (Legg J.A. concurring and Gibbs J.A. dissenting) stated what he considered to be the established proposition that (at 136), "in dealing with future loss substantial possibilities must be considered by estimating the chance of the event occurring and the balance of probabilities is confined to determining whether it did in fact happen in the past." The appeal was allowed by increasing the damages awarded by the trial judge by \$150,000 for loss of future earning capacity. Mr. Steenblok's award was based on the difference between his earnings as a raker and his earnings either as a security guard, or as a raker, working one-quarter of his usual time. The evidence was such that the court could easily quantify (once the court corrected the error concerning the standard of proof) the pecuniary loss.

- [11] Kwei v. Boisclair (1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 314, was cited by Finch J.A. in Pallos. In Kwei, where it was not possible to assess damages in a pecuniary way as was done in Steenblok, Taggart J.A., speaking for the Court, held that the correct approach was to consider the factors described by Finch J., as he then was, in Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353. Mr. Kwei had suffered a significant head injury with significant permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Mr. Justice Taggart cited the Brown factors with approval:
- [25] The trial judge, as I have said, referred to the judgment of Mr. Justice Finch in Brown v. Golaiy. Future loss of earning capacity was at issue in that case. It stemmed from quite a different type of injury than the injury sustained by the plaintiff in the case at bar. But I think the considerations referred to by Mr. Justice Finch at p. 4 of his reasons have application in cases where loss of future earning capacity is in issue. I refer to this language at p. 4 of Mr. Justice Finch's judgment:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

- [12] These cases, Steenblok, Brown, and Kwei, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in *Pallos* the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, though proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.
- [202] Although Mr. Eggleston is not a young person whose career path is unknown, he has established that he is now unable to perform an occupation that was a viable and realistic option for him before the collision - that of a logging truck driver. He has been rendered less capable of earning employment from all types of employment, he is also far less attractive to prospective employers. If Mr. Palfi ceases to endure his foibles, he is far less able to take advantage of all other job opportunities previously available to him, and he is less valuable to himself as a person capable of earning employment as evidenced by his present assessment of his self-worth and abilities.
- [203] Mr. Eggleston faces the prospect of further surgery which may or may not correct his present physical limitations arising from his right shoulder injuries which preclude jobs requiring heavy lifting. He still suffers balance issues which further limit his abilities, and he suffers cognitive issues that have not resolved almost four years after the collision. I find that he cannot return to driving a logging truck.
- [204] In those circumstances Mr. Eggleston's employment capacity is severely compromised. If it were not for Mr. Palfi's extraordinary understanding and generosity, Mr. Eggleston's future earning capacity would be even more compromised. Although he presently is employed making more money than previously, he has become for all practical purposes a "one employer employee."
- [205] In all of those circumstances and notwithstanding that Mr. Palfi testified that he intends to continue to employ Mr. Eggleston, the potential loss of that employment through familial discord, economic uncertainty or other vagaries of life is a significant negative contingency that must be considered when assessing Mr. Eggleston's loss of future earning capacity.
- [206] Having considered all of the evidence in this trial, I have concluded that Mr. Eggleston has established that \$115,000 is necessary to compensate him for the loss of at least three months' work he will suffer as a consequence of prospective shoulder injury and the further real and substantial possibility of loss of additional income earning capacity arising as a consequence of the collision and the injuries suffered by him.

[207] That award reflects: the fact of impending further shoulder surgery with a foreseeable loss of at least three months' salary but also the possibility that it will not be successful; the numerical calculations to which I have referred as an estimate of loss of future income if Mr. Eggleston continues in Mr. Palfi's employment in his diminished capacity; and also my assessment of the more drastic possible impact upon his income-earning capacity from other employment if one or more of the negative contingencies related to future employment by Mr. Palfi should occur.

Cost of Future Care

[208] Counsel for Mr. Eggleston has submitted entitlement to compensation for the costs of Mr. Eggleston's future care in an amount in excess of \$250,000, based upon:

- 1) Ongoing medication costs (\$40,065);
- 2) Ongoing psychological assistance (12 to 15 sessions at a cost of \$1,943);
- 3) Attendance at a comprehensive pain clinic (\$21,686);
- 4) Occupational therapy (\$2,429);
- 5) Assessment by a speech/ language pathologist (\$1,202);
- 6) A neurological re-evaluation (\$3,268 plus travel costs);
- 7) Vocational services (\$8,365);
- 8) Home support and maintenance services (\$129,277 based on \$925 per year);
- 9) Vehicle maintenance (\$3,775 based on \$225 per year);
- 10) Home building labour (\$50,000).

[209] In *Izony v. Weidlich*, 2006 BCSC 1315, Masuhara J. observed at para. 70:

[70] At the outset, I note that the cost of future care award is "by its nature notional and not a precise accounting exercise to determine the strict minimum" required by the plaintiff: *Strachan (Guardian ad Litem of) v. Reynolds*, 2006 BCSC 362. In *Courdin v. Meyers* (2005), 37 B.C.L.R. (4th) 222, 2005 BCCA 91 at para. 34, our Court of Appeal endorsed the following approach to dealing with the many imponderable factors and contingencies in assessing damages in this category;

Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

(Krangle (Guardian ad litem of) v. Brisco, [2002] 1 S.C.R. 205, 2002 SCC 9 at para. 21.)

[210] He went on to say at para. 74:

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally Krangle). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see Courdin at para. 35), or for items or services that it is unlikely he will use in the future.

[211] Also, in Uhrovic v. Masjhuri, 2006 BCSC 1209, aff'd 2008 BCCA 462, Gray J. stated at para. 82:

[82] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. There must be a medical justification for claims for cost of future care, and the claims must be reasonable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. See Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33, [1985] B.C.J. No. 2762 (QL) (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (QL) (C.A.).

[212] Application of those principles convinces me that the evidence in this trial falls far short of establishing either the medical justification for, or the reasonableness of, many of the claims for future care advanced by counsel for Mr. Eggleston.

[213] I agree with counsel for ICBC that the cost of future care report prepared by Ms. Diana Robertson, upon which Mr. Eggleston relies, is flawed in that it is based upon a functional evaluation performed in 2007 rather than upon a current evaluation. To that extent it is of limited value.

[214] In addition, Mr. Eggleston has had the benefit of medical attention that Ms. Robertson did not consider and that renders some of her recommendations for ongoing medical intervention unnecessary.

[215] In their submissions, counsel for ICBC and the defendant have acknowledged that Mr. Eggleston will be required to incur some costs for his necessary future care, but they submit those costs should be in the maximum amount of \$17,500.

[216] That submission is based upon Mr. Eggleston being entitled to compensation for:

- 1) allowance for the ongoing costs of necessary medication "until weaned of anti-depressants" (which they suggest should be \$2,500);
- 2) travel and accommodation costs for the recommended surgery on his right shoulder (which they estimate should be \$5,000);
- 3) an allowance for home maintenance that Mr. Eggleston will be unable to do because of his right shoulder complaints pending surgical intervention (which they suggest should be \$5,000); and

- 4) an allowance for "possible pain clinic expense" (which they suggest should be \$5,000).

[217] After considering the submissions of all counsel and the totality of the evidence, I have concluded that Mr. Eggleston has established that there is medical justification for reasonable costs of his future care in the total amount of \$31,943.

[218] That amount is composed of the following amounts for the following reasons:

- 1) \$10,000 for the ongoing costs of medication primarily related to ongoing headaches and anti-depressants. I do not agree with the submissions of counsel for ICBC that "it is fairly clear:" that Mr. Eggleston "will, with time go off the anti-depressants that he is on." The evidence establishes that Mr. Eggleston has twice unsuccessfully tried to wean himself off of anti-depressants. While one can remain hopeful that he will ultimately be successful, more than three years have now elapsed since the date of the accident which leads me to conclude that cessation of the need for anti-depressants in the near future is unlikely.
- 2) \$1,943 for ongoing psychological assistance. Mr. Eggleston received some psychological assistance in the past that assisted him in coping with the early stages of his recovery. The medical evidence establishes to my satisfaction that he will require further assistance in dealing with ongoing psychological issues arising from the injuries he has suffered and I consider the amount suggested to be reasonable.
- 3) \$10,000 for attendance at a pain clinic with associated travel. I agree with counsel for ICBC that the evidence establishes that most of Mr. Eggleston's chronic pain issues have now resolved with the noted exception of pain associated with his right shoulder injury. In those circumstances chronic pain clinic costs at the level suggested by Ms. Robertson are not reasonable. I agree with counsel for ICBC that Mr. Eggleston should have the shoulder surgery recommended by Dr. Leith before attending a pain clinic and that it is reasonable that given his present situation he should attend the St. Paul's pain clinic noted by Ms. Robertson in her report (at a cost of \$5,000). He should also be paid his reasonable travel and accommodation expenses estimated in the amount of \$5,000. I do not agree that it is either necessary or reasonable that Mr. Eggleston be required to schedule the surgery and the pain clinic in such a way that the costs of his travel and accommodation expenses will be shared with or become part of those costs related to his shoulder surgery. Common sense dictates that there should be some time for assessment of the results of the shoulder surgery before undertaking a pain management program.
- 4) \$5,000 for travel and accommodation expenses for shoulder surgery acknowledged as necessary and appropriate by ICBC and the defendant.
- 5) \$5,000 allowance for home maintenance assistance pending the surgical procedure on Mr. Eggleston's right shoulder and during the anticipated recovery period as suggested by ICBC and the defendant.

"In-trust" Claims

- [219] Mr. Eggleston has advanced an "in-trust" claim for services rendered to him by Dian Eggleston and Katrina Palfi while he was recovering from his injuries.
- [220] There is no doubt that both Mrs. Eggleston and Ms. Palfi devoted significant amounts of time and energy to caring for Mr. Eggleston while he was unable to look after himself due to the physical injuries he suffered in the collision, the debilitating pain he continued to suffer for many months thereafter, and the cognitive difficulties that have plagued his recovery.
- [221] For the first months after the collision while still at the Cheslatta Ranch, Dian Eggleston was responsible for all work Mr. Eggleston would have otherwise done, and looked after all of his daily needs while he was almost totally incapacitated. She also saw to his transportation to and from doctors, hospital and physiotherapy sessions because he could not drive.
- [222] When the Egglestons moved to Dawson Creek and Mrs. Eggleston returned to work, much of the responsibility for Mr. Eggleston's daily care fell to Mrs. Palfi for at least the first year after the move. I accept Ms. Palfi's evidence that in many respects there was a reversal of roles between parent and child as she dutifully cared for Mr. Eggleston's daily needs in the same way she did for her own children. She also ensured that his medication was properly administered and helped him with such matters as banking. As Mr. Eggleston's health improved over time, his dependence on her lessened.
- [223] Our Court of Appeal has recently re-visited issues concerning recovery for "in-trust" claims by injured plaintiffs whose family members provide services to him or her without payment.
- [224] In *Dykeman v. Porohowski*, 2010 BCCA 36, 1 B.C.L.R. (5th) 246 [Dykeman], in reversing the decision of the trial judge not to allow a question concerning the appropriateness of an "in-trust" claim to go to the jury, Newbury J.A. stated for the court, at paras. 28-29:
- [28] Since *Kroeker*, it has been settled law in this province that "housekeeping and other spousal services have economic value for which a claim by an injured party will lie even where those services are replaced gratuitously from within the family." In *Kroeker*, such recovery was allowed under the heading of 'loss of future ability to perform household tasks', but obviously, damages for loss of such ability prior to trial may also be properly claimed and recovered: see, e.g., *McTavish v. MacGillivray*, 2000 BCCA 164 at paras. 43, 51-7, per Huddart J.A.; *West v. Cotton* (1995) 10 B.C.L.R. (3d) 73 (C.A.) at para. 25; and *Campbell v. Banman* 2009 BCCA.484. The reasoning in *Kroeker* has been extended beyond "spousal" services to services rendered by other members of a family: see *Boren v. Vancouver Resource Society*, *Dufault*, *McTavish v. MacGillivray*; *Bystedt v. Hay*, all *supra*. Such awards are colloquially referred to as "in trust" even though it is the plaintiff who recovers them, and British Columbia courts do not generally impose trust terms in their orders, regarding the loss as that of the plaintiff: see *Feng v. Graham* (1988) 25 B.C.L.R. (2d) 116 (C.A.) at 9-10; *McTavish*, *supra*.

[29] The majority in Kroeker was alive to the possibility that awards for gratuitous services by family members of plaintiffs could "unleash a flood of excessive claims" (*supra*, at para. 29) and for that reason, urged courts to be cautious in making such awards. In the words of Gibbs, J.A.:

as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case. [At para. 19; emphasis added.]

I do not read Kroeker or Ellis, however, as establishing a threshold of "grievousness" in terms of the injuries which may necessitate such services. A plaintiff who has a broken arm, for example -- presumably not a "grievous" injury -- and who is obliged to seek assistance in performing various household tasks should not be foreclosed from recovery on this basis. This was recognized in Ellis in the quotation reproduced above. Thus I disagree with the trial judge's reference to grievous injury as a threshold that the plaintiff was required to surmount if her claim was to go to the jury. Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services -- were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? -- and with respect to causation -- were the services necessitated by the plaintiff's injuries or would they have been provided in any event? Finally, if these questions -- which I would have thought are appropriate for determination by a jury -- are answered affirmatively, the amount of compensation must be commensurate with the plaintiff's loss. The assessment of such loss has been the subject of several considered judgments in this province, most notably *McTavish* and *Bystedt*, both *supra*.

[Emphasis in original]

[225] Counsel for Mr. Eggleston submitted that an "in-trust" award in the amount of \$40,000, based upon \$20,000 for services rendered to him by each of Dian Eggleston and Katrina Palfi is appropriate and supported by the evidence in this case.

[226] Counsel for ICBC and the defendant suggest that there should be no award for the services of either Mrs. Eggleston or Ms. Palfi because the services they performed "did not go beyond that which would be expected in a familial relationship." They also, however, submitted that if any award was warranted it should be in the maximum amount of \$5,000 in compensation for Mrs. Eggleston's services in the early months after the collision, particularly at the Cheslatta Ranch and the amount of driving involved.

[227] I have determined that the evidence as a whole establishes that not only Mrs. Eggleston but also Ms. Palfi provided daily care, supervision, driving, banking and other assistance to Mr. Eggleston over and above what might be expected of a family member. I reach that

conclusion with respect to Mrs. Eggleston primarily, with respect to her daily care and performance of all work at the Cheslatta Ranch during the months after the collision and her efforts in planning and orchestrating the move to Dawson Creek with no assistance from Mr. Eggleston.

[228] Ms. Palfi also undertook responsibilities that would have required significant assistance from a paid caregiver. The law recognizes the fact that although she did so out of an abundance of love and affection for her father that is not a bar to recovery for those services.

[229] In the totality of the circumstances I find that the amount of the "in-trust" award suggested by Mr. Weatherill is excessive. I am, however, satisfied that a combined award totalling \$8,000 to compensate for the services provided by Mrs. Eggleston and Ms. Palfi is both necessary and appropriate.

Loss of home-making capacity

[230] Mr. Eggleston advances a claim of \$40,000 for his lack of home-making capacity arising from the reduction of his ability to carry out tasks as a handyman around the home under the principles enunciated in *McTavish v. MacGillivray*, 2000 BCCA 164, 74 B.C.L.R. (3d) 281 [McTavish].

[231] In *McTavish*, at paras. 61-63, Huddart J.A. explained the legal basis and rationale for such an award:

61 Whether the past loss of housekeeping capacity is properly characterized as pecuniary or non-pecuniary could be considered entirely semantic were it not for the impact of the overall limit on non-pecuniary damages. The limit is not relevant in this case. Counsel did not suggest any significance to the categorization of the award as general rather than special damages. For the purposes of this case, I need not discuss the question further.

62 What is significant for this case is whether the particular loss of housekeeping capacity can be valued in economic or pecuniary terms. The services provided by the respondent lend themselves to evaluation by replacement cost because, as the trial judge recognized, others performed them.

63 As we have seen, it is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of her family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic

capacity.

[232] At para. 68 she also stated:

68 In my view, when housekeeping capacity is lost, it is to be remunerated. When family members by their gratuitous labour replace costs that would otherwise be incurred or themselves incur costs, their work can be valued by a replacement cost or opportunity cost approach as the case may be. That value provides a measure of the plaintiff's loss. Like the trial judge I would prefer to characterize such compensation as general damages assessed in pecuniary terms, reserving special damages for those circumstances where the plaintiff actually spent money or incurred a monetary liability, although I do not wish to state a settled view on that question in the absence of full submissions as to the consequences of the distinction, if any.

[233] The third party and defendant submit that the evidence does not support such a claim for either past or future loss of home-making capacity.

[234] I do not agree.

[235] The evidence establishes that Mr. Eggleston no longer does the many tasks that he used to do concerning the upkeep of the family home and its yard, including snow removal. He also no longer expends the considerable energy and time involved in the maintenance of the herd of horses the family had at the time of the collision and which they still have and still maintain. Mrs. Eggleston now carries out all of those activities including feeding, husbandry, the cleaning of stalls and trimming of hooves, and has done so since the collision and will do so in future. She also now looks after snow removal and yard work and has done so since the collision.

[236] McTavish establishes that Mr. Eggleston is entitled to reasonable compensation for that loss of capacity, but I do not agree with Mr. Weatherill's suggested quantification of that loss.

[237] Mr. Eggleston is now capable of working long shifts at work many days driving a truck, and Dr. Leith has opined that he should have additional surgery on his right shoulder which should allow a reduction of pain and increase of physical strength that, if successful, will allow Mr. Eggleston to begin to do more of the handyman work he did before the collision.

[238] I am satisfied that in the totality of the circumstances an award of \$7,500 will appropriately compensate Mr. Eggleston for his past demonstrated loss of home-making capacity as well as his likely future loss.

SUMMARY

[239] In summary, I find that the plaintiff is entitled to the following damages as a consequence of the defendant's negligence:

- 1) Non-pecuniary loss: \$170,000
- 2) Past earnings loss: \$83,200

- 3) Future loss of earning capacity: \$115,000
- 4) Future care costs: \$31,943
- 5) "In-trust" claims: \$8,000
- 6) Loss of home-making capacity: \$7,500

Total: \$415,643

[240] Unless there are issues of which I am unaware, Mr. Eggleston will also be entitled to costs throughout on Scale B.

"Davies J."

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